

DATE: 18 October 2017

EXERCISE PROVIDERS MUSIC LICENSING CONSULTATION SECOND CONSULTATION PAPER

OneMusic Australia released a consultation paper on 2 May, 2017 seeking feedback from the exercise industry on a proposed music licensing scheme. That paper can be found online [here](#).

Valuable feedback was received from the sector, including in a follow-up meeting with representatives from Fitness Australia, which we believe will assist us in developing a music licensing scheme that is practical, relevant and equitable. This paper serves as notification that OneMusic Australia intends to implement the new licence scheme outlined below in late 2018. This scheme has been developed through detailed analysis, careful consideration and the consolidation of industry feedback.

INDUSTRY FEEDBACK RECEIVED

OneMusic Australia received feedback from individual exercise providers, and from the peak industry body. OneMusic Australia also met with representatives from Fitness Australia to discuss their submission. The main issues raised were:

- The diversification of music needs and changing consumption of music;
- The OneMusic New Zealand rates;
- The definition of a fitness class;
- Abolishing the two-tiered rate for music in classes;
- The minimum fee; and
- The broadening of the proposed “all in” per member rate to cover all types of fitness centres.

THE DIVERSIFICATION OF MUSIC NEEDS AND CHANGING CONSUMPTION OF MUSIC

OneMusic Australia acknowledges, as noted in the industry feedback, that the fitness industry has diversified since the current licensing schemes were negotiated, and that the way users consume music has also changed in that time. That in itself is not surprising and we note that the Copyright Tribunal held a similar view in 2010 when it said in the ‘Fitness Case’, “The fitness industry is dynamic and it is apparent that the various modes of fitness training pass through periods of popularity”¹

Argument was made that profit margins for fitness centres have reduced, consumers use multiple fitness centres, and that the use of personal headsets outside of classes by patrons of exercise facilities is more common now than in the past and that the combination of all these factors suggests that the value of music to exercise providers is less now than in the past.

OneMusic Australia’s approach, consistent with our announcement of the venture, has been to create, as far as possible, a revenue-neutral new licence scheme that provides increased simplicity for businesses, including a reduction in the number of music licences required. Accordingly, while comments on the general structure of this proposal and possible alternative approaches are welcome, OneMusic Australia’s position is that submissions advocating a fundamental reappraisal of the overall value of the use of music by the fitness and wellbeing industry are more appropriately the subject of separate discussions, which may include the use of Alternative Dispute Resolution or the involvement of the Copyright Tribunal of Australia, if required. Should the parties deem it necessary to enter into a separate and more fundamental revaluation negotiation of this nature, it may mean that in the meantime OneMusic Australia would be obliged to launch with the existing separate licence structures currently offered by APRA AMCOS and PPCA.

1 Copyright Tribunal decision at [79] of Phonographic Performance Company of Australia Limited (ACN 000680 704) under section 154(1) of the Copyright Act 1968 [2010] ACopyT 1

That said, OneMusic Australia believes that despite any diversification, exercise providers continue to regard music as no less an important and valuable part of their business. Indeed it may be that music is more important and more valuable.

However, in response to the specific claims, OneMusic Australia notes that:

- the Copyright Tribunal has held in several decisions that profit margin is not a valid factor in determining an appropriate price for the use of music (in the same way that other charges for electricity etc are not priced according to the user's profitability);
- whether a person uses multiple exercise facilities (or indeed also attends a dance school or a nightclub etc) is not a relevant factor in determining the licence fees paid by individual centres; and
- centres will make their own decision about the use of background music in relation to their members' use of personal headsets and determine whether or not they should continue to provide background music for their members.

Feedback was received in support of OneMusic Australia's proposed adoption of the current APRA AMCOS device-neutral tariff structure for background music, but some suggested that the structure would result in an increase in fees. OneMusic Australia reiterates that this is not the intention of the tariff and notes the increasing use of recorded-sources instead of broadcast sources for the provision of audio and audio-visual entertainment in fitness centres.

THE ONEMUSIC NEW ZEALAND RATES

Comment was made about the differences in the rates for fitness centres between those proposed by OneMusic Australia and those offered by OneMusic New Zealand. As mentioned above, OneMusic Australia has not undertaken a review of 'fitness rates' in Australia and has merely sought to harmonise the **existing** PPCA and APRA AMCOS licence schemes. The fees and licensing schemes in both territories have been developed from a different historical basis and are not linked, indeed they have varied between the two countries for some considerable time, including when the negotiations for the current Australian schemes were taking place. Licensing schemes and rates for exercise providers, and other schemes, differ greatly across numerous international territories due to historical, structural and developmental variables, and a comparison of any two will reveal disparities for those reasons.

