

CAMLA COMMUNICATIONS LAW BULLETIN

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Special Music Industry Edition

COVID: The Day(s) the (live) Music Died

Chris Johnson, Director of Legal Services at APRA AMCOS, helps explain licensing obligations in a streaming environment.

It's an insight of limited utility to recognise that the COVID-19 pandemic and its associated State- and Territory-based lockdowns have wrought havoc on both the personal and professional lives of most Australians. But what's less apparent is that the last 18 months has been an existential crisis for those relying on the public performance of music for their livelihood.

As public squares across Australia emptied of shoppers, concert goers, clubbers, drinkers and diners, and as ergonomic chairs sat empty in deserted offices, the income created by that activity for live and recorded music performances collapsed. A performance income lacuna.

As a result, musicians, songwriters, record companies and music publishers have sought out alternative ways to both connect with their audiences and to continue to eke out income from the exploitation of their music. Enter the live stream.

From the empty stages of lifeless venues to the closed-door intimacy of bedroom studios, musicians have been playing into the dead eye of a camera lens in an attempt to keep their art fresh, their fingers limber, their voices clear, their fans fulfilled and their stomachs full. At the same time, music promoters have looked to video to substitute the physical stage for a virtual one.

But replacing the real for the reel (boom!) has its challenges. Not insignificantly, it has changed the licensing of music from the simple to the complex, the well-worn to the novel, the easily understood to the often misunderstood.

Moving a performance of music from a live stage to a live stream or a recorded audio-visual film is a perfect solution in circumstances where live audiences are impossible or where venue capacity constraints make online access a prerequisite for viability. However, this seemingly simple act triggers a whole new set of permissions and licensing arrangements to those applicable to a conventional stage performance.

Traditionally, a live performance of music requires permission from the owner of the copyright in the musical works comprised in that performance – a public performance licence. If a sound recording is used on stage, the performance may also trigger the need for a licence from the copyright owners to publicly perform that sound recording – often, the record companies or their representative like the Phonographic Performance Company of Australia (PPCA). As a result of rights management organisations like APRA AMCOS, venue owners and promoters

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CAMLA

Editors

Ashleigh Fehrenbach and Eli Fisher

Editorial Assistants

Dominic Keenan and Claire Roberts

Design | Printing | Distribution

MKR Productions

Editors' Note

What makes a great song?

In the opening bars of this special music edition of the CLB, we dive into the world of music licensing where we see major labels focussing their attention on social media advertising and the antics of influencers. **John Fairbairn** and **Sheenal Singh** (MinterEllison) cover this issue in their article *Not in Sync* and **Chris Johnson** (APRA AMCOS) shares his insights on licensing obligations in a streaming environment. **Anita Cade**, **Ted Talas** and **Helen Wei** (Ashurst) look into the recent Roblox case and the use of music in new digital user platforms. We round out the first verse with a note **Ash Fehrenbach** and the team at RPC have written on the UK's *Tunein v Warner* case and the global challenge of protecting copyright works in a digital world.

Moving to the chorus – well, there's nothing catchier than copyright infringement. **Kosta Hountalas** (HSF) reminds us that love isn't always in the air with his in-depth review of the Federal Court's decision on whether an American music duo infringed the 1977 Strictly Ballroom theme song. **HSF** also look at where Clive Palmer went wrong in his re-write of Twisted Sister's 1984 hit "We're not going to take it".

Verse two is where we start to push the boundaries. The team from **Davies Collison Cave** ask us to question the legal status of viral sea shanties and **Ellen Anderson** (Addisons) gives us the latest on the Taylor Swift v Scooter saga. Will they get back together? From the sounds of things, never ever.

A good tune should always teach the listener something. Through the efforts of the Young Lawyers Committee, CAMLA presented two 101 webinars. **Nick Perkins** (Ashurst) and **Antonia Rosen** (News Corp) moderated a discussion with **Sue Chrysanthou SC** (153 Phillip Barristers) and **Dauid Sibtain** (Level 22 Chambers) on the tort of injurious falsehood. And **Belyndy Rowe** (Sainty Law) reports on the Sports Law 101 webinar on 22 September with a fantastic line up of speakers: **Tim Fuller** (Gadens), **Simon Merritt** (Lander & Rogers), **Calli Tshipidis** (Foxtel Group and YL Committee Chair). We have also recently hosted webinars on AdTech, the Telecommunications Ombudsman, and Sports Broadcasting, on which we will report in the next edition. Thanks to all who were able to attend and we look forward to bringing you more of these events in the coming months!

Finally, a great song will tell a story. To that end, we are delighted to bring you an exciting line up of interviews with giants in the Australian music and legal industry including **Dan Rosen**, **Damian Rinaldi**, **Brett Oaten** and **Mark Holden** who each share their own story and passion for music.

