

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged: Application – Form I

File Number: ACT1 of 2020

File Title: Re Application for Review of Determination lodged by Nightlife Music Pty Ltd

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

REGISTRAR

Dated: 3/08/2020 4:27 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



FORM I

(subregulation 20(1))

APPLICATION TO TRIBUNAL FOR REVIEW OF DETERMINATION

1. Nightlife Music Pty Limited of 50 Cribb Street, Milton, Queensland 4064 ABN 29 052 079 277 (**Nightlife**) hereby applies to the Australian Competition Tribunal pursuant to section 101 of the *Competition and Consumer Act 2010* for review of the determination of the Australian Competition and Consumer Commission (**ACCC**) dated the 13 July 2020, being an Application for revocation of A91367 - A91375 and the substitution of authorisation AA1000433 lodged by Australasian Performing Right Association Ltd (**APRA**) in respect of arrangements for the acquisition and licensing of performing rights and communication rights in musical works; Authorisation number: AA1000433 (**the Determination**).
2.
 - (a) Nightlife was not the applicant for the Determination.
 - (b) Nightlife's interest in the Determination is as follows:
 - (i) Nightlife lodged submissions to the ACCC in response to the request for authorisation on 22 February 2019, 29 May 2019, 12 June 2019, 18 June 2019 and 28 June 2019 (through our associated entity, the Background Providers of Music Ltd) (**BPM**), and on 6 March 2019;
 - (ii) Nightlife has participated in numerous conferences, two lengthy telephone conference calls and round table discussions with the ACCC, APRA and others, as an interested party, including the ACCC's Pre-Decision Conference of 19 July 2019;
 - (iii) From a financial viewpoint, Nightlife will be substantially impacted by the Determination. Nightlife is one of the largest background music suppliers in the Australian market with 5000 clients, who hold over 10,000 APRA licences for the public performance of musical works under a range of licence categories. Nightlife is a Business2Business platform servicing bars, hotels, clubs, gyms, bowling alleys, restaurants, retail outlets and others. Nightlife has a blanket agreement with APRA and the Australasian Mechanical Copyright Owners Society (**AMCOS**) enabling it to communicate and reproduce, respectively, its member's content for commercial



use. Nightlife is dependent on this licence to operate as a commercial background music provider in Australia. Nightlife has also collected public performance fees for its client base on behalf of APRA covering a subset of APRA tariffs. Nightlife has operated since 1989 and in that time has employed hundreds of staff. The effect of the Determination (as it stands) is that Nightlife will be severely impacted which could force it to cease operations in Australia during 2020.

3. I am dissatisfied with the determination of the Commission in the following respects: Condition C1.1 (ix) of the Determination states the following:

'Even with our licence, the use of digital music streaming services by you in your business may be in breach of the terms and conditions of your end user agreement with that service. You should check with your service provider.' The statement at condition C1.1(ix) must be included in APRA's comprehensive plain English guides within 12 months of the ACCC's final determination being made (or such longer period as is agreed with the ACCC).

C1.8 of the Determination states the following:

Any time a person using the 'Get a Quote' function on the OneMusic website answers yes to a question about the use of a digital music service or device to play music in their business APRA must ensure that the following statement is prominently displayed before the next question appears: 'Even with our licence, the use of digital music streaming services by you in your business may be in breach of the terms and conditions of your end user agreement with that service. You should check with your service provider.'

These paragraphs of the Determination are ambiguous and will have the effect of encouraging APRA/AMCOS to engage and continue to engage in misleading and deceptive conduct by issuing licences to businesses for the use of **consumer** streaming services in the public performance of music.

4. The determination that we are seeking from the Tribunal is as follows:
 - (i) Conditions C1.1(ix) and C1.8 should be replaced with conditions containing more suitable language, and
 - (ii) additional Conditions should be imposed on APRA/AMCOS in the Determination.



