

Friday 8th March 2024

ACA submission to ACCC: Australasian Performing Right Association Ltd – application for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661 – interested party consultation

Introduction

As an interested party in the application for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661 by the Australasian Performing Right Association Ltd (APRA), the Australian Childcare Alliance (ACA) is submitting this document to raise concerns regarding the selling practices of OneMusic Australia, a joint venture between APRA and the Australasian Mechanical Copyright Owners Society (AMCOS).

As the national peak body for the Australian Early Childhood Education and Care (ECEC) sector, the ACA represents more than **3,000 early learning (child care) service provider members** who employ more than **75,000 early childhood educators** and care for more than **360,000 families** throughout Australia.

ACA therefore represents a large number of OneMusic Australia licencees as well as prospective licencees.

ACA recognises the importance of ensuring fair and transparent practices in the music licensing industry, not only to protect the rights of Australia's musical artists but also to protect the rights of businesses when approached unsolicited by sellers.

In particular ACA recognises the right for businesses (i.e privately-owned early learning service providers) to go about their daily operations without being bullied, harassed or threatened to be fined by the sales team from OneMusic Australia.

By presenting this submission, ACA aims to highlight the selling practices of OneMusic Australia and our concerns that they may be engaging in **unconscionable conduct**.

ACA believes that it is essential for the Australian Competition and Consumer Commission (ACCC) to thoroughly assess the implications of the proposed authorisation revocation and substitution to protect the early learning sector, as well as other sectors, from unfair selling practices.

Response to ACA questions

1. In relation to the Alternative Dispute resolution (ADR) scheme which is available for members and licensees to resolve disputes with APRA, please indicate:

- a. whether you were aware of the existence of the scheme, including the resolution options available to you and the potential costs involved;
- b. the factors you take into account when considering whether or not to try to resolve a dispute through the scheme; and
- c. if you decided to try to resolve a dispute through the scheme, whether you were satisfied with the handling and outcome of your matter.

ACA was not aware of this scheme.

We note that the scheme was set up to support disputes between copyright owners, licensees and/or APRA AMCOS, so it doesn't apply to the businesses APRA AMCOS sells their music licences to and is therefore not relevant to ACA's member base.

2. The ACCC imposed multiple conditions in its 2020 authorisation that were aimed at improving transparency, including in relation to transparency of licence fees (Condition C1) and distribution of fee income (Condition C2), and clarity regarding resignation, opt out and licence back provisions (Condition C3). In addition, the ACCC required APRA to publish an annual Transparency Report (Condition C4) and could require APRA to provide an independent report about its methodologies for determining licence fees (condition C5). Please explain:

- a. To what extent have these conditions:
 - i. helped you to make better-informed decisions about your dealings with APRA;
 - ii. improved your ability to negotiate with APRA; or
 - iii. improved APRA's accountability?
- b. To the extent that the aims of these conditions have not been achieved, what alternative or additional condition/s could be imposed to address this?

ACA has no comments on this item. (Not applicable to ACA members.)

3. In 2018, the APRA AMCOS membership voted to change members' voting entitlements in board elections and annual general meetings. Please explain:

- a. the impact of this change on the composition of APRA's board since 2018;
- b. whether the current composition of APRA's board (as of the date of this letter) is representative of all APRA members; and
- c. any suggested further changes to voting entitlements which would improve the representation of smaller, independent members to APRA's board.

ACA has no comments on this item. (Not applicable to ACA members.)

4. Have the public benefits of the conduct authorised in 2020 (such as transaction cost savings in negotiation of rights, avoiding costs of having to make changes to APRA systems, and efficiencies in enforcement and compliance monitoring) changed in recent years, especially given the technological changes in the last 4 years?

ACA has no comments on this item. (Not applicable to ACA members.)

5. How do you consider technological changes have impacted on the ability of competitors to APRA to enter the Australian industry? For example:

- a. Has technological changes lowered barriers to entry for a collecting society operating with a similar or different business model to APRA's?
- b. Do you consider that the sunk costs to establish specialised knowledge and systems have been lowered, given new technologies available?
- c. Do you consider that economies of scale and scope, and network effects, have become lower, perhaps for new innovative business models for the granting of copyright licenses in return for royalties paid to owners of the musical works? This could also include a business model that facilitates direct dealing between users and owners of the musical works.