OneMusic Australia accepts that a limited "repertoire of cover recordings" is available for fitness centres and that some centres may consider such music is adequate for their needs. OneMusic Australia does, however, note that a study in the UK in 2014 found that 87% of people attending fitness classes prefer listening to music by original artists².

THE DEFINITION OF A FITNESS CLASS

Industry feedback noted the need for clarity regarding the precise definition of 'Fitness Class' and requested that ambient music, as opposed to music used for choreographic or time-keeping purposes, be excluded from the licence fee model for music in classes and instead be licensed under the background music tier.

OneMusic Australia intends to retain the definition of 'Fitness Class' – other than to change the name to 'Exercise Class' - in the current APRA AMCOS scheme, which is:

Exercise Class means a structured form of exercise conducted in a class environment on a commercial basis whether at a Fitness Centre or by your business if you are a Fitness & Wellbeing Instructor, which:

- a) *is directed by a fitness instructor (regardless of whether it is conducted by an on-staff or freelance instructor);*
- b) *is included in a published time-table or advance notification to potential participants;*
- c) *includes but is not limited to the following category of structured exercise class: freelance or pre-choreographed group fitness (including Les Mills, MOSSA, Radical and Zumba) circuit, dance, cycle/spin, flexibility/stretching/abdominal, yoga, Pilates or aqua; and*
- d) *is not a Virtual Fitness Class.*

OneMusic Australia does not propose to separate group exercises that are not choreographed to or timed with the music in a class and continues to agree with the Copyright Tribunal when it said it "does not accept that any distinction should be drawn between yoga and pilates classes and other fitness classes. Although music performs a different function in yoga and pilates classes than in rhythmic classes the same is probably true of some other kinds of non-rhythmic classes. The Tribunal takes the view that where music is played specifically in a fitness class for the purposes of the class it is integral to the exercise experience. In those kinds of classes where music is not essential to the class, such as yoga and pilates, it does not have to be played. Where music is played for the class, no distinction should be drawn."³

² Source: YouGov Plc. online survey, April 2014. Total sample size: 7492 GB adults aged 18+. Figures have been weighted and are representative of all GB adults

³ Copyright Tribunal decision at [302] of Phonographic Performance Company of Australia Limited (ACN 000680 704) under section 154(1) of the Copyright Act 1968 [2010] ACopyT 1

The continued choice by exercise providers to use music in fitness classes for both ambient and time-keeping/choreographic purposes illustrates the value that the use of music has in a fitness class context.

Apart from the complicated compliance issues and likely references to ADR processes that such an approach would create (including as new formats emerge over time), OneMusic Australia notes that the current class rate applies across the full range of classes that use music. Accordingly if a group or class-type was excluded according to a qualitative assessment that the music in those classes was less valuable, then the rate for the remaining types of classes would need to be adjusted upwards.

THE REMOVAL OF THE TWO-TIERED RATE FOR MUSIC IN CLASSES

OneMusic Australia now intends to reintroduce licensing classes with fewer and/or more than 10 participants at a different rate. The two-tiered rate was originally removed in an effort to simplify the fitness class licence, as PPCA and APRA data demonstrated that very few licensees were utilising the two tier option. However, based on industry feedback we are hesitant to cause unnecessary cost changes to our licensees as a result of over-simplification. This is a flexible option for our licensees and if it is valuable to them we will retain it.

However, it should be noted that the single rate originally proposed blended the existing single class rate and the small/large class rates. Re-instating the two tier option requires further adjustment to the rates.

REDUCTION OF MINIMUM ANNUAL FEE

In the original paper OneMusic Australia proposed a minimum annual licence fee of \$440 (inc GST) per provider per location for the use of background music and/or music in classes. This minimum fee was reached through detailed analysis of the current fees paid to APRA AMCOS and PPCA by exercise providers. Feedback was received that suggested that this minimum fee is too high, especially for those independent providers who only run minimal classes per week. OneMusic Australia has taken this feedback on board and is instead proposing to implement a minimum annual fee of \$220 for the use of background music and a separate minimum annual fee of \$220 for the use of music in classes (the minimum annual fee under the “All In” option would remain at \$440).

EXTENSION OF THE NEW ‘ALL IN’ LICENCE FEE STRUCTURE

OneMusic Australia proposed in the first consultation paper an alternative licence fee structure at \$44.00 per member per year to cover all background music, music in classes and music on hold. The structure was targeted at group fitness centres offering more personalised class instruction. We noted that this option “*will be of most benefit (and may result in a reduction in licence fees) to those exercise providers that tend to operate on fewer member numbers with higher numbers of classes*”.

