COPYRIGHT TRIBUNAL OF AUSTRALIA

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

Citation:	Phonographic Performance Company of Australia Limited (ACN 000680 704) under section 154(1) of the *Copyright Act 1968* [2010] ACopyT 1
Parties:	**REFERENCE BY PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED (ACN 000 680 704) UNDER SECTION 154(1) OF THE *COPYRIGHT ACT 1968***
File number:	CT1 of 2006
The Tribunal:	**DRIVER FM (DEPUTY PRESIDENT)** **PROFESSOR DENNIS PEARCE (MEMBER)** **DR RHONDA SMITH (MEMBER)**
Date of judgment:	17 May 2010
Catchwords:	**COPYRIGHT** – Proposed licensing scheme – reference of scheme to Tribunal for approval under s.154(4) of the *Copyright Act 1968* (Cth) – licences for use of sound recordings in fitness classes – calculation of licence fee – rate of increase – whether calculated by monthly membership of fitness centres, or by attendance at fitness classes or by reference to the classes conducted – choice modelling survey – measurement of the value of sound recordings in fitness classes – measurement of willingness to pay for recorded music – flaws in survey – alternative basis for calculation of licence fee – consideration of bargaining principles – consideration of competition issues – whether only fitness centres should pay the licence fee – consideration of definition issues in the proposed scheme – observations on the role of the ACCC in Tribunal proceedings.
Legislation:	*Copyright Act 1968* (Cth), ss 22, 85, 89, 136, 154, 157, 157B *Copyright (International Protection) Regulations 1969*
Cases cited:	*Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4)* [2006] ACopyT 2 *Australian Hotels Association v Copyright Tribunal* [2008] FCAFC 37, (2008) 75 IPR 449 *Copyright Agency Ltd v Department of Education NSW*

(1985) 5 IPR 449
Reference by APRA [2006] ACopyT 3
Reference by Phonographic Performance Company of Australia Limited under s.154(1) of the Copyright Act 1968 (2007) 73 IPR 162

Dates of hearing:	16, 17, 19, 23, 24, 26, 27, 30, 31 March, 6-9, 14-17 April, 29-30 June, 1-3 July 2009
Place:	Sydney
Category:	Catchwords
Number of paragraphs:	324
Counsel for the Applicant:	Mr R Cobden SC with Mr C Dimitriadis
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Counsel for the First Respondent:	Mr J V Nicholas SC with Ms K Richardson and Ms J M Beaumont
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Counsel for the ACCC:	Mr D M Yates SC with Mr J M Hennessy
Solicitor for the ACCC:	Norton Rose

COMMONWEALTH OF AUSTRALIA

Copyright Act 1968

IN THE COPYRIGHT TRIBUNAL OF AUSTRALIA

CT1 of 2006

REFERENCE BY:

PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED (ACN 000 680 704) UNDER SECTION 154(1) of the *COPYRIGHT ACT 1968*

THE TRIBUNAL: DRIVER FM (DEPUTY PRESIDENT)
PROFESSOR DENNIS PEARCE (MEMBER)
DR RHONDA SMITH (MEMBER)

DATE OF ORDER: 17 MAY 2010

WHERE MADE: SYDNEY

THE TRIBUNAL DIRECTS THAT:

1. The applicant bring in short minutes to give effect to the Tribunal's conclusions.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

COMMONWEALTH OF AUSTRALIA

Copyright Act 1968

IN THE COPYRIGHT TRIBUNAL **CT 1 OF 2006**

REFERENCE BY: **PHONOGRAPHIC PERFORMANCE COMPANY OF AUSTRALIA LIMITED (ACN 000 680 704) UNDER SECTION 154(1) of the *COPYRIGHT ACT 1968***

THE TRIBUNAL: **DRIVER FM (DEPUTY PRESIDENT)**
PROFESSOR DENNIS PEARCE (MEMBER)
DR RHONDA SMITH (MEMBER)

DATE: **17 MAY 2010**

PLACE: **SYDNEY**

REASONS FOR DETERMINATION

THE APPLICATION TO THE TRIBUNAL

1 The applicant, Phonographic Performance Company of Australia Limited ("PPCA"), is a copyright collecting society. It is a licensor within the meaning of s.136 of the *Copyright Act 1968* (Cth) ("the Copyright Act"). PPCA represents the interests of record companies and recording artists in relation to the broadcast, communication and public playing of recorded music and music videos to which the Copyright Act applies.