ACA has no comments on this item. (Not applicable to ACA members.)

Please comment on any other issues you consider relevant to the ACCC's assessment of this matter.

In the context of the ACCC's assessment of the Australasian Performing Right Association Ltd's application for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661, the Australian Childcare Alliance (ACA) would like to bring the **selling practices** of OneMusic Australia to the ACCC's attention.

OneMusic Australia is a joint initiative between APRA AMCOS and PPCA.

It was set up in 2019 to sell music licences to businesses Australia-wide on behalf of APRA AMCOS and PPCA,.

Background

In February 2022 the ACA was approached by OneMusic Australia (OneMusic) and invited to consider a sponsorship proposal.

OneMusic informed ACA that their primary goal in establishing the sponsorship arrangement was to educate the early learning sector about the legal obligations of individual service providers when playing music in their services.

OneMusic explained that the organisation was set up in 2019 and had mapped out the various industries and sectors that were the least aware of their legal obligations when playing music in their business environments.

OneMusic referred to their successful education/sales campaign targeted at the retail sector as well as the fitness sector, and that raising awareness rather than generating sales was the main objective when they first target a sector.

OneMusic informed ACA that their intention for 2022/2023 was to focus on the early learning sector, with the aim of running an education campaign for a year or so before moving to use any enforcement tools to change business behaviours and encourage those playing music to buy a OneMusic Australia annual licence.

ACA gave some consideration to the sponsorship proposal and agreed to commence promoting OneMusic-branded content to its member base, with a view to signing a formal sponsorship agreement a few months down the track, knowing it would take some time to develop a formal agreement with terms and conditions that both parties were happy with.

ACA was provided with some OneMusic-branded educational materials to share with its member base (i.e. early learning (child care) service providers). (*See Attachment A*)

Following ACA's initial promotion of OneMusic communications assets (such as OneMusic-branded fact sheets, links to the OneMusic website, etc), ACA started receiving unprompted feedback from members about the selling practices of OneMusic sales staff.

ACA member feedback about the sales techniques of OneMusic sales staff

Feedback from a number of ACA members (i.e. early learning (child care) service providers) based in Queensland and New South Wales indicated that the OneMusic sales staff were:

- Calling early learning service providers and their educators/teachers unsolicited.
- Overtly advising that they were taking note of whether the early learning service phone system used on-hold music.
- Asking whoever answered the phone - often an early childhood educator/teacher – whether they played music in the service, whether they played it during music, dance or exercise sessions with the children, whether they played music during events with parents, whether they showed the children any videos, and so on.
- Telling whoever answered the phone that the early learning service was already in breach of Australia's music copyright laws in light of the fact that they use on-hold music or play music during one of the activities confirmed by the educator earlier, and that the owner needs to buy a OneMusic Australia music licence to avoid being fined or other consequences.
- Notwithstanding the early learning service providers advising OneMusic that they were consciously using royalty-free music and not copyrighted music, OneMusic would demand that those early learning service providers prove their actions or else be deemed as in breach of Australia's music copyright laws.
- Calling back repeatedly, including to the direct mobile numbers of some early childhood educators/teachers, to urge the service provider to buy a OneMusic licence.

As a result of this telemarketing approach, early childhood educators and teachers were left:

- feeling stressed that they had somehow betrayed their employer by answering such questions.
- nervous about how to explain to their employer that as a business, they were now in trouble with the law.
- questioning whether they should answer the telephone as an ongoing practice.

Upon learning of the situation from their staff, early learning (child care) owner/operators felt either anxious about possibly breaking the law, or exasperated from being accused falsely, and also felt that their staff were being harassed and bullied by OneMusic's sales team.

Further to this member feedback, ACA received direct feedback from one of its Executive Committee members (i.e. board member), whose staff had answered the phone when OneMusic telemarketers had contacted them.

