

**DATE:** 5 April 2018

## FITNESS, EXERCISE AND WELLBEING PROVIDERS AND INSTRUCTORS CONSULTATION FINAL POSITION PAPER

OneMusic Australia received further comments from Fitness Australia on the proposed OneMusic licence for Exercise & Wellbeing Providers. We continue to appreciate and value Fitness Australia's in principle support of the venture.

Set out below is a table (with reasoning where relevant) to show a comparison between the structure and rates as proposed in OneMusic's Second Consultation paper and further final variations we are prepared to make both in response to Fitness Australia's latest submission and unilaterally.

Please also be aware that the proposed timetable for the launch of OneMusic has now shifted from the second half of 2018 to the first half of 2019.

ITEM	SECOND PAPER	FINAL POSITION
<b>Background Music Rate (inc Music Videos)</b>	Greater of \$1.35 per member per annum AND \$220	<i>OneMusic proposes to introduce this rate as is.</i>
<b>Music in Classes Rate</b>	<p><b>Option 1</b></p> <p>Greater of \$5.65 per class AND \$220 per annum</p> <p><b>Option 2</b></p> <p>Greater of \$7.92 per class with 11+ attendees and \$3.40 per class with 10 or fewer attendees AND \$220 per annum</p>	<p><i>OneMusic proposes to further reduce the rate, and subject to the actual launch date (and relevant CPI movements in the interim) will apply the following:</i></p> <p><b>Option 1</b></p> <p><i>Greater of \$5.41 per class AND \$220 per annum</i></p> <p><b>Option 2</b></p> <p><i>Greater of \$7.61 per class with 11+ attendees and \$3.27 per class with 10 or fewer attendees AND \$220 per annum</i></p>
<b>Copying Music</b>	<p><b>Option 1</b></p> <p>Up to 500 tracks copied per annum \$400, and up to 1,000 tracks copied per year \$800</p> <p><b>Option 2</b></p> <p>Up to 2,000 tracks per device at any one time, \$600</p>	<p><i>OneMusic considers that Option 2 provides the greatest level of flexibility to businesses. In forming this view OneMusic also reviewed the rate and now proposes a reduction to \$400. OneMusic notes that the combined rate is both cheaper than the aggregate of the current two licences and enables the copying of more tracks.</i></p>
<b>"All In" (all the above usages plus music on hold)</b>	Greater of \$44 per member per annum AND \$440 per annum	<i>Having considered the tariff proposal further, including by revisiting the tiered All-In structure discussed in the second consultation paper, OneMusic proposes to introduce this rate at \$35.20 per member per annum (subject to a minimum fee of \$374 per annum).</i>

ITEM	SECOND PAPER	FINAL POSITION
<p><b>Definition of Exercise Class</b></p>	<p>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 &amp; Wellbeing Instructor, which:</p> <p>a) is directed by a fitness instructor (regardless of whether it is conducted by an on-staff or freelance instructor);</p> <p>b) is included in a published time-table or advance notification to potential participants;</p> <p>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</p> <p>d) is not a Virtual Fitness Class</p>	<p><i>OneMusic is prepared to accept the proposed new wording from Fitness Australia subject to two variations.</i></p> <p><i>In the definition of ‘Group Personal Training Session’ inserting the words “or curated” after “not altered”, inserting the word “may” between the words “exercise activity” and “continue to take place” and that a definition of Background Fitness Music is introduced, such that the definitions now read:</i></p> <p><i>‘Group Personal Training Session’ means a fitness class conducted on the gym floor with 8 or less people, by an instructor holding personal training qualifications (Certificate IV in fitness or equivalent<sup>1</sup>) and conducted in a space where other exercise activity may continue to take place and the Background Fitness Music is playing but is not altered or curated for the purpose of the class and remains in use for background purposes only.</i></p> <p><i>‘Background Fitness Music’ means music that is played from a device, including but not limited to a music system, smartphone, tablet, radio or television, and which is not curated, altered or played in any manner whatsoever so as to be synchronised with an Exercise Class and is primarily intended to be passively listened to and not to be the main focus for Members attending the centre.</i></p>
<p><b>Incidental Website Use</b></p>	<p>\$550 per annum</p>	<p><i>OneMusic proposes to introduce this rate as is.</i></p>
<p><b>Partial Rights Discount</b></p>	<p>A discount of 42.5% on the otherwise payable licence fee if a centre does not require a licence from OneMusic Australia for either the APRA AMCOS or the PPCA rights.</p>	<p><i>OneMusic has undertaken further analysis on its proposed discount for a partial rights licence. OneMusic notes that across submissions received on other consultation papers there has been a call for ‘savings’ to be passed on to licensees. OneMusic notes that licence fees have never been linked to either APRA’s or PPCA’s cost of operations – that is, the licence fee isn’t a ‘fair and equitable’ rate for the use of music PLUS the costs of administering the licence, and accordingly the administration costs are borne by their members and licensors out of the cost of the licence fee. Nonetheless, OneMusic Australia is now proposing in the case of the Classes Rate a small decrease for the purchase of the aggregated rights. As a corollary, OneMusic further notes that in the case of a partial rights licence (which likely will be where a licensee asserts they do not require a licence from PPCA), APRA must undertake additional compliance work and therefore take on additional costs associated not with its rights but with the PPCA’s rights – i.e. the need to verify (including on an ongoing basis) that a licensee’s claims regarding the licensing of sound recordings are correct and will therefore apply a discount of 48.25% on the full licence fee for Exercise Classes where only one right is required.</i></p>