2 PPCA proposes to bring into operation a licence scheme initially described as the "Fitness Class Licence Scheme" ("the Scheme"). The Scheme relates to "the granting of sound recording licences for the use of sound recordings to accompany fitness classes (Fitness Class Use) held by providers of fitness classes (Fitness Class Providers)". The Scheme is intended to replace an existing scheme relating to the use of sound recordings for fitness class use.

3 Under s.136 of the Copyright Act, a licence scheme is a scheme setting out both:

- the circumstances in which the licensor is willing, or the persons on whose behalf the licensor acts are willing, to grant licences, and

- the charges, if any, subject to payment of which, and the conditions subject to which, licences would be granted in those classes of cases.

4 The term "licence" is defined in s.136 to include a licence to cause a sound recording to be heard in public.

5 On 8 December 2006, PPCA applied to the Tribunal for an order under s.154(4) of the Copyright Act. Section 154(1) of the Copyright Act provides that, where a licensor proposes to bring a licence scheme into operation, the licensor may refer the scheme to the Tribunal. At the date of the application s.154(4) required the Tribunal to consider such a scheme and make such order, either confirming or varying the scheme, as the Tribunal considers reasonable in the circumstances. PPCA's application sought an order from the Tribunal that the proposed scheme be confirmed or be varied as the Tribunal considers reasonable in the circumstances. However, s.154(4) was amended with effect after the date of the application to provide that the Tribunal might, as an alternative to confirming or varying a scheme, substitute for the scheme another scheme proposed by one of the parties. During the course of the hearing of its application, PPCA indicated that it accepted that it would be open to the Tribunal to substitute another scheme for that which it had proposed.

6 The Tribunal notes that s.157(2) of the Copyright Act allows a person to apply to the Tribunal if that person claims that the grant of a licence would be subject to charges or conditions that are not reasonable in the circumstances of the particular case. If the Tribunal is satisfied that such a claim is well founded, the Tribunal may make an order specifying the charges and conditions that it considers reasonable in the particular circumstances. Thus, the Tribunal is empowered to address the unreasonable application of a scheme in a particular case.

7 It is important to note that the effect of making an order confirming a licence scheme establishes a scheme of general application, binding not only those organisations that were parties to the reference, but all others who use the copyright to which the Scheme relates. However, approval of a scheme does not prevent a person or organisation from reaching an agreement with the copyright owner different from the confirmed scheme: see *Reference by APRA* [2006] ACopyT 3 per Lindgren P.

8 It is important also to note that a licence fee fixed by the Tribunal under an approved scheme is a maximum fee. There is nothing to prevent a collecting society charging its licensees a lower fee.

PARTIES TO THE APPLICATION

9 As indicated above, the applicant in these proceedings is PPCA.

10 The first respondent is Fitness Australia Incorporated. It is a national body representing businesses and professionals who together constitute the health and fitness industry in Australia. The Tribunal was informed that its membership comprises the State industry associations who have, as their business members, over 800 health and fitness facility owners, operators and managers and 18,000 registered fitness professionals.

11 The second respondent is the Australian Competition and Consumer Commission (ACCC). Section 157B was included in the Copyright Act in 2006. It empowers the Tribunal to make the ACCC a party to an application under the Copyright Act if the Commission so requests and the Tribunal is satisfied that it is appropriate for it to be a party. At its request, the ACCC was made a party by the Tribunal on 8 May 2007. This is the first application before the Tribunal in which this has occurred.

12 The third respondent, Mr David Smith, is the operator of a fitness centre in Wagga Wagga, New South Wales. Mr Smith took no part in the hearings.

Phonographic Performance Company of Australia (PPCA)

13 PPCA was established in 1969. In its evidence to the Tribunal it said that it was formed for two principal purposes:

- to manage the overall process by which owners of copyright in sound recordings could grant public performance and broadcasting licences and receive royalties for the use of those recordings; and

- to provide a central licensing body so that users of sound recordings for public performance or broadcast can obtain a single comprehensive blanket licence covering the repertoire of most record companies and recording artists.

