

SUBMISSION

TO: THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

BY: THE NATIONAL ASSOCIATION OF CINEMA OPERATORS – AUSTRALASIA on behalf of its members.

(The Cinema Operators)

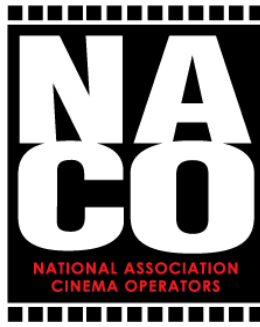
RE: AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED: APPLICATION FOR REVOCATION AND SUBSTITUTION

DATE: 31 May, 2013



Introduction

1. This submission is made by the National Association of Cinema Operators – Australasia (referred to throughout this submission as the **Cinema Operators**).
2. The National Association of Cinema Operators – Australasia represents all of the major cinema exhibitors in Australia and New Zealand, including Village Cinemas Australia Pty Limited, Event Cinemas Pty Limited, Birch, Carroll and Coyle Cinemas Pty Limited, Hoyts Corporation Pty Limited, Reading Entertainment Australia Pty Limited, together with a number of independent exhibitors, including Ace Cinemas, Nova Cinema, Grand Cinemas, Cineplex Australia, Dendy Cinemas and Wallis Cinemas.
3. The Australian Performing Right Association Limited (**APRA**) seeks authorisation of its various input arrangements, overseas arrangements, output arrangements and distribution arrangements, as described by it in paragraph 2 of its accompanying submission – Reporting Under Existing Authorisations (**Supporting Submission**)
4. APRA seeks revocation of the ACCC’s existing authorisations of APRA’s arrangements and substitution of new authorisations for a period of six years. As it states in paragraph 1 of its Supporting Submission, in effect, it is a re-authorisation application.
5. In the application process leading to the ACCC 2010 Determination, the major cinema exhibitors and the Independent Cinema Owners Association were represented by **Minter Ellison**. Minter Ellison made submissions to the ACCC respectively on 18 November 2009, 28 January 2010, 24 March 2010 and 3 March 2010.
6. The Cinema Operators are mindful of the many concessions and statements of support made on their behalf to the ACCC in the 24 March 2010 Submission (noted in 5 above) in relation to the draft 2010 Determination.
7. Accordingly, the Cinema Operators seek to limit their response to APRA’s Submissions at this time to the following:
 - a) Period of Authorisation; and
 - b) Adjustments or Discounts to Blanket Licences.



Period of Authorisation

8. The Cinema Operators submit that any authorisations granted should be for a period of no longer than 3 years to permit the Commission to review at the end of that period:
 - a) The international environment, particularly the continuing developments in Europe;
 - b) The progress or outcome of discussions between CISAC societies in relation to the proposed Global Repertoire Database (GRD);
 - c) Rapidly changing technologies for the publishing, reproduction and playing of music, such as music downloads, streaming, video on demand, and downloads to mobile and tablet digital devices;
 - d) The convergence between media and communication technologies – the importance of which was recognised by the Australian Government (Department of Broadband, Communications and the Digital Economy) in establishing the Convergence Review as an independent review to examine the policy and regulatory frameworks that apply to the converged media and communications landscape in Australia. Whilst the committee handed its final report to government on 30 March 2012, we still await adoption of its findings and outcomes from it.
 - e) The changing commercial structures as a result of the emergence of these new technologies – also recognised by the Australian Law Reform Commission in establishing the Copyright and Digital Economy Inquiry.

9. The timeline of the introduction of digital services (diagram contained in ARIA ALRC Submission 2012) details the very rapid diversification of digital music services. Since 2010, we have seen the following online music providers evolve:
 - a) Music Unlimited (Sony)
 - b) Get Music
 - c) Samsung Music Hub
 - d) Blackberry Music
 - e) JB Hi Fi
 - f) NAPSTER/Rhapsody
 - g) R.dio
 - h) iTunes Match
 - i) RARA
 - j) MOG
 - k) Deezer
 - l) Microsoft Zune
 - m) Guvera
 - n) Pandora
 - o) Vevo
 - p) Spotify



- q) Xbox Music
- r) Google Play
- s) Songl

The Cinema Operators are not confident that anyone can foresee the transformation of technology over the next six years. Cinema Operators confess they can not readily foresee the full extent of technological advance in cinema technology and content delivery six years hence. In this context, the Cinema Operators submit that the Commission should have the opportunity to review the authorisation within a reasonable timeframe. A six year period recommended by APRA is not appropriate.

