



Nightlife Music Video Pty Ltd
ABN 29 052 079 277

50 Cribb Street
PO Box 2135
Milton Qld 4064

tel: 1800 679 748
fax: 07 3367 0786

sales: 1800 679 748
support: 1800 773 468

email: info@nightlife.com.au
visit: www.nightlife.com.au

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

For the attention of the General Manager:

Dear Dr. Chadwick,

**Submission in response to the Australasian Performing Right Association Limited (APRA)
Application for Revocation of Authorisations A91187-A91194 & A91211 and Substitution of New
Authorisations A91367-A91375 (the APRA Application)**

This submission is in response to the application by Australasian Performing Right Association (APRA) to the Australian Competition and Consumer Commission (ACCC). Nightlife Music Video Pty Ltd (Nightlife) welcomes the opportunity to provide input into this process.

Nightlife supports the role of APRA as a collecting society. As a business, Nightlife respects the value of copyright and believes that all copyright owners should be paid for the use of their music. The value of APRA to Nightlife is their capacity to represent the sheer volume of copyright works that are required in the public performance environment.

In the main, Nightlife supports the re-authorisation of APRA. However, Nightlife offers a number of conditional aspects to enhance the benefit of APRA's authorisation:

- 1) APRA should provide more adequate public performance licensing arrangements for commercial music suppliers
- 2) APRA's full repertoire of works should be made publicly available
- 3) their royalty distribution model should provide greater detail
- 4) authorisation should be limited to a three year period

Nightlife has been operating for 24 years and is one of the largest background music suppliers in the Australian market. Nightlife provides over 2500 hard drive music systems in the field, across approximately 2100 clients. Nightlife is a business to business platform servicing bars, hotels, clubs, gyms, bowling alleys, restaurants and retail outlets – among others. For the avoidance of doubt, Nightlife has no business to consumer interface. Nightlife has a blanket agreement with the Australasian Mechanical Copyright Owners Society (AMCOS) to enable it to reproduce its member's content for commercial use. Additionally, Nightlife has direct licensing agreements with over 120 record companies for reproduction of the sound recordings and of those a further 75 have provided a non-exclusive licence for the right to collect and distribute public performance royalties. Nightlife also collects public performance fees for its client base on behalf of the PPCA.

Nightlife's clients hold APRA licences for the public performance of composers' works under a range of concurrent licence categories including the following:

- Recorded Music for Dancing
- Feature Recorded Music
- Background Music
- Radio
- TV Screens
- Audio Jukebox
- Video Jukebox
- Fitness Centres
- Music on Hold
- Live Performance
- Karaoke
- Retail

A conservative estimate would place the number of individual APRA licences Nightlife's clients collectively represent at approximately 10,000.

All of Nightlife's clients have the same proprietary hardware, using the Hard Drive Music System (HDMS) and proprietary software that has been continually developed over the last 13 years by its in-house team. Each system is tracked and registered and can be located at all times. All updates (in terms of new content, list updates and software updates) are delivered to clients on a fortnightly basis on an encrypted DVD which is used for file transfers and cannot be played on any other device. The software achieves two main goals for the company and also its licensors (copyright owners):

- 1) it encodes and protects every file by a proprietary cryptographic algorithm;
- 2) it ensures that clients are only able to play Nightlife music from the subscriptions they are paying for.

Given the underlying motivational factors pertinent in public submissions, it should be noted that there are certainly aspects to Nightlife's recommendations that will provide a benefit to the business directly, but these benefits only translate by addressing the whole industry and its various stakeholders.

APRA to Provide Public Performance Licensing Arrangements for Commercial Music Suppliers

Background music suppliers maintain and increase value in music. As music business operators, we are directly connecting content users with the copyright owners through a sophisticated understanding of their clients' needs, demographics and entertainment scope. Thus, we are able to increase revenue and continue to leverage the value of music, at a time when the ubiquity of free is difficult to contest.

Further, music suppliers are at the forefront of diminishing piracy in commercial settings. It is in every music suppliers' interest to ensure that the content they are providing commercially, is legal and cannot be copied. This allows predictable and controlled use of music, by protecting and sustaining performance rights through a transparent model that reports accurately on what is played, where it is played and the exact tariff applicable. Music suppliers have a vested interest in protecting copyright. With that in mind, it is fair to say that music suppliers can and do play an integral role in detection of piracy matters, and could further support collection agencies in their enforcement endeavours.

In the Executive Summary of the APRA application, section 9 (b) APRA submits that if it *"took only a non-exclusive licence of members' rights, costs of detection of infringement and enforcement would be substantially higher and there would be deleterious effects on ensuring compliance with the law"*. Nightlife recognises the value of exclusive input arrangements for APRA and its members. Nightlife acknowledges the notion that dissolved or fragmented blanket rights might lead to increased costs, without the infrastructure that music suppliers provide. Due to the fact that commercial music suppliers are in direct contact with the public performance market, consideration must be given to further engage with them through this infrastructure. Third party licence agents have proven the viability of this model through a practical pilot implementation with the Phonographic Performance Company of Australia Limited (PPCA) with respect to the public performance of sound recordings. This will not only strengthen APRA's enforcement and detection remit, but will also generate further revenue opportunities for its members by promoting the value of their copyrights.

