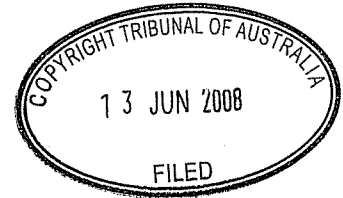


COMMONWEALTH OF AUSTRALIA

Copyright Act 1968



IN THE COPYRIGHT TRIBUNAL
FILE NO. CT 1 of 2006

Reference by: Phonographic Performance Company of Australia Limited (ACN 000 680 704)

POINTS IN RESPONSE

Fitness Australia is a health and fitness association which represents fitness centres throughout Australia (**Fitness Australia and Fitness Centres**). Fitness Australia answers the Applicant's Statement of points in support of its case (**Points in Support**) as follows:

General Response to Applicant's Points in Support

1. PPCA has the non-exclusive right to license certain sound recordings (the **PPCA Recorded Music**). It is not essential to use PPCA Recorded Music when providing group fitness classes in fitness centres in Australia.

Current rate reflects a commercial agreement with annual CPI increases

2. The most significant reference point for the determination of a reasonable remuneration for the use by fitness centres of PPCA Recorded Music is the rate freely established by PPCA in 1995, which was not objected to by the fitness industry and therefore a bargain struck between the parties (the **1995 Licence Agreement**)).
3. The PPCA rate established in the 1995 Licence Agreement has increased each year in accordance with annual CPI increases (together with an increase reflecting the introduction of GST in July 2000).
4. The 1995 Licence Agreement represented the Applicant's commercial assessment of reasonable remuneration for PPCA Recorded Music. It is also

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represented a fair reflection of the respective bargaining positions of the parties which takes account of the extent of the significance of PPCA Recorded Music in group fitness classes as described below.

5. Such value as there is in PPCA Recorded Music is reflected in the cost to the fitness centres of using those works under the 1995 Licence Agreement. Likewise, the current level of usage of PPCA Recorded Music by the fitness centres is a reflection of that cost.
6. The evidence filed by the Applicant provides no basis for a conclusion that the value to fitness centres of PPCA Recorded Music has increased since the agreed rate was struck in 1995. To the contrary, the evidence is consistent with a decline in value given, for example, the increase in popularity of group fitness classes which either do not use music at all or use only background music and the increase in the use and availability of non-PPCA Recorded Music in group fitness classes.

Quantum of proposed PPCA rate sought

APRA Rate and Overseas Rates

7. The rate fixed is comparable with the rate fixed by the Australasian Performing Rights Association (APRA) for the right to perform music in fitness classes and the new rate vastly exceeds that rate.
8. The current PPCA rate (increasing as it does in line with annual CPI increases) is comparable to rates currently payable for protected sound recordings in overseas jurisdictions. The new rate sought by PPCA is vastly in excess of rates payable for protected sound recordings in comparable overseas jurisdictions.

Use of PPCA Recorded Music by fitness centres

9. The new rate sought by PPCA does not reflect the true significance of recorded music in group fitness classes, let alone the true significance of PPCA Recorded Music in group fitness classes.

10. First, in return for a membership fee, fitness centres typically offer, at a location close to the home or work of a member, an array of services and facilities (including weights equipment, cardio equipment, roving supervision by certified fitness professionals, group fitness classes, and change rooms (including lockers, showers and other facilities), and in some cases, offer access to swimming pools, access to subsidised childcare, free personal training sessions, free car parking and free or subsidised access to nutritional programs.
11. It follows that group fitness classes are just one component of the service that fitness centres typically provide in return for a membership fee.
12. Secondly, a successful group fitness class is made up of a series of components, including:
 - (a) a qualified instructor – with the ability to observe and correct technique in order to avoid injury and with the ability to motivate class participants;
 - (b) the content of the class – including the nature of the activity (eg. cardio, weights, spin, yoga), the equipment used in the class and how the activities are choreographed;
 - (c) the time slot of the class.
13. Thirdly, music is typically either not used at all or is used only as background music in classes such as:
 - (a) Pilates, yoga, tai chi and stretch (**soft core classes**);
 - (b) abdominal-work classes (**abdominal classes**); and
 - (c) circuit-based classes (**circuit classes**).
14. These three styles of class have become increasingly popular and now represent a significant proportion of classes offered by fitness centres.
15. Fourthly, Fitness Australia accepts that in group fitness classes:

- (a) aimed at achieving a cardiovascular workout (such as Step, Spin, Ki Max, Body Attack, Spin, Top Ride, combat classes and dance classes) **(high intensity classes)**; and
- (b) using weights (for example Powerfit, Body Pump and New Body) **(weights-based classes)**,

recorded music is nearly always played.