Leading from OneMusic Australia’s further discussions with Fitness Australia, the parties agreed to work together to model a tiered “All In” structure that could apply across the whole exercise industry. A sample of those fitness centres in South Australia and Western Australia that have licences for background music and fitness classes with both APRA AMCOS and PPCA was used. The results are shown below.

Fig 1

Premises Size (m ²)	0 – 500	501+
Average Number of Classes per Year	607	2,330
Average Number of Members Per Year	549	1,938
Average Classes per Member	1.1	1.2
Average Licence Fee per Centre	\$3,885	\$9,710
%age of Centres with New Fee less than 50% of Average Licence Fee	40%	28%
%age of Centres with New Fee between 90% and 50% of Average Licence Fee	27%	22%
%age of Centres with New Fee between Average and 90% of Average Licence Fee	0%	0%
%age of Centres with New Fee between Average and 110% of Average Licence Fee	7%	6%
%age of Centres with New Fee between 110% and 150% of Average Licence Fee	7%	22%
%age of Centres with New Fee more than 150% of Average Licence Fee	27%	27%

Existing licence fee, combined for PPCA and APRA AMCOS.

While as might be expected there was some degree of consistency across those fitness centres that do not have classes – i.e. because the APRA AMCOS tariff is already based on member numbers – that was not the case for those centres that do offer classes. This lack of consistency existed even when the centres were categorised by premises size threshold. OneMusic Australia’s analysis has concluded that while it is possible to model a new tariff structure, including covering classes, based solely on the number of members, it would result in large-scale movements in licence fees. In effect the mean average is not indicative of the actual fees paid by individual centres. Unfortunately, as the table shows, very few centres would see minimal changes in licence fees, while the majority would see major changes. In our view such an outcome is unlikely to be supported by the industry and licensees. In any event OneMusic Australia notes by definition that this structure can only apply where a centre is using PPCA-represented sound recordings, and accordingly the existing per-class structure would need to remain as an alternative.

OneMusic Australia appreciates Fitness Australia’s approach to the consultations and the constructive discussions we have had to date that led to the proposition. However, based on our further analysis we do not believe that a new wide-ranging per-member rate is viable at this time.

MUSIC ON DEVICES

Since releasing the first consultation paper for Exercise Providers, OneMusic Australia has refined its position on the best way to harmonise tariffs between APRA AMCOS and PPCA with respect to the copying of music by businesses for the purpose of public performance. The advent of smartphones and digital music services has increased the music options available to businesses. While new digital music services provide a degree of choice and control not available when using radio stations or CDs, they do not offer the demographically targeted and individually curated playlists designed for their clients by background music service providers. In our view the digital music services that are intended for domestic listening purposes fall notably short of the benefits offered by sophisticated background music providers. Indeed, as it currently stands in Australia, almost all businesses that offer publicly available digital music streaming and download services limit their service to personal and domestic use. Furthermore, while the making of copies of recordings (for example of a CD, a digital download or music service) is permitted under the Copyright Act for domestic listening purposes, this does not extend to public performances (i.e. the type of performance that occurs in a fitness business). In the absence of an exemption under the Copyright Act and appropriate licensing, any public performances and reproductions (including by the operation of the service itself, such as caching or storing for offline use) require licensing. Such a solution has been available from APRA AMCOS and PPCA separately for several years and will continue to be offered by OneMusic Australia. That said, OneMusic Australia reminds businesses that if they are using a digital music service, they should refer to the Terms and Conditions of the service’s end user agreement to determine if there are other permissions they may require (including from the service provider itself) that are not under the control of OneMusic Australia.

Although APRA AMCOS and PPCA have licences for businesses that permit that business to use, cache or make copies of music for the purpose of playing as background music covered under this proposed scheme, there are notable differences in the two existing structures. The current PPCA scheme is limited to a maximum of 250 tracks per year on a cumulative basis, whereas the APRA AMCOS scheme is tiered depending on the maximum number of tracks copied on the relevant device at one time.