<sup>1</sup> OneMusic Australia accepts this terminology on the basis that the qualification is a widely accepted and appropriate industry term.

## OTHER COMMENTS

### Revenue Neutral Assumptions

OneMusic Australia disputes Fitness Australia’s claim that there is an inconsistency between the fact that some businesses will be “economically disadvantaged compared to the current scheme” and our cited target of a “revenue neutral new licence scheme”. OneMusic Australia notes that it has never claimed that there will be no movement on a centre-by-centre basis and indeed has sought to make that clear in discussions. There is an inevitability that in moving from one set of metrics to another some centres will experience a reduction in their licence fees and some will see an increase. The only option that would not cause individual centres to be “no worse off” is to maintain the two separate current schemes. A ‘solution’ that negates the general benefits of moving to a single licence model would not address Fitness Australia’s concerns the current scheme is out of touch with the modern fitness industry.

In any event OneMusic Australia notes:

- there is no increase in the class rate;
- the introduction of an All-In rate that will provide savings for some centres, compared with the current structure;
- the expansion of rights and reduction of the fee for digital copying; and
- the new definitions will likely reduce fitness class licence fees for some centres.

### Abbreviated Class Rate

OneMusic Australia rejects the request by Fitness Australia to introduce a series of discounts according to the duration of an Exercise Class. OneMusic notes again the Copyright Tribunal’s findings<sup>2</sup> that:

- no distinction should be made between the use of music in different types of classes (e.g. yoga or Pilates on the one hand and cycling or cardio classes on the other); and
- where music is played for an exercise class (whether integral or by choice), no distinction should be drawn.

Although these findings by the Tribunal were related to the type of class, OneMusic considers that the same arguments apply to the length of the class and accordingly will not introduce a tiered class rate structure linked to either format or duration.

## REVISED FEE STRUCTURE

In light of the points outlined above, including the agreed amendments, the fee structure now proposed is as follows:

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	\$5.41 per class	\$220
		OR	
		\$7.61 per class with more than 10 people \$3.27 per class with 10 or fewer people	
(c)	Copying Music	\$400 for up to 2,000 tracks per device at any one time	
<b>OR</b>			
(d)	All In (All of the above plus music on hold)	\$35.20 per member per annum	\$374

<sup>2</sup> 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 3

## NEXT STEPS

OneMusic Australia intends to publish the main terms of the licence scheme shortly in order to provide advance notice to fitness centres of the new structure and rates. The timing of that publication will depend on the finalised start date for OneMusic Australia, but we will endeavour to provide at least six months' notice.

Fitness Australia or individual centres may object to some of the proposals set out above. Licensees and associations have recourse to expert processes under APRA's existing alternative dispute resolution service, Resolution Pathways, on which advisory committee a Fitness Australia representative sits.

If there is a reference to Resolution Pathways and the parties are unable to agree on an outcome, then either party may make a reference to the Copyright Tribunal.

## FURTHER QUESTIONS

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