16. However, while recorded music is typically always played in high intensity and weights-based classes, it is the use of recorded music which is an important component, not the use of PPCA Recorded Music. This is demonstrated by, for example:

- (a) fitness centres providing high intensity and weights-based classes under a Radical Fitness licence which do not use any PPCA Recorded Music (such as Powerfit, Ki Max, Top Ride, X 55, Fight Do and Mega Danz);
- (b) the use of recorded music in Les Mills' classes which is not PPCA Recorded Music;
- (c) the use of music in fitness centres sourced, for example from the United States, which is not PPCA Recorded Music; and
- (d) the intention of fitness centre owners to completely stop using PPCA Recorded Music in group fitness classes if there is a significant increase in the PPCA rate.

17. Fifthly, even where recorded music is used in group fitness classes, it is not a factor which drives either membership at fitness centres or drives participation in group fitness classes. This is demonstrated for example by independent market research carried out by fitness centre chains in Australia such as Fitness First and Fernwood.

Survey Evidence

18. For the reasons set out in full in the affidavit evidence of Dr Timothy Bock, Prof. Hanemann and Prof. Krosnick, the Applicant's evidence in relation to

surveys is completely without utility and the Tribunal should give that evidence no weight.

Alternative sources of recorded music

19. The Tribunal may take the approach of seeking to approximate the notional bargain that would be struck between PPCA as a willing, but not anxious, licensor and the fitness centres as willing, but not anxious, licensees.
20. In addition to the factors set out above demonstrating the relative insignificance of PPCA Recorded Music to group fitness classes, the following other factors are relevant to the notional bargain between the parties.
21. First, the fitness centres have a series of credible alternatives to using PPCA Recorded Music in group fitness classes. These credible alternatives currently available to fitness centres include:
 - (a) pre-choreographed classes and music provided by Radical Fitness (such as Powerfit, Ki Max, Top Ride, X 55, Fight Do and Mega Danz) which do not use any PPCA Recorded Music;
 - (b) the use of music in Les Mills' pre-choreographed classes which is not PPCA Recorded Music;
 - (c) the use of music in fitness centres sourced, for example from the United States, which does not include any PPCA Recorded Music; and
 - (d) music provided by Radical Fitness which is suitable for freestyle group fitness classes which does not include any PPCA Recorded Music.
22. Secondly, in response to these proceedings by PPCA, fitness centres have been in talks with other music providers which would be prepared to provide non PPCA Recorded Music to the Australian market. These include:
 - (a) SAIFAM, which has a large existing (and continuously updated) catalogue of purpose-recorded music for fitness classes covering all major exercise regimens; and

(b) a large United States based provider called "Body Training Systems", which offers the following pre-choreographed group fitness programs with music:

- (i) Power Group;
- (ii) Group Kick;
- (iii) Group Ride;
- (iv) Group Step;
- (v) Group Centergy;
- (vi) Group Groove; and
- (vii) Group Active.

23. Thirdly, there is a high likelihood that new providers of non PPCA Recorded Music suitable for group fitness classes will enter the market in response to a higher PPCA rate, thereby further increasing the credible alternatives available to fitness centres.

24. Fourthly, the bargaining power of the fitness centres has increased since the 1995 Licence Agreement, including because there:

- (a) has been an increase in popularity of group fitness classes which either do not use music at all or use only background music;
- (b) has been an increase in non PPCA Recorded Music already used in group fitness classes;
- (c) has been an increase in available credible alternatives to PPCA Recorded Music; and
- (d) is a high likelihood that the credible alternatives available to fitness centres would increase in response to a higher PPCA rate.

25. The increase in bargaining power of fitness centres would put significant downward pressure on the notional bargain that would be struck between PPCA and the fitness centres for use of PPCA Recorded Music in group fitness classes.

Methodology of calculation

26. The Applicant seeks equitable remuneration of \$4.54 per member per month.
27. Putting to one side the quantum of that proposed fee, the methodology of imposing fee is inequitable, including for the following reasons.
28. First, fitness centres typically have a significant proportion of members who, while listed as members, either do not attend their fitness centre at all, rarely attend or are sporadic in their attendance.
29. Secondly, even among those fitness centre members who are actively attending their fitness centre, the majority do not attend a group fitness class each time they visit a fitness centre. Rather, the evidence shows that the percentage of persons who, when attending a fitness centre, actually attend a group fitness class varies, however in all cases the majority of members do not attend group fitness classes.
30. Thirdly, even among those members who are actively attending their fitness centre and who actually attend a group fitness class while there, a significant proportion of group fitness classes offered by fitness centres are soft core, abdominal and circuit classes which mostly either do not use music at all or use only background music.
31. As a separate matter, the current rate established as a result of the 1995 Licence Agreement has in fact resulted in PPCA now receiving more per member than it did in 1995. This is due to the trend that has seen fitness centres increase the number of group fitness classes offered which has resulted in fewer members attending each class.