OneMusic Australia recognises that a balance must be achieved between ease of compliance on the one hand and a flexible structure to accommodate the needs of fitness centres and exercise providers on the other. To that end OneMusic Australia seeks specific feedback on the two proposed licensing options set out below in Figures 2 and 3. Under Fig. 2, which follows the current PPCA structure, businesses would pay a specific amount for the number of copies they make each year, capped at 1,000. Those businesses would, however, be able to build up a larger library over time. Under Fig. 3, modelled on the current APRA AMCOS licence, businesses would pay a fee that allows them to keep up to 2,000 copies at any one time and within that limit are able remove and add tracks to keep their music fresh, so long as they keep within the 2,000 cap. Ultimately, either the structure in Fig. 2 or Fig. 3 could be offered as part of this scheme, depending on feedback received from the industry. Both options, however, would not be made available concurrently.

Fig.2

TRACKS COPIED PER YEAR PER LOCATION	RATE PER YEAR (INC GST)
1 – 500	\$400
501 – 1,000	\$800

Fig.3

MAXIMUM NUMBER OF TRACKS PER DEVICE AT ANY ONE TIME	RATE PER YEAR (INC GST)
2,000	\$600

WEBSITE MUSIC USE

OneMusic Australia now also proposes to make available a basic website licence for exercise providers, recognising that most exercise providers operate websites to provide an online presence for their business. OneMusic Australia also understands that an increasing number of those businesses use their website to provide an online environment that seeks to create an offering for members that is complementary to their fitness centre experience.

Accordingly, OneMusic Australia proposes to offer an additional licence option (subject to certain limitations) for businesses that want to play music on their website at \$550 per year, including GST.

The rights that OneMusic Australia is able to license for online uses are limited, including because of restrictions on the use of music in advertisements. Under this part of the scheme businesses must:

- limit music use to audio-only content;
- only use music where it is incidental and where the primary purpose of the website is not the streaming or sharing of musical content;
- use no fewer than 5 and no more than 15 tracks playing in a random linear, non-interactive loop;
- not derive any revenue from the playing of music; and
- only stream music from their website (e.g. does not include use on a business' Facebook or YouTube pages).

Any uses outside these limits will require separate licence arrangements.

REVISED FEE STRUCTURE

In light of the points outlined above, including the agreed amendments to (a) re-introduce a two-tiered music in classes licence fee structure and (b) reduce the minimum annual fees for both the use of background music and music in classes, the fee structure now proposed is as follows:

Fig 4

TIER	MUSIC USAGE	RATE (INC GST)	MINIMAL ANNUAL FEE PER PROVIDER (INC GST)
(a)	Background Music (including Music Videos)	\$1.35 per member per annum	\$220
(b)	Music in Classes	\$5.65 per class OR \$7.92 per class with more than 10 people \$3.40 per class with 10 or fewer people	\$220
(c)	Copying Music OR	See Fig 2 and Fig 3 above	
(d)	All In (All of the above plus music on hold)	\$44 per member per annum	

By way of an example, if a centre has 180 members and offers 42 classes a week without any requirement for a background music tariff or licence to copy music, with each class attended by between 12 and 20 members, then OneMusic Australia would presume the centre would opt to obtain the All In rate (d), which would be \$7,920 (180 members x \$44) compared to \$12,339.60 per annum under (b) (42 classes x 52 weeks x \$5.65).

PARTIAL RIGHTS

OneMusic Australia is aware some fitness centres seek alternative sources of music that do not require all of the rights that would be granted under OneMusic Australia's licence. Such libraries of music tend to be smaller in size and represent a mere fraction of the recordings available under the proposed OneMusic Australia licence. It is OneMusic Australia's view that its proposed scheme is superior and offers much greater value for money in part because the playing of original and recognisable recordings that are specifically tuned to the demographics of your customer base creates a better atmosphere to attract and keep members (and as mentioned earlier in this paper, studies show fitness members overwhelmingly prefer the use of original recordings). Nonetheless, for businesses that do choose such an alternative music source and have no requirement to access sound recordings under OneMusic Australia's licence – and can provide evidence of this – a discount of 42.5% will be applied where relevant. In the original paper this figure was quoted at 50% but has been adjusted in line with OneMusic Australia's more thorough analysis of the cost and efficiency base, including for accounts holders. No adjustment is available under the All In alternative structure, which is offered on the basis that the centre uses original sound recordings represented by OneMusic Australia.



SUBMITTING YOUR FEEDBACK

OneMusic Australia, having regard to the submissions it has received to the initial discussion paper, intend to implement the new Exercise Scheme as varied and set out above subject to any new and substantive arguments received by 17th November 2017.

Please provide your feedback in the form of a submission to consultations@onemusic.com.au. All submissions must be in a Microsoft Word or PDF format.

FURTHER QUESTIONS

If you have any questions or would like to discuss the proposal further, please email questions@onemusic.com.au and we will be in touch.