14 "Public performance" is the convenient shorthand term used for the exclusive right given by s.85 of the Copyright Act to the owner of the copyright in a sound recording to "cause the recording to be heard in public" and to "communicate the recording to the public".

15 The Tribunal was informed that PPCA is able to give effect to the purposes for which it was established as a result of the receipt from record companies (licensors) of non-exclusive licences of the right to play sound recordings in public. PPCA had 736 licensor members at 6 January 2009. The PPCA licensors include the major recording company groupings Sony Music, EMI, Universal and Warner. The Tribunal was informed that these companies collectively own or control the public performance copyright in 80 to 90 per cent of the sound recordings commercially released in Australia. The licence given to PPCA applies to all the sound recordings owned or controlled by the licensor from time to time.

16 Businesses and other entities that want to play sound recordings in public require a licence to do so from the owner of the copyright in the recording. As PPCA has only a non-exclusive right from its licensors, it would be possible for a person who wished to play a sound recording in public to obtain permission directly from the relevant sound recording copyright owner. However, it is only PPCA that can offer a licence covering the repertoire of many different copyright owners. PPCA warrants that it has the right to licence the works of its licensors. It does not warrant that every sound recording played by a licensee will be covered by the PPCA licence. However, it claims never to have received a representation that a licensee is being sued for breach of copyright. This largely stems from the fact that PPCA's licensors own or control the performance right in most sound recordings that are protected under the Copyright Act. The respondents did not attempt to rebut this claim.

17 References in this decision to "PPCA music" refer to sound recordings comprised within the PPCA repertoire. It is not intended to suggest that PPCA has any copyright interest in music per se.

Australasian Performing Rights Association

18 The Australian Performing Rights Association (APRA) was not a party to these proceedings. However, its position in regard to the operation of fitness centres should be noted. APRA represents the owners of the copyright in musical works, in contrast with PPCA, which acts on behalf of the owners of the copyright in sound recordings of musical

works. A fitness centre that wishes to play music as an accompaniment to its fitness classes must have a licence for that purpose from APRA. In contrast with PPCA, APRA has the licensing rights in virtually all musical works published world wide. This distinction in coverage is referred to from time to time throughout this judgment and has an impact on the scheme that the Tribunal approves.

PROTECTED RECORDINGS

19 Copyright protection is afforded to sound recordings by the Copyright Act on the same basis as other works are protected under the Copyright Act, namely: the recording is made by a qualified person; or the recording is made in Australia; or the recording is first published in Australia (Copyright Act, s.89). Protection is then extended to overseas recordings by virtue of the operation of the *Copyright (International Protection) Regulations 1969* (CIPR), regulation 4. However, the protection afforded is more limited than that given to other works in which copyright subsists because of the inclusion of subregulation 6(2). That reads:

> (2) Copyright that subsists in the recording includes the exclusive right to cause the recording to be heard in public, only if:
>
> (a) the maker of the recording was, at the time when the recording was made:
>
> (i) a citizen or national of a Schedule 3 country; or
>
> (ii) a person resident in, or a body corporate incorporated under the law of, a Schedule 3 country; or
>
> (b) the recording was made in a Schedule 3 country.

20 A Schedule 3 country is defined by regulation 3 of the CIPR as "a country that is specified in Schedule 3 as a country that provides rights for secondary uses of sound recordings". Schedule 3 contains a list of the countries that provide such rights. They include most of the major record producing countries with the notable exception of the USA.

21 The range of sound recordings protected in Australia is greatly affected by the scope of the reference to the "maker" of a recording. The Tribunal was addressed at length on this topic by the parties.

22 The Copyright Act was amended in 2005 to provide protection for the first time to performers of works. As part of these changes, and in regard only to sound recordings, s.22 was amended by the inclusion, relevantly for present purposes, of subsections (3), (3A) and (7). Those provisions read:

> (3) For the purposes of this Act:
>
> (a) a sound recording, other than a sound recording of a live performance, shall be deemed to have been made at the time when the first record embodying the recording was produced; and
>
> (b) the maker of the sound recording is the person who owned that record at that time.
>
> (3A) For the purposes of this Act, the makers of a sound recording of a live performance are:
>
> (a) the person or persons who, at the time of the recording, own the record on which the recording is made; and
>
> (b) the performer or performers who performed in the performance (other than a performer who is already covered by paragraph (a)).

