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***Entertainment Enterprises Pty Ltd***

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31 May 2013

Attention: Tess Macrae

Australian Competition & Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2600

Dear Tess


**AUSTRALASIAN PERFORMING RIGHTS ASSOCIATION LTD APPLICATION FOR  
REVOCATION OF AUTHORISATIONS A91187-A91194 AND A91211 AND  
SUBSTITUTION OF NEW AUTHORISATIONS A91367-A91375 – INTERESTED PARTY  
CONSULTATION**

Further to our recent conversation and the letter to interested parties, please find attached our submission in respect of the above application.

As mentioned due to time constraints, we have made our submission to the best of our ability in the time provided.

We appreciate the additional time that you gave us to lodge this submission.

Yours faithfully  
ENTERTAINMENT ENTERPRISES PTY LTD

  
.....  
GRAHAM J HARDIE  
DIRECTOR

Enc.

**SUBMISSION BY THE ENTERTAINMENT ENTERPRISES PTY LTD GROUP OF  
COMPANIES**

**RE: AUSTRALIAN PERFORMING RIGHT ASSOCIATION'S (APRA)  
APPLICATION FOR NEW AUTHORISATION FROM THE AUSTRALIAN  
COMPETITION AND CONSUMER COMMISSION (ACCC)**

Due to only becoming aware of APRA's application late last week, our submission has been prepared with time constraints and as such we would appreciate the opportunity to provide further support documentation and submissions either written or through interviews with your office at a later date if requested.

1. APRA'S MONOPOLY POSITION

APRA holds a monopoly position as the sole body which represents music composers and the public performance rights in musical works and lyrics of songs in Australia.

As such every business requiring a license for public performance of musical works and lyrics of songs can only deal with APRA. This is despite APRA not having the copyright for all musical works available.

2. DISPUTE RESOLUTION ALTERNATIVES

The provision for dispute resolutions provided for licensees are in practice not equitable for licensees.

**a) Copyright Tribunal**

The option of a licensee or even a small number of licensees referring a dispute with a Copyright Collection Society to the Copyright Tribunal is not feasible for the following reasons:

- i) The Copyright Tribunal of Australia is an independent body administered by the Federal Court of Australia and as such as experienced in the PPCA Hearing (CT2 of 2004) is conducted in a formal manner similar to a hearing in the Federal Court.

This includes requiring a licensee which operates its business through a corporation or with a corporate trustee to obtain leave from the Tribunal to appear without legal representation.

- ii) The costs associated with licensees referring a dispute with a Copyright Collection Society to the Copyright Tribunal are so high that it eliminates this option for individual licensees.

These extraordinary high costs include:

- Necessity to appoint a firm of solicitors and essentially have that firm instruct a Senior Counsel to attempt to counter the high powered legal team (both internal and external) that is engaged by the Copyright Collection Societies.
- Due to their virtually limitless financial resources the Copyright Collection Societies are able to engage experts from both Australia and overseas to support their case and as found in the Decision of the PPCA Hearing No. CT2 of 2004, the inability of the objecting licensees to similarly fund such expert reports in repudiation of the Society's expert witnesses left the Tribunal with no choice but to accept the evidence of the Society's expert witnesses.
- The Copyright Tribunal hearings are mostly heard in Sydney which requires objecting interstate licensees and their legal representatives and consultants to incur the

additional costs of travel to and staying in Sydney for pre hearing conferences and the hearing itself.

- The legal formalities surrounding the preparation and the hearing itself are complex and expensive and beyond the reach of individual licensees.
- Section 174 of the Copyright Act 1968 states:

### **Cost of Proceedings**

- i) “The Tribunal may order that the costs of any proceedings before it incurred by any party, or a part of those costs, shall be paid by any other party and may tax or settle the amount of the costs to be so paid, or specify the manner in which they are to be taxed”.

Therefore an underfunded application exposes the applicant to a highly probably loss at the Copyright Tribunal and therefore potential liability for costs to be awarded against the applicant.

For the above reasons the Copyright Tribunal of Australia is not a viable option available to licensees due to its legal complexity, high costs, exposure to damages and inability to fund a meaningful case against the extensive financial resources of the Copyright Collection Societies such as APRA and PPCA.