Following telephone discussions between his staff and the sales team at OneMusic, this particular board member received an email from OneMusic, stating that he had “been advised on a number of occasions that his business requires a OneMusic licence” for the public performance of its music and that the matter had now been “referred to their legal representatives who may begin infringement proceedings”.

The email continued: “If you wish to avoid legal action and incurring legal costs please fill out the attached licence agreement and email back to me immediately.”

ACA raised its concerns with OneMusic

Following this feedback from a number of members, ACA contacted OneMusic directly and asked for a meeting with their in-house legal team. This request was granted, and on 20 July 2022 ACA met with OneMusic via Zoom to discuss concerns around their selling practices.

ACA talked through the feedback received from their members in this context, and expressed concerns that OneMusic’s unsolicited telephone calls to ACA members, which included threats of negative consequences if the business didn’t buy a music licence, could amount to unconscionable conduct as well as misleading and deceptive conduct.


During the meeting ACA asked OneMusic’s legal team if they could consider retraining their sales staff to:

- ask if they could speak to the owner/operator at first contact with an early learning service (as opposed to talking to the educator who may have answered the phone).
- refrain from collecting enforcement evidence during unsolicited sales phone calls.
- use the phone call as an opportunity to educate the owner/operator about their legal obligations when playing music in their service, rather than threatening them with negative consequences such as fines or other legal action.
- refrain from telling early learning services and their staff that buying a OneMusic Australia music licence is the only way a business can comply with Australia’s copyright laws – ACA believes this is misleading given that businesses can limit the music they play and engage directly with the copyright owner.

Following ACA’s verbal request, OneMusic told ACA that their sales team could talk to prospective customers however they liked, given that it is a legal requirement for businesses that play music in their business settings to seek permission from the copyright owner.

ACA response to OneMusic’s refusal to change their sales practices

As a result of this direct feedback from OneMusic’s in-house legal team, ACA declined to enter a sponsorship agreement with OneMusic.



ACA then worked with HWL Ebsworth Lawyers to produce a fact sheet on the rights and obligations of early learning services when playing music in their services. (*Please refer to Appendix A.*)

ACA circulated the fact sheet to ACA members (i.e. our member base of early learning service providers) along with a link to the ACCC's webpage about [unfair selling practices](#), and in particular are that talks to the illegal practice of [pressuring and harassing prospective customers](#).

ACA has warned its members about the telephone selling techniques used by OneMusic and suggested that **only** the owner/operator talks to their sales staff, should they get in touch.

ACA also reported this information to the ACCC in 2022 via the ACCC's 1300 302 502 phone number



Conclusion

ACA understands the need for businesses to seek permission before playing copyright-protected music in business settings. Furthermore ACA supports the rights of individual musical artists to be remunerated when their music is used for commercial and income-generating purposes.

ACA was committed to assisting OneMusic Australia in educating the early learning sector about their rights and obligations when playing music in early learning services.

However we became concerned about the selling practices of OneMusic Australia and the impact these practices are having on the early learning sector.

ACA is concerned that OneMusic Australia is acting as a retailer of music licences whilst simultaneously acting as a regulator and enforcer of Australia's copyright laws (as they apply to the playing of music in business environments).

ACA is concerned that OneMusic Australia does not seem to appreciate that Australia's Competition and Consumer Law regarding unfair selling practices also applies to them.

We would recommend that the ACCC gives consideration to the sales practices being used by OneMusic Australia and introduces some conditions that effectively protect Australian businesses from their questionable selling practices as part of any new authorisation provided to the Australasian Performing Right Association Ltd.

We would also recommend these conditions include the establishment of an overt and **independent** pathway (i.e. not managed by [OneMusic](#)) to facilitate disputes between businesses and OneMusic.

We thank you for taking the time to read this submission.