23 Subsection 22(7) contains a number of significant definitions:

> "performer" in a live performance:
>
> (a) means each person who contributed to the sounds of the performance; and
>
> (b) if the performance includes a performance of a musical work--includes the conductor.
>
> "sound recording of a live performance" means a sound recording, made at the time of the live performance, consisting of, or including, the sounds of the performance.
>
> "live performance" means... a live performance, whether in the presence of an audience or otherwise.

24 PPCA asserts that, if a performer who contributes to the making of a sound recording has an Australian connection or is a citizen of a Schedule 3 country, the recording qualifies as a protected recording. Accordingly, if there is any musician satisfying this description who contributes to the recording, even if only as a member of the orchestra, chorus or backing band or vocalists, the record will be protected in Australia. It also relies on the definition of "live performance" to claim that it does not matter if the recording is made in a studio or is not made with all performers present at the one time. It points out that recording techniques involve a layered or iterative process in which various tracks are made and mixed. It is the exceptional case for a recording to be made as a one off exercise with all contributors present.

25 This approach results in many of the records used in fitness classes being classified as protected recordings. It is rejected by the respondents.

26 Fitness Australia asserts that the reference to the "maker" of a sound recording in regulation 6(2) of the CIPR requires all persons who fall within the description of "maker" to satisfy the nationality requirements before the recording can be regarded as being protected. This is the reverse of the PPCA argument. On the Fitness Australia approach, in those cases where the protection for the recording is reliant upon the connection of a person with a Schedule 3 country, if any contributor to the recording does not have that connection, the recording will not be protected.

27 Fitness Australia also rejects the claim by PPCA that a live performance does not require the presence of all performers at the one time. In Fitness Australia's view, a studio recording of a work does not qualify as a protected record unless the work is performed and recorded at the one time by the whole group of performers.

28 This issue became of significance in the hearing before the Tribunal because Ms Lynne Small, Manager, Finance, Operations & Administration at PPCA, undertook an analysis of the track listings of new CDs issued by Fitness Compilation Vendors, ie, vendors of recordings made for use in fitness classes. This analysis applied PPCA's meaning of protected records. It led Ms Small to conclude that around 70 per cent of the tracks included in the records were protected. The overwhelming majority of these tracks would thereby fall within the scope of PPCA's licence.

29 Fitness Australia sought to discredit this analysis. Applying its basis for determining whether a recording is protected under the Copyright Act, it asserted that, at best, 60 per cent and more probably 40 per cent of the tracks sampled were protected. (However, this basis for the number derived is affected by the fact that it is asserted that the Les Mills programmes do not require a PPCA licence, as to which see [72]). Fitness Australia also questioned the methodology adopted by Ms Small to arrive at her conclusion. Fitness Australia claimed that the analysis undertaken was not rigorous and inflated the number of records that could be claimed as protected.

30 In this context it is pertinent to note that the Tribunal had brought to its attention that Rhythm Express Music, one of the largest Australian companies that produces music compilations for use in fitness classes states on its website that:

> The greatest advantage of all our CDs is that we license the biggest tracks from all the major record companies. We only publish the original artists.

31 The Tribunal does not think it appropriate that it should express a view on the correct approach to be taken to determining what sound recordings fall within the protection provided by the Copyright Act. It involves a very difficult question of the interpretation of the copyright legislation that should be left for a court to resolve in a case where the interpretation bears upon the outcome of an application. It is sufficient for present purposes to indicate that the Tribunal is persuaded that many, but not all, records that are used in fitness classes are protected recordings and that some of these will not be covered by the PPCA licence. The Tribunal has taken this into account in arriving at the figure that it has fixed as the appropriate rate to be paid for the use of such records. It returns to the issue at [275] and [308].

32 The Tribunal also takes into account that obtaining a PPCA licence largely overcomes the problem of deciding whether a record is protected. A licence provides access to the whole PPCA repertoire. In practical terms, the need to seek the consent of the owner of the copyright to use a particular track on a record for the purposes of a fitness class is taken away. If a record is not protected, no licence to use it is required. If it is protected, the PPCA licence will in practice remove the need to seek permission to use it. While not all protected records are covered by the PPCA licence, it is pertinent to a consideration of the value of the licence to a fitness provider that PPCA is not aware of an instance where a licensee has been called to account for using a record not covered by the PPCA licence. Neither did the respondents identify any such instance.

