

15 March 2017

The Hon Kevin Edmund Lindgren AM, QC
Code Reviewer
Suite 704
4 Young Street
Neutral Bay NSW 2089

By email: codereviewer@gmail.com

Dear the Hon Kevin Edmund Lindgren AM, QC (Code Reviewer),

LPA Submission to Review of Copyright Collecting Societies Code of Conduct

Thank you for the opportunity to provide comment on the operation and terms of the Copyright Collecting Societies Code of Conduct ("Code"). As the peak body for Australia's \$2.5 billion live performance industry, Live Performance Australia (LPA) represents licensees of both APRA AMCOS ("APRA") and PPCA for the public performance of musical works in Australia. Our Members include producers, promoters, venues, performing arts companies and festivals that collectively contribute a significant portion of the royalty revenue collected for the public performance of music.¹

Background

1. LPA has been actively involved in discussions with APRA on behalf of live performance licensees in recent years. In 2015 LPA concluded negotiations with APRA on licence fees and conditions for the public performance of live music at promoted events and festivals. APRA is currently consulting with LPA on other licensing matters that affect our Members. As you are aware, LPA has made previous submissions to the annual Code compliance review.
2. LPA made several submissions to and was actively involved in the most recent ACCC reauthorisation process for APRA in 2013-14. LPA recognises that the conditions for APRA's reauthorisation determined by the ACCC has led to improved transactions and transparency in accordance with the conditions set. This has served to address some of the concerns LPA has raised in recent years.

Governance and Oversight

3. LPA Members depend upon the ability to licence the use of music works in a fair, efficient and timely manner to maintain their business operations, such as promoting live music concerts and producing live shows. Despite recent improvements in the licensing experience between APRA and our Members, as recognised in the Productivity Commission's recent findings² content users are disadvantaged by an imbalance that exists between licensees and collecting societies.

¹ In 2015-16 public performance revenue contributed 21.25% (\$70.7m) of APRA AMCOS total revenue. Source: APRA AMCOS Year in Review 2015-16 (digital report), accessed at: <http://2016.yir.apraamcos.com.au/music-customers-revenue/>

² Collective licensing and collecting societies' (Section 5.4, Chapter 5), *Intellectual Property Arrangements: Productivity Commission Inquiry Report (No.78)*, Productivity Commission, 23 September 2016, released 20 December 2016, pp.153-161

4. The voluntary operation of the Code and other current governance arrangements do not effectively mitigate against the monopolistic stronghold that copyright collecting societies can exert over the copyright material they are authorised to licence. As a result, imbalanced collective copyright arrangements exist that disadvantage licensees.
 - 4.1. Firstly, there is no accessible avenue for licensees to seek an independent and enforceable determination on licence fees and conditions. The Copyright Tribunal is the only independent body that can determine the fees and conditions for licences in accordance with the market value of content and how it is used. However, in cases where licensees disagree with the conditions or fees of a licence scheme it is significantly costly and onerous to pursue proceedings through the Copyright Tribunal. The lack of accessible means to pursue an independent determination creates scope for copyright collecting societies to set unchallenged arbitrary licence fees and conditions that do not accurately reflect the value of content within the context in which it is being used.
 - 4.2. Secondly, there is a lack of effective recourse for licensees to pursue efficient, fair and independent resolution of licensing disputes with collecting societies. LPA acknowledges the efforts by APRA to implement an independent Alternative Dispute Resolution (ADR) scheme as a condition of their recent reauthorisation. However, in practice due to resourcing and time constraints licensees can be disadvantaged in pursuing disputes through ADR. Collecting societies have access to resources that far outweigh what individual licensees have to resolve disputes. Additionally, licensees in the live performance industry are dependent on collecting societies to issue licences for the use of music within a reasonable timeframe prior to productions or concerts being presented. As such, licensees are not in a position to pursue costly and lengthy disputes with a collecting society. The lack of independent dispute resolution options that are also efficient, accessible and enforceable further disadvantages licensees in their dealings with copyright collecting societies.
 - 4.3. Thirdly, enforceable transparency requirements for collecting societies can be improved. There is a lack of clear and detailed disclosure on how the distribution of funds to right holders correlates to the royalty payments received. As such, there is currently insufficient information available to discern how royalty revenue collected is then distributed to the rights holders that own the content used. Licensees should be able to confirm that fees paid for the use of particular content is fairly distributed to the owner of that content.

Recommendation

5. LPA supports any measures intended to secure a fair and transparent collective licensing system. We submit that improved governance and oversight requirements can increase the efficiency, fairness and transparency of collective licensing for both content users and rights holders. As recently recommended by the Productivity Commission, we believe it is timely and appropriate for a review of the governance and transparency arrangements of collecting societies by the ACCC. LPA supports in principle Recommendation 5.4 of the Productivity Commission's report on intellectual property arrangements as follows:

The Australian Government should strengthen the governance and transparency arrangements for collecting societies. In particular:

- *The Australian Competition and Consumer Commission should undertake a review of the current code, assessing its efficacy in balancing the interests of copyright collecting societies and licensees.*
- *The review should consider whether the current voluntary code: represents best practice, contains sufficient monitoring and review mechanisms, and if the code should be mandatory for all collecting societies.*³

We thank you for inviting LPA to make a submission on this important issue for our industry.

Yours sincerely,



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ABOUT LPA

LPA is the peak body for Australia's live performance industry. Established in 1917 and registered as an employers' organisation under the *Fair Work (Registered Organisations) Act 2009*, LPA has over 400 Members nationally. We represent commercial producers, music promoters, major performing arts companies, small to medium companies, independent producers, major performing arts centres, metropolitan and regional venues, commercial theatres, stadiums and arenas, arts festivals, music festivals, and service providers such as ticketing companies and technical suppliers. Our membership spans from small-medium and not-for-profit organisations to large commercial entities. LPA has a clear mandate to advocate for and support policy decisions that benefit the sustainability and growth of the live performance industry in Australia.

³Ibid, p.161