In addition to the abovementioned enforcement and detection benefits through third party agents, specific benefits and improvements in APRA's distribution practices could be achieved. According to APRA's most recent publicly available financial figures (APRA Review 2011/2012), the after expenses revenue generated from the public performance sector provided an estimated \$40.3 million dollars, otherwise represented as 24.9% of APRA's distributable revenue. *NB: This estimated figure is based on calculations representative of the percentage of the overall distributable revenue, as these figures have not been disclosed in the annual reports.*

APRA's current distribution rules (ref APRA Dist rules sec 1.5) are determined by APRA's Board of Directors and have *"the intent and purpose of achieving fair and equitable distribution of the income collected by APRA"*.

Regarding APRA's distribution pools, the following statements were made:

- 15.2 *A separate distribution pool applies to each of the major identifiable sources of distributable revenue for which programme returns (or similar documentation) are*

provided to APRA. The principal distribution categories, some of which include a number of discrete pools, are:

(a) free to air television;

(b) subscription television;

(c) radio;

(d) cinema;

(e) concerts and 'live' performances;

(f) nightclubs;

(g) ringtones, digital downloads, streaming services, video on demand; and

(h) other online sites.

- 15.3 *Distributable revenue received in respect of public performances or communications to the public (including broadcasts) for which no programme returns or similar documentation are available is apportioned to those pools which, in the Board's view, most accurately reflect the music performed.*

APRA further identifies that specific portions of the accrued background revenue are allocated to pre-existing distribution pools (as outlined above). Specifically, fees collected for television sets used in public performance settings are added to the television pools; one third of the licence fees for video jukeboxes, video tape players and large screens are added to the distribution pool from music used in the music television programs, namely "Rage", "Music Max" and "Channel V". All other background music is allocated to the radio distribution pool. However, there are a number of commercial music suppliers existent in the market that collect public performance fees on behalf of APRA. Unfortunately, these rights are limited and restricted to a very small subset of public performance activity. Those licences collected by the background music suppliers under the BMS licence scheme are "*distributed directly to the works they report to APRA*" (p. 36, APRA Distribution Practices).

It is here, where opportunities for improvements to the public benefit arise in support of APRA's reauthorisation. However, in light of APRA's most recent activity in reference to this facet of their business, it also presents one of the greatest potential threats to public detriment, and Nightlife submits it could be construed as being anti-competitive.

Historically, APRA have made licences available to background music suppliers, under the BMS licence scheme to collect a limited range of public performance fees that were restricted to retail, fitness and restaurant/café uses. As outlined in APRA's supporting document "Report Under Condition C2", Dispute 4 refers to a dispute between APRA and a background music supplier in reference to a review of the current agreements in place. For the avoidance of doubt, Nightlife is not the background music supplier in question in this document. Nightlife has, however, been party to a number of discussions regarding this review. Nightlife has previously held the BMS Licence but with further restrictions than other BMS licence holders with fitness centres being excluded from its arrangement. Nightlife has pursued a BMS licence that enables the business to collect APRA's tariffs on behalf of its client base.

In light of the aforementioned, and with regard to other related market factors, there are a number of issues with APRA's current position regarding background music suppliers that Nightlife submits requires further investigation. In Nightlife's experience and opinion:

- 1) APRA is systematically reducing the incentives for existing background music suppliers to such a point, that there is no commercial motivation to participate in the scheme;
- 2) APRA will not licence background music suppliers for broader use (i.e. hotels, bars, feature recorded music and nightclubs) on the grounds that "it is in regular contact with these clients to license other music usages in these sectors";
- 3) Music suppliers are able to provide accurate play data to support transparent public performance royalty distribution;
- 4) APRA provides public performance licences to end users who are in fact using music illegally and are therefore perpetuating the proliferation of piracy.

There are no grounds under which APRA should unreasonably withhold a licence for a background music supplier for all appropriate uses for its clients. Music suppliers are able to provide significant and pertinent data relating to the use of APRA's members' copyrights that relate directly to APRA's published licence fees. This play data would allow royalties to be directly attributable to the relevant copyright owner.

Beyond the benefit of APRA's members, licence holders have identified a market for agents that address their needs in relation to public performance compliance obligations. Nightlife is in regular receipt of requests from its client base to collect and manage their APRA tariff obligations. In the last three years alone, there have been over 500 direct enquiries from Nightlife's clients for assistance with APRA. This is a trend that is often coupled with client discontent and frustration regarding a tariff structure that is seldom understood. This is compounded by the existence of the aforementioned structure that requires review, as there have been significant technological developments in the public performance environment throughout the last ten years, both by end users and suppliers. However, there have been limited opportunities for tariff review over the same period of time. In the same timeframe, and to their credit, APRA have been extremely proactive in exploring licensing opportunities in regard to emerging technologies. The same benefits would apply by following a similar approach to licensing in the public performance environment.