FITNESS CENTRES

The fitness industry

33 The fitness industry was said to be made up of a range of sectors that include:

(a) traditional fitness centres with group exercise studios and weight areas;

(b) weight loss circuit centres;

(c) health/wellness centres;

(d) personal fitness studios;

(e) personal fitness services delivered outdoors;

(f) mobile personal fitness centres;

(g) leisure/aquatic centres;

(h) community centres; and

(i) service specific centres such as martial arts, boxing, yoga, pilates and dance studios.

34 The Tribunal was told that there are over 1,000 fitness centres in Australia that offer a diversity of classes and activities to members and casual attendees.

35 In 2007 PPCA commissioned a survey of the fitness industry by The Market Intelligence Co Pty Ltd ("the Fitness Classes Study"). Ms Denise Billard, who was in charge of the project, provided an affidavit to the Tribunal and was cross examined. However, the information provided by the study went largely unchallenged by the respondents.

36 Relying upon a report published in 2006 by the International Health, Racquet and Sportsclub Association (IHRSA), the Fitness Classes Study indicated that 9 per cent of the Australian population are members of a fitness centre. This figure was said to be supported by an Australian Bureau of Statistics statistic that 10 per cent of Australians participate in fitness activities. The study demonstrates a very rapid increase in the number of fitness centres operated by chains of such centres, usually under franchising arrangements. For example, the Fernwood chain centres increased in number from 27 in 2000 to 73 in April 2007. Fitness First centres rose in number from 11 to 69 in the same period. (At the date of the Tribunal hearings in April 2009 this number had risen to 83.) The Curves chain was reported to have opened 178 new centres in 2006-07 (but many of these were purchases of existing centres). Counterbalancing these increases, the study indicated that there has been a decrease in the number of independent fitness centres.

37 Another fitness classes segment noted in the study is that of companies that provide corporate exercise programs. It was said that many of these companies go out to different workplaces, schools or hospitals and in some cases conduct group exercise sessions. The Tribunal received very little information relating to this segment of the fitness industry but it

has taken its existence into account in consideration of the licence arrangements that it has determined.

38 The Fitness Classes Study described the fitness industry as being one that was thriving. It referred to the Fitness Australia national strategic plan 2007-2010 which predicted an overall growth of around 10 to 15 per cent. The study noted that fitness centres are targeting new markets for older people and people in rehabilitation. It said that the industry is also benefitting from government health and fitness campaigns.

39 Fitness Australia claimed that, while the industry overall may be growing, traditional fitness centres have experienced a decline in membership. It was said at the hearing that, while this position had been exacerbated by the then current economic climate, the downturn had commenced earlier. Competition from other forms of fitness activities, including the development of specialised centres offering such activities as yoga and pilates, was said to have sparked this trend. However, these types of centres will fall within the proposed PPCA licence scheme if they offer classes to which the scheme applies.

40 Many fitness centres provide group classes. The Fitness Classes Study put this offering at a mean of 35 classes per week in individual centres and 48 in centres that were part of a chain. The number of classes offered in the centres that were the subject of the study ranged from 3 to 199 per week. The number of persons taking part ranged from 1 to 33 with an average of 12. Of the classes attended by researchers engaged in the Study, 97 per cent were said to use music in the whole or part of the class.

41 The study noted that 50 per cent of the classes that used music were conducted in time to the beat of the music for the whole class and 16 per cent for part of the class. Thus a third of the classes where music was used were not conducted in time to the music. Whether or not exercise is conducted in time to the music it may be an integral part of the class. See the discussion from [50] below.

42 Fitness Australia claimed that the number of fitness classes that used music was in fact diminishing. It observed that classes such as pilates, yoga, tai chi, stretch and circuit were increasingly popular with members and that most of these classes used music only as background. The use of background music in the sense of music being played in a centre

generally and not being directed to the participants in a class is not the subject of the licence under consideration in this case. However, the licence application is not limited to the use of music in classes conducted in time to the music. It includes also any use of music where it is provided specifically as part of a fitness class.

