QHA
QUEENSLAND HOTELS ASSOCIATION

31 May 2013

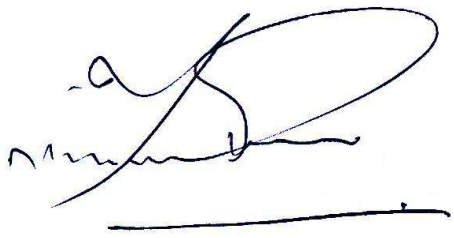
The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601
Email: adjudication@accc.gov.au

Dear Sir / Madam

Thank you for the opportunity to submit comments in relation to the application for revocation, substitution and re-authorisation by the Australian Performing Rights Association (APRA). The Queensland Hotels Association (QHA) represents 900 hotel and licensed businesses in Queensland, almost all of which have at least one type of APRA copyright licence, and is a key licensed industry stakeholder in Queensland.

Please do not hesitate to contact me should you require clarification or expansion on any of the issues raised.

Yours sincerely



T.H. McGuire
President

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QHA SUBMISSION TO THE ACCC, RELATING TO THE APPLICATION FOR REVOCATION, SUBSTITUTION AND RE-AUTHORISATION BY THE AUSTRALIAN PERFORMING RIGHTS ASSOCIATION (APRA)

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Introduction. International legal conventions have evolved to enable the creators and owners of copyright material to be compensated for the commercial use of their copyright material. In the case of widely-used music recordings and video clips, and due to the difficulty of individual music users obtaining permission from the tens of thousands of music copyright holders, an international system has evolved to collect and distribute royalties in return for granting permission to use music for commercial purposes. Organisations which act as the 'middle men' and that own and grant permission to use copyright music on behalf of the copyright owner are generally referred to as "copyright collection societies".

In Australia, copyright fees are payable under the *Copyright Act 1968 (Cth)* by commercial users of protected music. The *Copyright Act 1968 (Cth)* gives Australia's two copyright collection societies (APRA and PPCA) the legal right to collect copyright fees for the commercial use of copyright 'protected' music and music videos. They do this by issuing 'blanket' copyright licenses to commercial businesses, including hotels, on an annual self-assessed basis. Copyright protected music often has two copyright components, the song or musical works and lyrics (APRA), and the sound recording (PPCA). Not all music or music videos are protected by copyright, and the respective copyright societies first need to obtain the rights to do so from the copyright owner before they can collect copyright fees on behalf of the copyright owner. APRA issues about 15 separate licence types, whilst PPCA issues more than 30 different types.

Some relevant factors include:

- PPCA exists to licence copyright for <u>recording</u> of music whilst APRA grants permission to perform the <u>musical composition and lyrics</u> (musical work). For example, in the case of a band performing live, an APRA fee/licence is due for performance of music and lyrics, but a PPCA fee is not due as the music is live, not recorded.
- For PPCA and APRA to grant a licence to use music, they must first obtain the rights to do so from the copyright holder. Not all music is copyright protected and not all composers or record companies are members of APRA or PPCA. Consequently, not all music used in a venue is able to be licensed by, or is due a copyright fee to APRA and/or PPCA.
- In the Australian context, APRA issues about 15 separate annual licence types, whilst PPCA issues more than 30 different types. Licensing is generally based on a self-assessment process, where the venue operator completes a venue music survey form, returns it to APRA/PPCA where the raw survey information is 'converted' into a licensing obligation which is then invoiced to the venue operator. This process can of itself be confusing or create the seeds of dispute, particularly if the venue representative is not familiar with the nature of the venue's entertainment offering or technology, or the guidelines and parameters which apply to APRA licensing.

- APRA and PPCA effectively operate a duopoly for music copyright licensing in Australia and, in practical effect, operate as both the copyright licensing authority and the copyright licensing enforcement agency through their legal threats and processes. Consequently, the relationship between the two copyright collection societies and their customers is much more complex than a straightforward supplier/customer relationship and often involves legal, commercial and inter-personal tension.

- The different types of music copyright licenses developed by APRA are commercial terms and devices and are determined by the copyright collection agency itself. Variations between the different licence types (e.g. nightclub vs dance parties or background vs foreground) are not driven by the requirements of the *Copyright Act* or other laws, but are commercial schemes devised by the collection agencies, ostensibly on behalf of copyright owners. It is not clear whether or to what extent the agencies consult with their customers or the copyright owners on these or similar issues. Consequently, the complexity of the copyright collection industry is a hallmark of the way the music industry has elected to operate, and one impact is that the licensees see this complexity as a contrived mechanism aimed at increasing the opportunities to confuse licensees and to extract a higher level of licence fee from licensees than might be gained from a less complex licensing regime. Commercial imperatives aside, the hotel industry contends that this complexity is unnecessary and, as a result, there is significant opportunity to simplify the current system.