Particulars of the facts and contentions upon which I intend to rely in support of the application for review, and a statement of the issues as I see them, are included as Attachment 1.

6. My address for service for the purpose of regulation 21 of the Competition and Consumer Regulations 2010 is 50 Cribb Street, Milton, Queensland 4064, or by email at markb@nightlife.com.au.

Dated this 3rd day of August 2020

Signed by/on behalf of the applicant
Nightlife Music Pty Limited

A handwritten signature in black ink that reads "Mark Brownlee". The signature is written in a cursive style.

Mark Brownlee
(Managing Director)

(Where applicant is a corporation, state position occupied in corporation by person signing. If signed by solicitor for applicant this fact should be stated.)

History

Form I amended by SR No 330 of 1995, reg 10.1 and 10.2, effective 6 November 1995; SR No 20 of 1996, reg 10.2, effective 31 January 1996; SR No 280 of 2010, Sch 1, effective 1 January 2011 (as amended by SR No 337 of 2010).

Attachment 1

This attachment contains the particulars of the facts and contentions upon which Nightlife relies.

1. A consumer streaming service is a service such as Apple Music, Google Play, YouTube, Pandora and Spotify (for ease of reference herein collectively referred to as ‘consumer streaming services’) with a subscription fee being paid by the user to access the provider’s repertoire.
2. Consumer streaming services have become increasingly popular in recent years because they are an inexpensive way for consumers to access large amounts of repertoire.
3. This is because the fees charged by copyright owners such as record companies for the use of repertoire by consumer streaming services, which are passed onto consumers in the form of fees, are far lower than the fees charged by copyright owners to entities that wish to engage in the public performance and communication of sound recordings and musical works for a commercial purpose.
4. Paragraph 4.157 of the Determination recognises that businesses pay lesser amount in licence fees for using consumer streaming services:
The ACCC does note that, when a business sources music content from a personal streaming service, the licence fee that APRA charges that supplier does not reflect that the music they are supplying may be used in commercial settings. When a business sources music content from, for example, a BMP (background music providers (BMPs), such as Nightlife), the BMPs licence fee does reflect that it is supplying music content for commercial use.
5. Aside from the use of consumer streaming services like Apple Music, the low cost has also resulted in consumer streaming services becoming increasingly popular with businesses in recent years, because they are viewed by businesses as an inexpensive means of accessing large amounts of repertoire popular with their customers.
6. Staff members at businesses create ‘playlists’ on a device connected to the internet, such as a mobile phone, with these playlists comprising of songs that appear on these consumer streaming services, and then undertake the public performance (for example) of these songs at pubs, clubs or restaurants by connecting their device to the in-house sound system.
7. The use of consumer streaming services by businesses in this manner breaches the terms and conditions of these streaming services. For example, clause 5 of the Spotify terms and conditions of use states, “we grant you limited, non-exclusive, revocable permission to make use of the Spotify Service, and limited, non-exclusive, revocable permission to make *personal, non-commercial* use of the Content” (emphasis added).