Our pilot study demonstrates that agency agreements benefit all stakeholders through this arrangement. As initially stated, Nightlife has had an agency agreement in place with the PPCA since September 2011. During that period, there has been a steady increase in the number of clients opting to use Nightlife as their agent. PPCA's published tariffs are implemented by Nightlife's Licensing Department in consultation with the venue and directly with the PPCA. The appropriate fees are paid by Nightlife on behalf of the venue, including a competitive deduction for administration expenses. The amount will then be incorporated into the client's monthly subscription invoice.

Nightlife then provides, on a quarterly basis, detailed reports of:

- each sound recording used
- the quantity of actual plays per sound recording
- the applicable tariffs for each sound recording
- the value attributed to each sound recording, broken down by tariff

In this value chain, the end user, music supplier, collection agency, and copyright owner are all deriving a benefit from the exploitation of the sound recordings in a public performance environment. Music suppliers have regular contact with their clients and are therefore in a much better position than collection societies to understand the music uses occurring in dynamic, multi-format entertainment areas.

There are significant public benefits that would support users and creators alike due to additional layers of accountability and transparency that would naturally result from agency agreements. There is no evidence that demonstrates any public detriment would flow from background music suppliers acting as agents in the marketplace.

APRA's Repertoire of Works Should be Made Publicly Available

Section 4.1.38 of the APRA Application addresses inherent difficulties in adjusting licence fees when licensees have not been in a position to report music use accurately. Nightlife and other background music suppliers work with a subset of available music that infers predictable use. As a result, only a relatively small number of songs are used in the public performance environment where it is controlled by a music supplier. It is therefore feasible that end users of music, who are able to provide accurate music reports, should benefit from an adjustment of their licence fees. This would be achievable, pending APRA's willingness to give access to its available repertoire of managed rights.

APRA's Distribution Revenues Should Provide Greater Detail

It would be in the interest of both users and creators to have improved access to the overall breakdown of distributed revenue for the public performance sector. Nightlife believes having this information withheld is unnecessary and does not provide copyright users with an accurate understanding of the size and scope of the environment. This could potentially lead to an imbalance of how the value of music is perceived in the marketplace.

In the last two financial reporting periods for the fiscal years 2010/2011 and 2011/2012, APRA have significantly modified their revenue breakdown from the previous reporting periods 2007/2008, 2008/2009, 2009/2010, as evidenced in table 1 below:

TABLE 1 Reduction in Transparency of APRA's Financial Reports

APRA Revenue Growth 2007-2012

	11/12	10/11	09/10	08/09	07/08
Revenue	185.7	183.0	172.4	159.6	151.1
Expenses	23.8	22.4	20.9	20.5	19
Expense to Revenue Ratio	12.82%	12.24%	12.12%	12.84%	12.57%

Free to air TV broadcasting			34.9	34.2	33.6
Subscription television broadcasting			14.1	13.2	11.6
Government broadcasting			7.0	6.6	6.5
Ringtones			0.5	0.8	0.8
Digital downloads			3.1	2.1	1.2
Streaming and webcasting			1.8	1.6	1.1
Cinema			4.6	3.9	3.6
Public performance - <i>live</i>			3.9	3.1	2.9
Public performance - <i>concerts</i>			12.7	8.2	8.1
Public performance - <i>featured recorded music</i>			6.2	3.5	2.4
Public performance - <i>non-featured music</i>			24.1	24.3	21.8
Public performance - <i>all other</i>			3.7	2.5	3.1
Radio broadcasting			31.7	31.8	33.3
			<u>148.3</u>	<u>135.8</u>	<u>130</u>

Broadcasting	94.4	91.8	87.8
General public performance	40.3	35.2	32.3
Live events	15.7	16.5	17
Digital and online	9.7	8.7	5.4
Cinema		5.6	4.6
Education	1.7	1.8	1.2
	<u>162*</u>	<u>159.6</u>	<u>148.3</u>

Broadcasting	58.3%	57.5%
General Public Performance	24.9%	22.1%
Concerts & Live	9.7%	10.3%
Digital & Online	6.0%	5.5%
Cinema		3.5%
Education	1.1%	1.1%

**NB: This estimated figure is based on calculations representative of the percentage of the overall distributable revenue, as these figures have not been disclosed in the annual reports.*

Authorisation Should be Limited to a 3 Year Period

For the reasons set out in this submission, Nightlife submits that the ACCC should grant APRA a conditional authorisation period of three years. However, we believe by incorporating the suggested conditions, increased benefits for music creators, users and copyright owners could be achieved.

We thank the ACCC for the opportunity to comment on APRA's applications and welcome the chance to further participate in the public discourse throughout this process.

We consent to this submission being placed on the public register.

Nightlife respects music creators and users.

Yours sincerely,

Mark Brownlee
Managing Director | Nightlife Music Pty Ltd