The issue: In the past, music licensing was simple, non-invasive and cheap. However, since the mid 1990s, the cost and complexity of music licenses for commercial premises has become much higher and more problematic because of:

- Changes in technology such as audio and video systems, and delivery means such as Internet streaming e.g. *Spotify*, and computerised systems e.g. *Nightlife*, and dedicated subscription TV channels e.g. *Music Max* ;
- The ready availability of digital, shared, and pirated music to individuals; and
- The advent of Internet piracy which has depressed record and CD sales, and reduced the revenue stream to performers, record companies and the copyright collection societies.

It is the hotel industry's view that these factors have caused the copyright collection societies to become much more aggressive and avaricious in seeking higher copyright fees from their traditional licensee groups such as entertainment businesses, hotels, clubs, gymnasia, and dance venues in order to 'replace' the revenue lost to music piracy.

Currently, there exists a mis-match between the level of knowledge and sophistication of the copyright consumer group, and the licensing group, with the copyright collection societies taking advantage of industry ignorance and lack of understanding of copyright laws and processes to broaden and increase their ability to raise more copyright fees from traditional sources. This has clear potential to render copyright music uneconomic in many hotel businesses, to the

detriment of that business, the copyright owners, patrons, and the copyright collection societies themselves.

At the individual hotel level, music copyright is a confusing, worrying mess, with many hoteliers worried about the cost and need for compliance, and sometimes ignorant of their rights and obligations. The APRA licensing system is complex and unhelpful, and not responsive to commercial realities. The status and effectiveness of the Copyright Tribunal is also of concern, but is outside the scope of this submission.

The APRA and client relationship. Because of the unique position in law enjoyed by the Australian copyright collection societies, APRA does not have a normal commercial relationship with its clients, the music copyright licensees. APRA is effectively the monopoly licence issuer, the arbiter of what copyright licencing is required, the entity which determines, sets the conditions for and issues the various types of copyright licences, and the entity which enforces compliance through legal threats and mechanisms. This means that commercial consumers of music feel disempowered when they apply for or enter into discussions and negotiations with APRA relating to copyright licensing issues. APRA sets the tone, the timeline, the fees and the conditions for licensing and has a 'take it or leave it' approach. This assertive and inflexible approach is amplified (in our view) by the fact that many of APRA's licensing agents are remunerated on a part-commission basis where a percentage of the individual's remuneration is linked to the quanta that is raised in a particular areas from new or renewed licence fees. In our view, this creates a conflict of interest, especially in relation to the provision of objective licensing advice to venue operators, where the APRA representative is conflicted between the requirement to provide objective and fair advice to clients, and the perceived or actual financial advantage to themselves and their employer, of maximizing licensing revenue. Generally, APRA's clients in the hotel industry are individual SME businesses without access to detailed knowledge or advice on copyright law and obligations. They are therefore more reliant on objective advice and ethical dealing from the copyright collection societies than might otherwise apply in a standard commercial arrangement. On the other hand, APRA can and does act collectively under its authorization which means that the individual business licensing consumers operate at a systemic disadvantage in any dealings with APRA.

Absence of licence category transparency. QHA hotel member are frustrated and confused about the lack of transparency which applies to the setting or APRA licensing categories and fees. Individual licence applicants or their delegates frequently frequently complete the APRA licensing application form in good faith but without knowledge or cognizance of what the 'flick and tick' sheet actually represents. It could be argued that the 'one size fits all' application form and approach is designed to confuse applicants and to provide the maximum opportunity for different licence requirements to be placed on the applicant.

One clear example where the system currently works to the disadvantage of copyright licence applicants is the treatment of television video screens. In the 1970s and 1980s, it became the norm for hotels to install a 'new' colour television in a bar or communal area for the enjoyment of patrons in a (then) 'free to air' environment. Because these vision and sound sources occasionally screened copyright music (remember *Countdown* ?) APRA included the requirement to declare television sound sources as a requirement on the APRA licensing application. Jumping forward to 2013, the use, nature, proliferation and technical presentation of television screens has changed dramatically from where it once was. It is not unusual for hotel and similar businesses to have significant numbers of such television screens, in different sizes and connected to different image sources, within a venue. Today, many such screens act as monitors, are not fitted with speakers and sound amplifiers, and/or are dedicated to the showing of a particular or customized image source – e.g. used for TAB odds only, showing of sport only, Keno screens, or in-house advertorial. APRA makes no attempt to clarify the definition of screens as a sound device in its application processes, with the result that many licensees 'innocently' total up the total number of television screens in their venue for licensing and APRA fee purposes, irrespective of whether that device does, can or has the capacity to screen copyright music or video. It is the view of the hotel industry that such institutional silence and ambiguity not only works to the financial disadvantage of actual and prospective licensees, but is the result of deliberate engineering by the copyright collection societies aimed at maximizing revenue by taking advantage of consumer ignorance.