8. The use of consumer streaming services by businesses also results in these businesses potentially engaging in copyright infringement contrary to the *Copyright Act 1968* (Cth).
9. Copyright infringement occurs when another person (or entity) does the things that only the copyright holder is usually allowed to do with their sound recording and/or musical work, without the copyright owner's permission (often called a licence) and without any relevant defence.
10. By using consumer streaming services, businesses undertake the public performance and communication of sound recordings and musical works in a manner not permitted by the copyright owner, and never envisaged by the copyright owner.
11. The use of consumer streaming services by businesses in their premises has resulted in substantial losses being incurred by background music providers (**BMPs**), such as Nightlife. BMPs develop products around the use of licenced repertoire, including (according to paragraph 4.144 of the Determination) *curated music content to businesses that play music, such as, bars, hotels, clubs, gyms, restaurants, retail outlets and other venues (and music delivered) to businesses via various platforms including physical delivery (such as CDs), digital downloads and streaming.*
12. All BMPs are licenced by APRA/AMCOS, representing musical works, to supply products containing musical works to commercial businesses.
13. OneMusic Australia (**OMA**) is a joint initiative between APRA/AMCOS, and the Phonographic Performance Company of Australia (**PPCA**). OMA purports to licence businesses on a one-stop shop basis for the use of music in their businesses.
14. APRA/AMCOS also provides a licence through OMA to businesses for the use of consumer streaming services, in direct competition with BMP products. This is the Digital Copying/Delivery Licence also known as the 'copying licence'.
15. As many businesses are now using these less expensive consumer streaming services instead of BMP products, the BMPs have suffered substantial losses due to reduced client sales. BMPs such as Nightlife now envisage that eventually they will be forced to cease operations in Australia, as businesses continue to migrate from BMP services to less expensive consumer streaming services.
16. The use of consumer streaming services by businesses in their premises has also resulted in substantial losses to copyright owners and recording artists, who receive far less money in the form of licence fees from the use of consumer streaming services by businesses, than they would have received in the form of licence fees collected from BMPs and passed onto copyright owners.

17. This usage of consumer streaming services by businesses has taken place despite this usage being contrary to the terms and conditions of these services, and this usage potentially resulting in copyright infringement by these businesses.
18. The Determination recognised that the use of consumer streaming services by businesses is a serious problem. At paragraph 3.21 of the Determination:
Some background music providers continued to express particular concern regarding use of consumer streaming services by some businesses licensed by APRA and that APRA's licensing arrangements were encouraging this practice.
19. At paragraph 4.413 of the Determination:
Some ... BMPs ... have raised concerns about APRA granting licences to businesses that source the music they play from ... "consumer music services", such as digital music streaming services, where the terms and conditions of use of the service stipulates that it is for personal, non-commercial use only.
20. At paragraph 4.415 of the Determination:
The ACCC understands that BMPs are concerned about some businesses using consumer music services, whose subscriptions fees and terms and conditions of use reflect that they are for personal use only, in commercial settings as an alternative to engaging a BMP.
21. At paragraph 4.416 of the Determination:
When a business supplies music content to other businesses, for example a BMP providing curated music content to a bar, both the BMP and the bar require separate licences from APRA if the music being played is within APRA's repertoire and the BMP and/or bar has not obtained a licence or licences directly from the APRA member(s) whose musical work(s) are being played. The licence APRA provides to the BMP recognises that the BMP is supplying music to commercial users.
22. At paragraph 4.147 of the Determination:
In comparison, a digital streaming service supplying music content to users for personal use only requires an APRA licence, but the end user, if they are playing music only for personal use, does not. The licence APRA provides to the personal use only digital streaming service does not provide for the streaming service to supply music to commercial users
23. The Determination also recognised that the Digital Copying/Delivery Licence charged by APRA/AMCOS to businesses when using consumer streaming services, also resulted in a significant competitive advantage compared to businesses that use BMPs.
24. At paragraph 4.149 of the Determination:
... in addition to the general licence fee that the business pays for a licence from APRA, APRA levies an additional 'digital copy/delivery charge' on some business which APRA defines as: 'the additional cover you need from us if for example you

have copied a CD onto a hard drive or made a copy of a digital download. You will also need this additional cover if you are using an existing recording for a purpose for which it has never been licensed for such as in the case of personal digital music streaming services like Spotify or Apple Music.'