We hope you enjoy reading this edition as much as we did putting it together. Thank you to all our brilliant contributors.

Eli and Ash

can be licensed on a "blanket" basis for all musical works that may be used in any performances on their stages, which would include the vast majority of the world's commercially available music. Whatever the song being performed at a licensed venue, it is usually covered under a blanket APRA AMCOS licence, and the fees distributed to the owners of those musical works and sound recordings. Recently, both APRA AMCOS and PPCA have granted those rights to venues and events via a joint licensing initiative, OneMusic Australia.

However, as soon as an artist, a venue or a promoter decides to live stream or video record their performance for use online, the arrangements that have been a staple for the public performance of live music for generations are quickly upended.

So, here's a quick guide to what's required for those that want to live stream or record commercial music for the purposes of streaming those performances online.

1. Is it being live streamed or recorded?

First, live streaming.

In Australia, the right to use musical works with visual images - what's known as the synchronisation right – is highly valued and tightly held by the owners of that right – the writers and music publishers. This is also the case for record companies and the synchronisation of their recordings. The use of music in films, TV shows, concert films and advertisements has been a reasonably lucrative source of income for songwriters, musicians, publishers and record companies for many years. However, recently, there has been a level of uncertainty and consternation globally over the question of whether an audio-visual live stream of a live performance activates the synchronisation right, such that it requires a synchronisation licence from the owners of that right. An audio-visual live stream, in its purest form, is a real-time communication of audio-visual material online. As it's "real time" there is some question as to

whether or not the reproduction or copying right, and therefore the synchronisation right, has been exercised. This is a discussion (or debate) that will, no doubt, continue as live streaming matures.

In any case, what the producers of the live stream will definitely need is a communication to the public right for the musical works that are included in the live stream and, if used, for any sound recordings that have been used. In many cases, the streaming platform will hold a licence that will allow for the communication of music via that platform, particularly if delivered over an established service such as YouTube or Facebook (Meta). However, live streaming on an unlicensed platform (for example, a musician's own website) will require a communication licence for, at least, the musical works from APRA AMCOS.

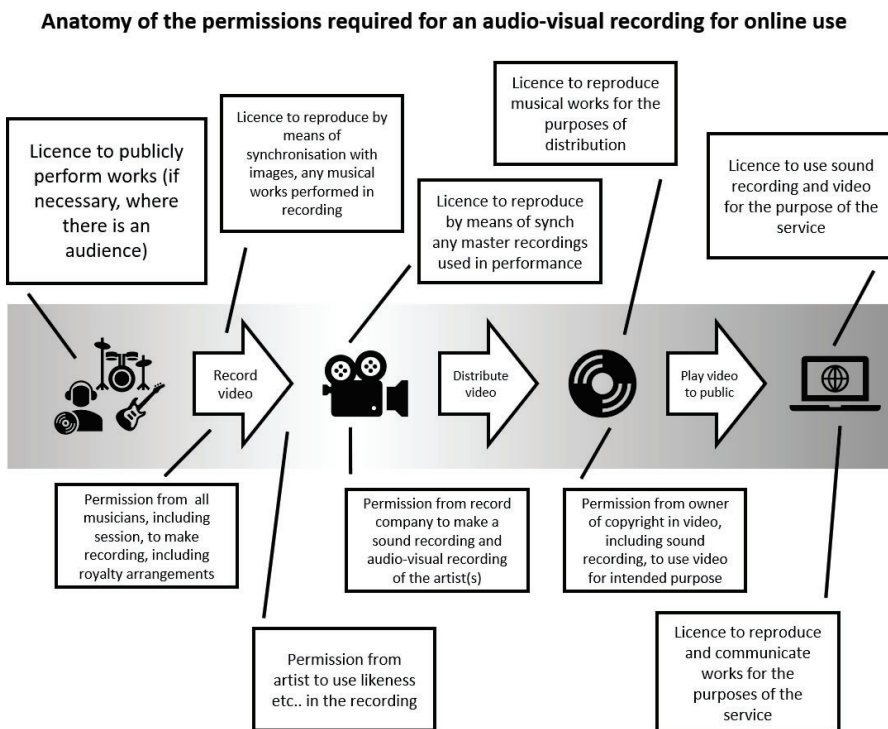
The fact is that pure, live and real time streaming is unusual, as often there's a strong desire to capture the performance for replay later. This

is particularly the case for event promoters looking to maximise audiences online over time.

And it's in the audio-visual recording of the performance where the act of synchronisation becomes undeniable and the process more complex.

As shown on the right, an audio-visual recording triggers a web of rights that belong to songwriters, musicians, publishers, record companies and collecting societies. The 'one stop shop' for the licensing of live public performance of music in a venue, for instance, from a OneMusic Australia licence, can turn into a cavalcade of different people, organisations and permissions for live streaming.