Similarly, the nuances and technical definitions around the various copyright licence categories are lost on the average licensee. Most small businesspeople rely upon the 'authority' to apply the various licence requirements and fees in an objective, fair and transparent manner, for example, food safety licensing. In the case of music copyright licensing, the complexity and legalistic nature of the copyright licensing regime means that licensees rely on the good offices of the copyright collection societies to assist them to determine their 'fair' music licensing requirements.

By way of example, a particularly vexatious issue is the matter of the APRA (and PPCA) *Nightclub* licence category. A large majority of hotels (almost universal) do not consider themselves to be nightclubs or to operate as nightclubs, even if someone might dance to a juke box or a music source. However, in its pursuit of higher levels of licensing revenue, APRA has become increasingly aggressive in pursuing licensees for this type of copyright licence coverage, much to the annoyance and cost of licensees. In response to hotel industry 'pushback' from the application of the Nightclub licence category, APRA has responded by expanding its licence categories to include a new category called 'music for dancing' which, although it removes the 'nightclub' moniker, simply re-names the licence type aimed at expanding and maintaining the licence fee coverage for APRA. It is this kind of unexplained, avaricious and cynical behaviour which represents, in our view, unsatisfactory exploitation of the unique and dominant position that APRA currently occupies.

Many Queensland hotel; licensees complain to the QHA that APRA and PPCA appear to undertake covert and overt surveillance of their venues aimed at maximizing copyright licensing opportunities. A clear example is the habit of 'trawling' the industry Internet websites for 'evidence' of music being used in venues which may or may not be being used in compliance with or breach of copyright conditions. It is relatively common for licensed venues to be contacted by a representative of the copyright collection societies and be told words to the effect that "you will need to obtain/expand/renew your APRA licence as we know from looking at your website that you …". Behaviour such as this is indicative of an unhealthy client / provider relationship and does nothing to promote a transparent or mutually respectful commercial relationship. In the case of the Nightclub licence category, the approach and parameters applied by APRA take no account of the nature of hotel businesses, including the reality that hotel venues are compartmentalized to allow for maximum product diversity and patron comfort (i.e. the various functions of the venue are physically separated: TAB, gaming, bistro, bar, break-out areas, sports bar etc), and that if music or a juke box is playing in one area, then it is unreasonable that the entire venue be classified as a Nightclub venue with the entire floor-space and patron capacity of the venue being used in fee calculation.

The end outcome of this decline in transparency is that venues are increasingly looking to minimize their use of copyright music and video, thereby reducing the fees payable to APRA and PPCA and resulting in a self-defeating exercise for those who potentially benefit from the collection of copyright fees. We are increasingly hearing laments from the public and commentators about the "death of the pub music scene" but no publican or promoter is going to encourage live music if the copyright licensing costs of providing the venue are greater than the income to the venue.

Conflict resolution. The current conflict resolution process is unsatisfactory, and its complexity and cost offer further opportunity for copyright collection societies to effectively bully individual venue operators into submission. When dispute arises over coverage or quanta of fees, the copyright collection societies are quick to threaten legal action and slow to engage in reasonable negotiation or discussion. Individual venue operators are both fearful of the cost of legal engagement, and unknowing of or daunted by the ADR process. There appears to be no obligation on the copyright societies to disclose information that may be relevant to the interests of the licensee, and the standard response from copyright society representatives is that "the *Copyright Act* requires you to pay these fees so you don't have any option".

Suggested areas for improvement. Are as follows:

- APRA should improve its transparency about the setting of licence fees, and the guidelines and principles for the allocation of venue music licensing categories.
- The assessment and application process which includes determination of what copyright licence types apply and what copyright licence fees are due is unnecessary complex and should be simplified through mutual consultation.

- APRA should, in consultation with customer stakeholders, re-design its processes and forms for assessing copyright needs and applications, including clarifying the nuances and copyright obligations related to sound sources and the application of copyright fees for televisions and other technical implements which do not emit sound.
- The ADR process should be simplified, better explained, and underpinned by a simple dispute resolution path where there is dispute over coverage or fees;
- Any future and ongoing authorization of existing arrangements should be for shorter periods of time, between two and three years, to take account of the changing impact of technology, and to provide opportunities for alternative licensing mechanisms or licensing regimes to emerge.

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