25. At paragraph 4.150 of the Determination:
A business playing music, for example a bar, that is provided by a BMP licenced by APRA does not incur this charge but a business playing music from a personal streaming service does. The ACCC understands that the rationale for this fee structure is that the licence fee APRA charges the BMP reflects that it supplies music to other businesses, but the licence fee APRA charges the streaming service that is for personal use only does not.
26. At paragraph 4.151 of the Determination:
... a BMP that supplies musical content to business pays APRA a premium for doing so. A streaming service that supplies content for personal use only does not. If a business chooses to source music from a streaming service that is not licensed to supply content for commercial use, APRA charges that business an additional fee directly.
27. APRA/AMCOS do not deny that businesses are using consumer streaming services, but claim that it is not a concern. Paragraph 4.153 of the Determination:
APRA submits that it is apparent that some businesses are using digital streaming services as a source of background music and the BMPs wish to prevent them doing so to drive them to use BMPs instead. APRA submits that it is not appropriate for it to refuse to grant a licence to a business because it is using a digital streaming service as a background music source.
28. The ACCC accepts APRA's view and claims that the use of consumer streaming services at business premises is an enforcement problem for the service providers, and is not a APRA/AMCOS problem. Paragraph 4.159 of the Determination:
The ACCC considers that the issue in relation to use of personal use streaming services for commercial purposes is primarily one of lack of enforcement by these streaming services of their terms and conditions of use.
29. Nightlife respectfully disagrees with the position of APRA/AMCOS and the ACCC on this issue.
30. Nightlife claims that APRA/AMCOS has and currently continues to licence businesses for the use of consumer streaming services, and as a result, these businesses believe it is acceptable for them to use these consumer streaming services on their premises.
31. According to numerous anecdotes conveyed to Nightlife, many former clients of Nightlife have also advised Nightlife that they are no longer using BMP

products/services and are instead using consumer streaming services because (of words to the effect):

‘...while Spotify will never be as good as Nightlife for my bar, it’s cheaper and seeing as APRA/AMCOS have issued us a licence, it must be ok to use’.

32. Nightlife claims that in licensing businesses for the use of consumer streaming services, APRA/AMCOS are engaging in misleading and deceptive conduct in relation to these businesses, by actively encouraging them to believe that by obtaining a licence from APRA/AMCOS, they are being authorised by the copyright owners (being either APRA/AMCOS directly, or APRA/AMCOS as agents on behalf of record and publishing companies - through their input agreements), to use these consumer streaming services in a business context.
33. APRA/AMCOS have a near monopoly in relation to the licensing of musical works for the purposes of reproduction, public performance and communication. APRA/AMCOS is currently using its near monopoly market power to compete unfairly against BMPs, by granting licences to businesses for the use of consumer streaming services, thereby encouraging them to engage in the public performance of music made available through these services.
34. BMPs cannot compete with APRA/AMCOS. As a result of the Determination, there will continue to be an uneven playing field in the market for musical works.
35. Another concern is that APRA/AMCOS have licenced businesses to use consumer streaming services, when they don’t have the rights to all of the repertoire appearing on those consumer streaming services. So, for example, while the APRA/AMCOS input agreement with Sony Music Australia may allow APRA/AMCOS to licence Australian Sony artists such as Amy Shark, Adam Harvey and Guy Sebastian to a consumer streaming service, there are many artists whose recordings appear on consumer streaming services who are not the subject of input agreements. Yet, when APRA/AMCOS issue a licence to a business for the use of a consumer streaming service, these businesses not only believe they are authorised to undertake the public performance of musical works using the consumer streaming service, but they incorrectly think they can use *all* of the repertoire appearing on the consumer streaming service.
36. Conversely, some of the music appearing on consumer streaming services may be so-called royalty free music, not requiring any APRA/AMCOS licence, yet businesses may be encouraged by APRA/AMCOS to take out licences with respect to this royalty-free repertoire.
37. Both of these situations are indicative of misleading and deceptive conduct potentially being undertaken by APRA/AMCOS. Paragraph 4.184 of the Determination acknowledges the possibility that APRA/AMCOS may encourage businesses to take out licences with respect to musical works where the would-be licensors do not require a licence, or where they believe that such a licence will allow

them to publicly perform repertoire not covered by such a licence. Yet, while the ACCC acknowledged this situation in the Determination, the ACCC took no steps in the Determination to reduce the likelihood of this behaviour occurring.