Adjustments or discounts to Blanket Licences

10. As a general statement and overview, APRA's input and output arrangements (including its overseas arrangements) have, in so far as they relate to the screening of films by Cinema Operators, the following effect:
 - a) The input arrangements arm APRA with the public performance right in the musical works and associated literary works incorporated within a film;
 - b) Cinema Operators must negotiate with APRA as a monopolist to acquire a licence or permission to screen a film incorporating those works;
 - c) APRA enjoys significant market power over Cinema Operators as the exhibition of films would be entirely foreclosed unless a licence is negotiated with APRA;
 - d) APRA seeks to exercise its licencing power, enabled by its input and overseas arrangements (exclusive licencing arrangements with overseas affiliated collecting societies) with parties who would otherwise be in competition, by participating in the total box office revenue of Cinema Operators through a blanket licence of the entire repertoire upon Cinema Operators for a defined percentage of the total gross box office receipts (all cinema operators current licences are such blanket licences);
 - e) There is no realistic opportunity for Cinema Operators to negotiate downstream public performance rights in the relevant works at source as the totality of APRA's arrangements prevents, in real terms, that opportunity;
 - f) Notwithstanding the opt-out and licence-back arrangements in APRA's constitution, and their statements of how many such opt-out and licence-back



arrangements it has entered into since 2010 (refer paragraph 3.1.7 of Supporting Submission), APRA's blanket licences with the Cinema Operators represent in practical terms an effective barrier to the Cinema Operators' obtaining rights at source including for US films since APRA's blanket licences provide no discount or adjustment mechanism to licence fees to account for directly sourced rights (in effect, Cinema Operators would be paying twice for the same rights).

11. APRA's opt-out and licence-back provisions do not provide any significant constraint on its ability to exercise monopoly power for two reasons:

11.1 APRA is a monopoly of composers who pool their works and generally provide blanket licences. Members will only have an incentive to utilise opt-out or licence-back provisions if they assess that as a result they will be in a more favourable negotiating position than that provided through APRA. Given APRA's monopoly position, this is likely to be rare.

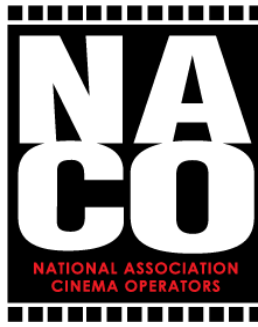
11.2 There is no incentive for a prospective user to seek to acquire rights from an APRA member unless there will be a corresponding reduction in the price paid under the APRA blanket licence for works which the user may still require an APRA repertoire. APRA's blanket licences for cinemas currently provide for a price structure based solely on a percentage of total box office receipts, with no allowance for any reduction in fees to take account of directly acquired rights. Accordingly, there is no incentive for the Cinema Operators to acquire rights directly.

12. Cinema Operators continue to explore means by which they might enter into direct licencing, particularly licencing of Australian performing rights at source for US films either on a "through to viewer" basis from producers and distributors or from music copyright holders directly. However, the ability to negotiate appropriately discounted blanket licences is essential to the commercial viability of considering such arrangements.

13. In the Minter Ellison Submission of 3 March 2010, it was noted that Cinema Operators supported certain views expressed in the Draft 2010 Determination:

a) For predominantly "predictive" users, in particular film producers/cinema operators, there is further scope for and benefit from increased direct dealing and competition between suppliers and between acquirers (Draft Determination paragraph 4.125);

b) There is scope for more progress on allowing adjustments to blanket licences in appropriate circumstances including an appropriate adjustment to the fee (Draft Determination paragraph 4.226);



- c) The anti-competitive detriment resulting from APRA's input and output arrangements will be more limited where their arrangements do not prevent direct negotiation between copyright owners and users and licencing arrangements allow adjustments to blanket licences in appropriate circumstances including an appropriate adjustment to the fee (Draft Determination paragraph 4.135)
 - d) A fundamental impediment to users using APRA's licence back provisions is APRA's propensity to offer users blank licences and there being no discount to these licences which would incentivise direct dealing (Draft Determination paragraph 4.153).
14. The Cinema Operators continue to support the need for greater flexibility in APRA's input arrangements to facilitate direct dealing between members and users, and the provision of blanket licences which permit adjustment to blanket licence fees to reflect directly licenced music.
15. Regrettably, the Cinema Operators have been unable to determine whether any APRA members have utilised APRA's opt-out and licence-back facilities in relation to film production by virtue of the confidentiality attached to Confidential Attachment 16 to the Accompanying Submissions.
16. Regrettably, Cinema Operators licence agreements still contain no provision for discounts to their licences, thereby providing no incentive for direct dealing.
17. Accepting APRA's Distribution Practices document that APRA receives box office revenue amounts and percentages from the Motion Picture Distributors Association of Australia, together with film/music cue sheets, to enable accurate distribution payments to its members, the Cinema Operators contend that calculating an appropriate discount or adjustment could be readily negotiated with APRA by provision of the box office takings of the licensee for films in which directly licenced music occurs.
18. The Cinema Operators submit that they are not aware of APRA having offered any discounted blanket licences or having undertaken any active exploration with users in respect of such licences with the Cinema Operators pursuant to the 2010 Determination.