43 The Tribunal was not provided with any clear evidence as to the proportion of members of fitness centres who attended fitness classes in which the use of music was an integral part of the training being undertaken. Mr Malcolm Allan, Operations Director, Fitness First, said that about 28 per cent of visits to fitness centres resulted in a person attending a fitness class. Ms Jadranka Raguz, who is the Managing Director of the New Dimensions Health Club in Mount Druitt, NSW, stated that her records showed that around 12 per cent of the members of her club attended fitness classes. The large Fernwood women-only fitness centre chain reported attendance in classes as 42 per cent.

44 Whatever might be the exact figure, it is apparent that this type of class comprises a significant element of the training being offered at many, but by no means all, fitness centres.

Membership

45 Membership of fitness centres is very fluid. Fitness First is one of the major fitness centre operators both in Australia and overseas. At the time of the hearing it owned and operated 83 centres in Australia with approximately 340,000 members. Mr Allan stated that the average member remains with Fitness First for only two years. Approximately 50 per cent of members leave Fitness First each year. Mr Allan said that he understood that this represented the experience of the industry generally.

46 Persons may attend fitness centres on a casual basis rather than as a member but the evidence before the Tribunal indicated that this represents only a very small percentage of total attendance at centres.

Membership fees

47 The fees structure for membership adopted by fitness centres varies between centres both as to terms and amount. There are administrative fees, joining and cancellation fees, deferral fees and transfer fees in addition to the standard attendance fees. Many centres

require the taking out of an annual membership. Others have monthly membership. Cancellation does not usually entitle a full refund of the balance of the fees paid.

48 Membership fees vary considerably according to the nature of the facilities available and the degree of personalised attention a member is given. The figures provided to the Tribunal were confidential but it can be said that, in 2008, they covered a spectrum from around $40 per month per member to nearly $300. Fitness First charges $18-$25 for casual visits. The 2007 Fitness Classes Survey put the average figure for such visits at $14.

49 In most centres it appears that fees are not geared to the particular use of facilities by members (except at the higher end of the range). The membership generally entitles access to all facilities of the centre, including fitness classes where these are available.

Use of music in fitness centres

Activities using music

50 Fitness centres offer a diversity of exercise types. Some are directed to building core strength and muscle tone. Others are concerned with improving aerobic capacity or flexibility.

51 Music is not an integral part of all activities carried out at a fitness centre. Activities such as weights, swimming, cycling, walking machines and classes with personal trainers are often undertaken without using music. (Music may be played as ambient background sound to these activities but that use is not the subject of this application before the Tribunal). Some activities offered by fitness centres take place outside the centre, eg, boot camps and running. Music is not usually used by the fitness centre providers as a part of these activities.

52 However, music is an integral part of a number of activities which are conducted as classes. These can include activities such as aqua and cycling (also known as "spin") which can also be undertaken by a person on their own as an alternative to being part of a group in a class environment. The reference to the Tribunal is concerned only with class activities. The evidence to the Tribunal indicated that classes in which music will be an integral part of the training include aerobics, circuit, dance, cycle/spin, and aqua.

53 It was claimed by PPCA that stretch, yoga and pilates classes should also be included among these. The evidence to the Tribunal was that the practice in relation to these types of classes varied considerably. Some were conducted to music but many were not. Even when music was played in the class, it was seldom, if ever, used for its beat. However, the Tribunal notes that, while these types of activities serve a different fitness purpose than the activities that have a rhythmic basis, music may still be seen as contributing to the value of the class.

54 It was accepted by the parties that music is used in various classes to provide the rhythm and tempo for the exercises undertaken. Professor Patricia Tremayne, who is an Associate Professor in Psychology at University of Western Sydney and a former fitness instructor, said, in an affidavit on which she was not examined, that the presence of music has a range of practical benefits in fitness classes. Professor Tremayne's view of these benefits may be summarised as:

- allowing the instructor to alter the training effect on muscles by varying the speed of movement;
- enabling the instructor to control and structure the class – both the structure of the class as a whole and for the individual moves within the class;
- motivating the participants by adding rhythm and interest – reducing fatigue and uplifting participants and making exercise more effective and interesting;
- generally increasing the enjoyment and benefits of the class.

55 Professor Tremayne did not limit these advantages to circumstances where exercises in a class had to be performed to the beat of the music. She considered that the comments were applicable also to classes where the exercises were not performed to the beat of music and gave as examples spin, circuit, boxing and yoga. In spin classes music acted as a motivator; in circuit and boxing it added energy, intensity and aggression; in yoga and pilates it created a relaxed and meditative atmosphere.