38. Paragraph 4.184 it states:

The ACCC has also advised APRA that should statements or representations that cause a business to believe it requires an APRA/OneMusic licence when this is not the case be made in the future by APRA or OneMusic, the ACCC may take appropriate enforcement action in respect of such statements under the misleading or deceptive conduct provisions of the Australian Consumer Law without further notice.

39. Nightlife is concerned with other aspects of the Determination insofar as it misrepresents the position of the BMPs and otherwise is misleading and ambiguous, including the following:

- Regarding paragraph 4.143: the potential detriment from APRA's licensing of businesses that use 'consumer' music services. This heading is potentially misleading/unclear. A more accurate heading would be: 'Potential Detriment from APRA providing a licence (levy/fee) for the use of 'consumer' digital music streaming services in a business'.
- Regarding APRA's licensing of a business - which licence does the Determination refer to? Is it the licence for public performance or the 'Digital Copy/Delivery' licence which is for the use of consumer music streaming services.
- This delineation of the two licences is significant, as it forms the basis of APRA's argument as to why they require a 'Digital Copy/Delivery' licence when consumer music streaming services are used by businesses.
- It is unclear why the BMPs have been attributed with usage of the terminology of 'consumer music services', as these services already exist in the music industry, so this reference should be omitted. This reference infers that the BMPs are concerned with the provision of licences to businesses. BMPs welcome the granting of public performance licences. Nightlife's concerns are solely with APRA/AMCOS granting the 'Digital Copy/Delivery' licence to businesses for the use of consumer streaming services.
- Regarding paragraph 4.144, BMP platforms are technologically comparable to consumer platforms and should be described as such. Nightlife is essentially a digital music streaming service company (using C1.8 terminology).
- Regarding paragraph 4.149, the additional licence referred to is a 'digital copy/delivery charge' as defined by APRA as a copying or download licence. This is the original and legitimate use of this licence for either copying CDs or downloading MP3s.
- But then, 4.149 also states that APRA defines the 'digital copy/delivery charge' is required for when consumer streaming services are used. By repurposing this legitimate licence for a non-legitimate use, APRA potentially continues to engage in misleading and deceptive behavior because the licensee falsely assumes that this licence legitimizes the use of consumer streaming in businesses.

- Regarding paragraphs 4.150, 4.151, and 4.152, the reference to playing music should be to playing digital music from a consumer service.
 - Regarding paragraph 4.153, APRA/AMCOS is potentially engaging in misleading and deceptive conduct, by not stating which licence they are referring to in their claims here. The Determination should clearly state that the licence referred to in this paragraph is the additional fee for consumer digital music streaming services and not the public performance licence.
 - Regarding paragraph 4.154, APRA/AMCOS is potentially engaging in misleading and deceptive conduct, by implying that they would have to refuse a public performance licence or an additional fee in these circumstances. It is unclear which licence/fee they are referring to in this instance. This in itself is misleading and ambiguous.
 - In addition, 4.154 is a factually incorrect statement, as BMPs have never objected to the digital copy/delivery licence. The BMPs have only objected to this licence being used to legitimize consumer streaming services for business.
 - Paragraph 4.160 misrepresents the position of BMPs, as they have never suggested abolishing the digital copy/delivery fee.
40. The Determination not only does not reduce the near monopoly power of APRA/AMCOS, but conditions C1.1 (ix) and C1.8 of the Determination (which are central to the ACCC's response to the use by businesses in their premises of consumer streaming services), are not an effective response to APRA/AMCOS licensing businesses for the use of consumer streaming services.
 41. Nightlife is uncertain of the intent underlying C1.1 (ix) and C1.8 of the Determination. The Determination represented an opportunity for the ACCC to take steps towards encouraging greater competition in the market for musical works, but regrettably the ACCC failed to take advantage of this opportunity.
 42. These conditions *may* have been intended to reduce the incidence of misleading and deceptive conduct by APRA/AMCOS, or even support the submissions by the BMPs to the Determination process.
 43. Nightlife's view is they will not have the effect of reducing the incidence of potential misleading and deceptive conduct by APRA/AMCOS.
 44. Nightlife further contends that the ACCC response in C1.1 (ix) and C1.8 of the Determination will in all likelihood actually increase the incidence of misleading and deceptive conduct by APRA/AMCOS, because they impose no meaningful requirements or obligations on APRA/AMCOS and simply represent an acceptance of 'business as usual' as far as licensing is concerned.
 45. Nightlife contends that APRA/AMCOS should not issue licences to businesses for the use of consumer streaming services, and this should be included as a condition in the Determination.