### **b) Expert Determination**

This option is not seen as being reasonable by licensees as the choice of an expert is from a panel of three barristers with expertise in intellectual property matters. As such it is more than highly probable that the expert barrister chosen would have extremely limited knowledge of the actual

businesses of licensees and therefore more likely to be bound to by legal precedents and legal arguments rather than industry knowledge. Again the extensive financial resources of Copyright Collection Societies such as APRA puts the individual licensee at a distinct disadvantage in putting forward their case.

To succeed before the expert barrister and in order to counter the legal precedent set by the decisions such as that of the PPCA matter No. CT2 of 2004 it would require the licensee to effectively run a whole new hearing similar to an application in the Copyright Tribunal.

### **c) Mediation**

This is the last resort for licensees in dispute with a Copyright Collection Society. It is still very expensive, but provides the only alternative to a highly legalistic and expensive process through the Copyright Tribunal or Expert Determination.

Aggrieved licensees failing to reach a mediated settlement may only fall back on a referral to either the Copyright Tribunal or Expert Determination which as outlined above is financially out of the reach for individual licensees. This leaves the licensee in breach of copyright and subject to possible legal prosecution.

The Code of Conduct for Copyright Collecting Societies in its Objectives at 1.3(d) states a prime objective is:

“(d) to ensure that Members and Licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes involving Collecting Societies”.

As illustrated in the PPCA Copyright Tribunal Hearing CT2 of 2004 the Copyright Collection Society with its virtually unlimited financial resources was able to expend very large sums in engaging multiple consultants from

within Australia and abroad together with a team of high powered lawyers and Senior Counsel. Such opportunity for presenting a case is not achievable for individual licensees.

Legal precedents set at the Copyright Tribunal can only be challenged or reversed through a hearing in the Copyright Tribunal.

This results in a substantial disadvantage to licensees as the other forms of Dispute resolution are not able to overcome the legal precedent even where the legal precedent is wrong or unfair to licensees.

### 3. CODE REVIEWER

It should be considered that the position of Code Reviewer be reviewed and replaced by a Government person or body funded by a levy on the Copyright Collection Societies. This would provide to aggrieved licensees access to a totally independent Government body to have complaints dealt with and at the same time achieve the object of direct oversight of the Copyright Collection Societies by Government as was outlined in the 1997 Attorney General's report of the inquiry into Copyright Music and Small Businesses.

Currently the Code Reviewer is appointed by the Copyright Collection Societies, and has his salary paid by the Copyright Collection Society

Our experience is that our detailed complaint regarding the introduction on 1 November 2008 by APRA of its new "Recorded Music for Dancing" License scheme lodged with the Code Reviewer in July 2010 did not receive a direct response either verbally or in writing to the issues raised. The complaint was mentioned in his Annual Report but we do not believe it addressed our fundamental complaints.

There is no apparent appeal process if a licensee is dissatisfied with the decision of the Code Reviewer.

The net income of the Copyright Collection Societies are accumulatively around \$200 million per annum and a levy to fund an independent Government body would not be a material financial impost to those societies.

In this respect the appointment of a Government person or body as the Code Reviewer would also ensure that as was foreshadowed in the "Report of the Inquiry into Copyright, Music and Small Businesses" prepared by the Attorney-General's Department in 1997, that:

"More fundamentally, the Government considers that the activities of Copyright Collection Societies warrant continued oversight to ensure the societies operate efficiently, effectively and equitably" (Page 3 of 12).

At the moment the Government is removed from direct involvement in the activities of the Copyright Collection Societies but with the Code Reviewer being a Government appointed body this would change to the fairness of all parties.

#### 4. CODE OF CONDUCT

- i) Copyright Collection Societies are required to treat licensees fairly, honestly, impartially, courteously and in accordance with its constitution and license agreement and as expected under the Voluntary Code of Conduct for Copyright Collection Societies.
- ii) Licensing schemes introduced by a Copyright Collection Society should be clearly understandable as is expected under its Code of Conduct at 2.3 (c)(ii).