Response to particular paragraphs

32. Fitness Australia accepts the matters set out in paragraphs 1-18 of the Point in Support.
33. Fitness Australia denies paragraph 19.
34. In relation to paragraphs 20-21, Fitness Australia:
- (a) denies that recorded music is a central component of group fitness classes;
 - (b) says that while the use of recorded music is an important component of certain group fitness classes (such as high intensity classes and weights-based classes) it is not a component at all of some other group fitness classes;
 - (c) says that group fitness classes which do not involve the use of any music or in which music is used in the background have become increasingly popular and now represent a significant proportion of group fitness classes offered by fitness centres;
 - (d) says that in relation to group fitness classes where recorded music is used:
 - (i) the recorded music is selected for such use because the pace and beat of the music fits the type of class;
 - (ii) the beat, pace and style of the recorded music will typically vary over the course of the class to match the pace of the kind of exercise being done at that stage of the class; and
 - (iii) the recorded music can serve the purpose of motivating participants, setting the pace for movements, keeping the class in step, making the experience more enjoyable and encouraging rhythmic movement;

(e) says that the matters referred to in subpara (d) apply to non PPCA Recorded Music and PPCA Recorded Music;

(f) otherwise denies paragraphs 20 and 21.

35. In relation to paragraph 22, Fitness Australia:

(a) says participants in group fitness classes do not pay substantial fees to attend those classes;

(b) says members of a fitness centres pay a set membership fee which entitles the member to use all of the facilities and services offered by that fitness centre to members (including typically, cardio equipment, weights equipment, access to certified fitness professionals, access to group fitness classes and changing facilities) and that the membership fee does not apply to group fitness classes;

(c) says that where fitness centres offer casual visits for non-members to use the fitness centre, that casual visit fee entitles the person to (during that particular visit) use all of the facilities and services offered to members and accordingly the casual visit fee does not represent an amount to attend a particular group fitness class;

(d) otherwise denies paragraph 22.

36. Fitness Australia denies paragraph 23.

37. In relation to paragraph 24, Fitness Australia:

(a) says that the methodology proposed by PPCA for the new rate (based on a fee per member) is inequitable because:

(i) a significant proportion of members of fitness centres do not actively attend fitness centres to which they are listed as a member;

(ii) the majority of persons who attend a fitness centre do not participate in a group fitness class during that visit; and

- (iii) a significant proportion of group fitness classes offered by fitness centres do not use music at all or use only background music;
 - (b) says that the proposed new rate does not fix the class “by attendee” as asserted by the Applicant, but rather fixes the rate by reference to all members regardless of whether they actually are actively attending a fitness centre and regardless of whether, where they do attend, they participate in a group fitness class;
 - (c) says that, in the premises, the proposed methodology for the new rate is not correlated to actual use of recorded music in group fitness classes (let alone correlated to actual use of PPCA Recorded Music in group fitness classes);
 - (d) says that a rate fixed per class is equitable because it is correlated to the use of recorded music in group fitness classes;
 - (e) says that the current PPCA rate – which reflects a bargain struck between the parties and which increases each year by CPI – is an appropriate fee both in quantum and in general methodology;
 - (f) otherwise denies paragraph 24.
38. In relation to paragraph 25, Fitness Australia:
- (a) denies that there has been an increase in the use of recorded music in group fitness classes;
 - (b) says, to the contrary, because of the rise in popularity of group fitness classes which either use no music or use only background music, there has been a decrease in the use of recorded music in group fitness classes;
 - (c) admits that:
 - (i) there are businesses which produce tapes and CD’s of recorded music tracks where the music has been specifically selected and

arranged for use in different types of fitness classes of different durations;

- (ii) those companies produce tapes and CD's which are remixed to suit a variety of fitness classes;
- (iii) in relation to that music, it is set at a sequence of particular tempi and bridges in the music are removed so that each track on the tape or CD has an even number of counts for the desired sequence;

(d) says that the matters referred to in subpara (c) apply to non PPCA Recorded Music and PPCA Recorded Music;

(e) otherwise denies paragraph 25.

39. In relation to paragraph 26, Fitness Australia:

(a) says that the economic and survey evidence filed by PPCA in relation to the value of recorded music in group fitness classes should be given no weight by the Tribunal; and

(b) denies that the Fitness Class Rate is unreasonably low.

40. In relation to paragraphs 27-29, Fitness Australia:

(a) says PPCA met with representatives of Fitness Australia but did not discuss a revised Fitness Class Rate;

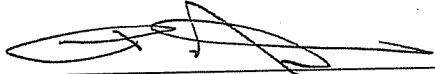
(b) says that at those meetings PPCA wished to discuss the conduct of surveys which it claimed would assist it in establishing a Revised Fitness Class Rate;

(c) says no agreement was reached on the methodology to be employed by PPCA; and

(d) otherwise denies paragraphs 27-29.

41. Fitness Australia accepts the matters set out at paragraph 30.

Dated: 13 June 2008



Charles Delius Somerville Alexander
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Solicitor for the First Respondent