Should you have any queries, please feel free to contact the Australian Childcare Alliance directly:

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Appendix A



Playing music and videos in your early learning centre: Your rights and obligations

1. Overview

Certain music and videos are protected by the *Copyright Act 1968* (Cth) and associated regulations (**Copyright Law**) in Australia. Copyright Law prevents the unauthorised use of copyright. If you want to use music and videos protected by copyright in your childcare, **you will generally need permission from the copyright owner**. There are **very limited circumstances** where a licence is not required.

When you are using music and videos as part of a business, this is **different** to when you listen to or watch videos in your personal time. Use in a business is for a **commercial and income-generating purpose** and not for your **private and domestic use**. This applies **regardless** of the type of business (including a not-for-profit).

For example, if an employee listens to music through their headphones in the staff lunchroom, this is for their own **private and domestic** use and is permitted under Copyright Law. However, if you play music for your employees in the lunchroom, this is a service that you are providing in connection with your business, which is **commercial** and not permitted unless you have permission from the copyright owners.

Copyright applies **regardless** of if you have paid to download or access the music or video.

This includes where the music:

- (a) is on a CD/DVD;
- (b) was downloaded, for example from iTunes; or
- (c) is streamed, for example through Spotify;
- (d) is played through a radio or television.

Commercial uses in a childcare centre which may require permission from the copyright owner include where you play:

- (e) 'on hold' music for telephones;
- (f) music or videos during activities, such as dancing, exercising, yoga or karaoke;
- (g) music to settle babies or toddlers to sleep in sleeping areas;
- (h) music for staff in offices or in a lunchroom; and/or



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- (i) backing music, including when singing or playing instruments.

2. Exclusions

Some music and videos can be used by businesses without needing to obtain permission from the copyright owner. This may be because:

- (j) the copyright has expired (it is in the public domain); or
- (k) the copyright owner has published the music or video and allowed commercial use without needing to seek express permission (production music or royalty free music).

You do not need a licence **if you do not play music or videos** in your childcare centre or your early learning centre.

It can be difficult to determine if copyright has expired, so it is always best to check if you have any doubt.

3. Seeking permission

You can obtain permission to use music covered by Copyright Law by coming to an agreement with the copyright owner. When seeking permission you will usually be required to make a payment (royalty) to the copyright owner in exchange for use in your business. Usually the agreement will be documented in a legal document called a **licence agreement**.

In Australia, OneMusic Australia has the **exclusive** right to licence most commercially released music.

(l) **OneMusic Australia**

OneMusic Australia (OneMusic) is a joint initiative between **APRA AMCOS** (the Australasian Performing Rights Association and Australasian Mechanical Copyright Owners Society) and **PPCA** (the Phonographic Performance Company of Australia). APRA AMCOS and PPCA are collecting societies which manage copyright and collect royalties on behalf of copyright owners (artists, recording studios, record labels). OneMusic is permitted to operate under the Copyright Law and, through APRA AMCOS and PPCA, is subject to a code of conduct for collecting societies.

OneMusic offers a streamlined service to provide licences to a wide range of popular music (such as the music you hear on the radio). OneMusic offers a licence tailored to childcare centres which may cover most of your use of music.

(m) **Who to seek permission from**

It can be difficult to determine the owner of copyright in music, as copyright can be held by the artist, record label and the recording studio. It is important to check that you are approaching the copyright owner, not just the artist.

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If you know the copyright owner, for example if it is a local artist, then you can seek permission directly from that person (provided they are not a member of APRA AMCOS). However, where you are using 'popular' music from a range of international artists, the right to licence may be exclusive to OneMusic. This means you may be required to purchase a licence through OneMusic.

(n) Other Providers

There are a range of separate providers who allow you to access music through their service offering **and** provide you with a licence. In many cases, the service provider has a licence agreement with OneMusic, APRA AMCOS and/or PPCA to provide you with access to music and videos for a commercial purpose. You always need to check that the service provider includes a licence with their service offering, otherwise you may also need a OneMusic licence.

4. Frequently asked questions

(o) Does it matter if we are playing music to children who are 0-5 years old?

If you are using works subject to copyright in any commercial capacity you will need a licence. This applies if you are a childcare centre as the music is being used for a commercial purpose. It also does not matter if you are a not-for-profit, as the use is still commercial.