This has not been our experience in the case of the new GFN scheme introduced by APRA on 1 November 2008. In an endeavour to seek clarity our Association provided APRA with the plan, layout and

function of a Typical Nightclub with the request that APRA provide licensing details of their new scheme for that Typical Nightclub.

The response from APRA was:

“We do not consider that responding to your document regarding a “typical” nightclub would be productive in these discussions. In our view it is far more appropriate to examine actual premises and discuss reasonable licensing arrangements with the venue operators and industry representatives .....

and later:

However, seeking to muddy the waters with discussions of hypothetical multi use premises and references to PPCA decisions in which we have no part, does not advantage any of our respective members”.

This approach by APRA removes the opportunity for a licensee planning a new venue or renovating an existing one to have a clear understanding of how it may minimise its liability for copyright fees.

- iii) For the purpose of a fair, equitable and competitive market, Copyright Collection Societies should be open and transparent in all its dealings with individual licensees to ensure that no licensee is at a market disadvantage.
- iv) We are concerned that certain methods and procedures in dealing with individual licensee are contrary to the Code of Conduct for collecting societies to be fair, open, honest and courteous to licensees.

5. BRIEFLY OUTLINE OF OTHER MATTERS FOR FURTHER SUBMISSION OR DISCUSSION IF REQUESTED:



**i) Non-Disclosure of Specific Recipients of Distributions by the Copyright Collection Societies**

Although it is widely perceived through the industry that the greater bulk of distributions of net income from both APRA and PPCA (purportedly as high as above 90%) goes to just a small number of non-Australian record companies, there is no public disclosure of the specific amounts distributed to those companies. For the purpose of transparency and fairness to the Australian licensees who pay the license fees from their Australian businesses, the specific distribution details of the license fees should be made available.

This is particularly so as the net income is distributed by the Copyright Collection Societies without being subject to Australian taxation on distribution.

**ii) Board Composition**

A “not for profit” organisation should have representation from all parties to the licensing agreement to ensure fairness, openness and transparency. There is to our knowledge no representatives from licensees on either of the boards of APRA or PPCA.

To avoid conflicts of interest, fairness, balance and transparency there should be equitable representation for licensees on these boards.

**iii) Mandatory Code of Conduct**

The Government should consider the implementation of a mandatory Code of Conduct as distinct to the current voluntary Code of Conduct.

As is expressed in the Attorney-General’s “Report of the Inquiry into Copyright, Music and Small Businesses” under Recommendation 6 the response from Government stated:

“The Government has also considered whether the immediate development of a mandatory Code of Conduct enforceable under legislation is preferable. Although such action would be inconsistent with a “light touch” regulatory approach, it may prove necessary if the collection societies are unable to agree amongst themselves on the content and terms of a voluntary code. A mandatory code might also provide stronger enforcement mechanisms and, therefore, result in better compliance than might be the case with a voluntary Code of Conduct”.

and further:

“As indicated above, the Government will consider the development of a mandatory code if a voluntary Code of Conduct is not effectively implemented or if there is significant dissatisfaction amongst copyright users and members of collection societies with the Code and its operation”.

**iv) Period of Renewal**

In view of the matters raised in this submission the period of six years instead of three years is in any event too long.

It is our submission that the Copyright Collection Societies should be subject to more frequent review rather than less.

**v) Non-Disclosure of Copyright Material by Copyright Collection Societies**

APRA does not have the copyright for all music recordings available to licensees.

Therefore it is our opinion that their monopoly position is contrary to the public interest and against allowing competition to be introduced into the market. By refusal to declare what specific recordings they have copyright for the Copyright Collection Societies are not providing the opportunity for licensees to have the choice of not being subject to a license from these respective Copyright Collection Societies.

In the case of both APRA and PPCA (and in particular PPCA) the material that they do not have the copyright for is very substantial.

However licensees can not exercise the option or take the risk of not having a license from these monopoly Copyright Collection Societies. A lack of specific information could easily cause an Australian business to be inadvertently in breach of copyright and therefore subject to consequential legal action and damages.

We thank you for the extension of time you have provided to enable our submission to be lodged and as indicated at the commencement of our submission, we are available if requested to provide additional information and meet if you require.