The rights required and how one may obtain rights for the audio-visual recording of music are shown below:



Right?	What is it?	Who do I need to talk to?
Public performance right for musical works and any sound recordings	This may be required where there's an audience for the performance that is being recorded	In Australia, this is available from OneMusic Australia
Performer recording right	This is the right to make a recording of a musician, if that right is held by someone other than the musician	This right is a contractual right that is held by a performer's record company, so permission should be sought from them where a performer is under such a contract
Permission to use a performer's likeness etc.. and moral rights	This is the right for a musician to have a say in how their image and performance are being used	This is typically controlled by the musician or performer themselves
Synchronisation right for the musical work	This is the right to place, or fix, images in synchronisation with musical works that are protected by copyright	The owners of the synchronisation right for musical works are typically the writers and/or the music publishers, so permission should be sought from them. This right is not generally held by APRA AMCOS or OneMusic Australia
Synchronisation right for master recording	This is the right to place, or fix, images in synchronisation with previously recorded tracks that are protected by copyright	The owners of the synchronisation right for recordings are typically the record companies, so permission should be sought from them
Cinematograph film right	This is the right to use the copyright comprised in the cinematographic recording of the performance for the purpose that is required	The owners of this right are the people who did all things necessary to produce the film, and could be the production company, the camera operator or funder
Distribution right	This is the right to copy the musical works and sound recordings in the cinematographic recording for the purposes of distributing it to others	If not already captured under the synchronisation licence, or not already licensed by the distributor (for instance YouTube) then this is available from AMCOS and PPCA
Communication to the public right	This is the right to communicate the musical works and sound recordings comprised in the live stream or recording online	If not already licensed by the platform (for instance Facebook or YouTube) then this is available from APRA AMCOS (musical works) and for sound recordings PPCA and/or record companies

2. Is money being made?

In traditional public performance licensing, the question as to whether or not the performance is intended to make money directly is not one that determines whether or not the performance can proceed. In most cases, the way the licence fees are calculated for a free live performance differs slightly from income generating ones, but it does not stop the show or, generally, trigger any alternative licensing processes.

But this question is a significant one for performances that are live streamed or recorded.

Like any other communication of music protected by copyright online, the live streaming of performances in real-time over the internet requires the platform, website or service to be licensed for that communication. In Australia, most large online services offering such functionality are licensed for such a communication, and whether it's a commercial performance (whether that be by placing advertisements, selling tickets or offering subscriptions) is not necessarily fatal to coverage under those licences. In most cases, the performance will be subject to 'take down' from the service, but that's a reality for any live stream delivered on those services and not specific to commercial use.

However, in practice, pure, real-time live streaming is rare - particularly in a commercial context. And if a musical performance is to be recorded for a commercial purpose

(including a delayed, or on-demand 'live' stream), then additional permissions for that recording need to be sought.

For the reproduction of musical works, and, if necessary, any sound recordings used in a recording, a synchronisation licence should be secured from the owners of those rights - the writers and music publishers for each and every musical work and the record company for sound recordings. Also, the right to make a recording of the musicians themselves needs to be secured from the owners of those rights - which, in many cases is the performer's record company. In both cases, the fact that it's a commercial exploitation will likely have a significant impact on whether the recording can proceed and, if so, how much it will cost to do so.

3. What platform is it being used on?

As noted above, whether an online platform, service or website is licensed makes a difference as to the permissions and licences required for someone wishing to deliver a live stream or a video recording online.

A real-time, live stream of a music performance online will be covered for communication rights for licensed platforms, services or websites, but, for unlicensed web locations, a communication licence will be necessary. This is the same for audio-visual recordings of music performances, provided that the synchronisation rights were previously secured by the maker

of that recording. For recordings, the platform, service or website will also need to be additionally licensed for any supplementary reproductions made as a result of the operation of that service (so called, "mechanicals").

The ability to shift performances online has provided the music industry with not only the opportunity to reach greater audiences, but also the ability for musicians to remain connected with their audiences (and keep some money flowing) during what has been a public performance cataclysm. And the fact that the end of this pandemic is in sight will not bring an end to the need or desire for the streaming of music performances online. However, the replacement of live performances with virtual ones does not come without its challenges. Reasonably efficient, well-understood and long-standing live music licensing arrangements are, at lightning speed, being transitioned to an environment potentially requiring myriad permissions and licences that were never built for rapid deployment or large-scale application. As a result, those wishing to pivot online may find themselves having to deal with much greater complexity.

But the music industry has always been in the front row when dealing with technological advances, and there's little doubt that it will again rise to the challenge. In the meantime, for those wanting to get music performances online, it may take a little more effort, a bit more time and a lot more knowledge.

ELECTRONIC COMMUNICATIONS LAW BULLETIN

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