(p) How much will a licence cost me?

The cost of a licence will depend on where you have purchased it from, as well the extent of protection afforded by the licence. OneMusic offers a standard rate for childcare facilities based on the type of facility and the maximum number of children a facility is permitted to have in its care on any given day (the number of 'licensed places'). **Vacation Childcare Facilities** (facilities operating only during school vacation periods) and **Restricted Hours Childcare Facilities** (facilities which operate for 5.5 hours or less per day) are eligible for a discounted licence fee from OneMusic.

The current annual rate for a **Long Day Childcare Facility** is \$3.58 per licensed place. The current annual rate for **Vacation Childcare Facilities** and **Restricted Hours Childcare Facilities** is \$2.15 per licensed place.

(q) If I have a licence, can I use the works however I want?

No - Purchasing a licence does **not** allow you to use the works for any purpose. You must use the works in accordance with the licence terms. For example, most licences from OneMusic do not allow works to be used for the following purposes:

- (i) uploading videos to social media; or
- (ii) profiting from the sale of works which include the licensed works (for example a performance).

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If you are unsure if your use is in accordance with the terms of the licence agreement, we recommend that you clarify the use with the organisation or seek a legal opinion.

(r) **I have received a letter (including a letter of demand) from OneMusic, what can I do?**

If you believe that you are not infringing copyright, you may wish to communicate this to OneMusic. OneMusic should not pursue you further if they are satisfied there is no infringement.

If you do not hold a relevant licence, we suggest purchasing one through OneMusic or another valid provider as soon as possible and refraining from using any music which may infringe copyright.

We always suggest speaking to a lawyer if you are unsure if you are infringing copyright.

(s) **What if we only play music which is free to use?**

If you are playing music or videos which:

- (i) are in the public domain (copyright has expired);
- (ii) is production or royalty free music (the copyright owner has given their express permission for commercial use, which may include some Creative Commons music **released for commercial use**); or
- (iii) you have otherwise received permission from the copyright owner,

then you may not require a licence to play music. However, you should always check that the music you are using falls into one of the categories listed above to ensure you are not accidentally infringing copyright.

We always suggest speaking to a lawyer if you are unsure if the music is free to use.

(t) **Can I play free DVDs from community organisations or government departments? (Eg. Kids Alive Do The Five, Cancer Council, etc)**

If your early learning service is being provided educational materials by a government department or a community awareness campaign, these materials **may** include a licence for your commercial use (outside of OneMusic). However, if you are in doubt about how you can use the materials you should check by contacting the organisation directly.



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(u) **We use Spotify or Apple Music, is this okay?**

Currently, music services like Spotify or Apple Music do not allow use of their services for commercial purposes (even if you have a OneMusic licence or licence from another provider). This is because it is against their Terms of Use. However, there are a range of separate music streaming services which allow its subscribers to play music for commercial purposes. A list of service providers (partnered with OneMusic) who allow their services to be used commercially can be found [here](#). Not all providers will provide their services in Australia.

We always suggest speaking to the service provider or a lawyer if you are unsure if your music provider allows commercial use.

(v) **What if my service is a not-for-profit – does the relevant copyright law still apply?**

Yes - Copyright Law applies to the use of music and videos in your childcare centre **regardless** of the type of business (including a not-for-profit).

(w) **Do I need to go through OneMusic?**

As OneMusic (through APRA AMCOS and PPCA) is the collecting society on behalf of a wide range of copyright owners, it is generally most efficient to seek a licence from OneMusic. However, you are not required to obtain a licence directly from OneMusic.

A licence can be purchased through:

- (i) the copyright owner, only if they do not have an agreement with OneMusic;
- (ii) directly from APRA AMCOS or PPCA; or
- (iii) in some circumstances, a music/video provider (including a music streaming service).

If you pursue a licence through an alternative provider, you may be referred back to OneMusic, for example Soundtrack Your Brand, SoundMachine and Activaire require a OneMusic licence. Some providers can engage directly with the collecting societies on behalf of the childcare centre, such as POS Music.