46. In the alternative, APRA/AMCOS should clearly articulate to businesses the risks attached to them using consumer streaming services, including the risk of breaching the terms and conditions attached to these services, and engaging in copyright infringement, as a result of the use of these services. The requirement for APRA/AMCOS to clearly articulate these risks to business under this alternative should be included as a condition in the Determination.
47. If APRA/AMCOS is required to clearly articulate to businesses the risks attached to them using consumer streaming services, the ACCC should require APRA/AMCOS to develop suitable language in the form of a disclaimer or warning notice that reflects clearly these risks (**Disclaimer**).
48. Nightlife suggests the following as suitable language for the Disclaimer (based on paragraph 4.162):

OneMusic can issue your business with a licence for the use of the music that it represents in it's repertoire when using a digital consumer music streaming service. OneMusic cannot authorize the actual use of the digital consumer music streaming service. However, you need to be aware of the risks, that even with a OneMusic licence, if you choose to use such a consumer steaming service, your business will be in breach of the terms and conditions attached to that service, and you will also be in breach of copyright, for music that is outside of OneMusic's repertoire when played on that consumer streaming service. For further information, you should read ..., being on the ACCC website.

49. Nightlife contends that the use of the Disclaimer should not represent any difficulty for APRA/AMCOS as it is very similar to a position previously expressed by APRA/AMCOS in communications to clients, although it is different to the position currently appearing on the APRA/AMCOS website.
50. An example of disclaimer by an APRA/AMCOS representative in email correspondence dated 5 March, 2020 to a Nightlife client, indicating their acceptance of this position is included here: “**Consumer streaming services:** firstly, consumer streaming services, such as Spotify, YouTube and Apple Music, are not designed or intended for use in a business. If you look at the ‘terms of use’ for a subscription to those services, you will see that use in a commercial setting is prohibited by the operators of those services. So, anytime you choose to use a consumer service in your business you are accepting the risk of breaking that service’s terms of use. That said, if you choose to accept that risk and use a consumer music service as your music source to play OneMusic Australia’s vast repertoire of music in your business, you will still need to have a OneMusic Australia licence. So, while OneMusic Australia cannot authorise the actual use of the consumer streaming service itself, it can provide you with a licence *for the use of its music* in your business.”

51. Nightlife suggests this Disclaimer should be used in the following fora:
- in the form of a verbal statement made by APRA/AMCOS/OMA licensing staff at the beginning of any conversations with businesses seeking to use consumer streaming services in their businesses,
 - in the form of a written notice on relevant licencing pages of the APRA/AMCOS/OMA websites, and all on relevant guides (such as plain English guides) as well as on website pages containing application forms, ‘Get a Quote’ (OMA’s point of sale when taking out a licence), and in the form of a written notice that clearly appears at the foot of all letters and emails from APRA/AMCOS/OMA staff to licencees,
 - the ACCC should also be required to host a website page that clearly explains this position, using language agreed between the ACCC, APRA/AMCOS/OMA and Nightlife. A link to this website page should appear on the APRA/AMCOS/OMA website, and on website pages containing application forms.