56 Professor Peter Terry, a Professor of Psychology at University of Southern Queensland, made similar comments on the value of music in fitness classes. In particular he said that music exhorts participants to greater efforts and improves work output. He alluded to research that indicated that listening to motivational music significantly increased a

participant's stamina, enhanced their emotional responses and exhorted them to greater effort thereby improving work output.

57 Professor Terry also asserted that it was unlikely that an individual would gain any extra motivation, positive emotions or enhanced mood during exercise where only a beat machine, ie, a machine that provides a beat but no melody, was being used. He also asserted that an original version of a musical work has a better psychological effect than a cover version (see from [61]). He was subjected to strong criticism in the course of cross-examination on this last assertion. However, his other remarks were not contradicted.

58 No evidence of a significant kind was led by the respondents suggesting that these assertions of the importance of music in the conducting of fitness classes were incorrect. It was claimed that it was possible to undertake classes to a beat machine or by an instructor calling out directions but it was recognised that these were poor alternatives to music.

59 Fitness Australia laid some emphasis on evidence that indicated that other factors were as, if not more, important to the success of a fitness class than the music used. It was asserted that the skill of the instructor was regarded by participants as the most important feature in their enjoyment of a class. Significant also were the nature of the classes, the equipment used and the choreography followed.

60 The Tribunal accepts that many factors go to the enjoyment of a class and that the music used is but one of those factors. However, it considers that playing sound recordings is regarded by instructors and participants as an essential part of many forms of fitness class conducted by fitness centres, particularly those that are rhythm based. It also concludes that members of fitness centres would find certain classes less attractive without music and would be unlikely to continue to attend some types of classes or would look to other classes in the absence of the use of sound recordings.

The sound recordings used

61 The music to be used in rhythmic fitness classes has to be suitable for the purpose in that it is required to have a standardised beat. Bridges between individual works and pauses may be removed from sound recordings to permit the continuity necessary for an uninterrupted exercise session.

62 There is an established market for compilations of music for use in fitness classes. These are customised recordings of popular music specially selected and sequenced for fitness class use. The tempo of the various pieces of music on the recordings will have a designated beat per minute (BPM). For the purposes of freestyle classes (as distinct from those which have been pre-choreographed), a fitness class instructor selects the piece that has the BPM to suit the particular exercises or activities that are being performed in the class that he or she is taking.

63 Many of the pieces of music included in compilations are original performances by well known singers or groups. However, many are "cover" versions where another performer or group provides their version of the original.

64 There was a difference of opinion expressed by the witnesses before the Tribunal as to whether participants in fitness classes preferred to hear original performers or were content with cover versions. The Tribunal does not have to resolve this issue. It is apparent that both types of recordings are widely used. While it may have a marginal effect on the popularity of a particular class, it does not seem to the Tribunal to be a matter that has a significant impact on the value of recordings to the conduct of the classes. The more significant issue is the proportion of PPCA licensed recordings used in fitness centres. This is returned to below.

65 There was some difference of opinion in the evidence as to whether it was possible to buy fitness compilation recordings in retail stores. Whether or not this is possible, it was apparent that most compilation recordings are bought directly from compilation vendors. Many, but by no means all, compilation recordings are manufactured and sold by PPCA licensors.

Use of non-PPCA music in classes

66 Not all fitness classes use music that is a part of the PPCA repertoire. Although the ACCC noted that PPCA's licence from the recording companies was non exclusive and so users could by-pass PPCA, there was no evidence of this occurring, or if it was occurring, the extent of it. However, the evidence supported the claim by Fitness Australia and the ACCC, that there is a substantial amount of recorded music available for use in fitness classes from other sources.

67 There are two established programs of fitness classes that use at least some non-PPCA music for the purposes of their exercises. These programs constitute training packages that are bought by fitness clubs and are presented by trained instructors. The programs are known as Les Mills and Radical Fitness. There are also other sources of music for use in fitness classes.

LES MILLS

68 Les Mills fitness programs originated in New Zealand and were first used in Australia under licence in the mid-1990s. They have proved extremely popular. Mr William Robertson who introduced the programs into Australia informed the Tribunal that there are 4,000 licensed Les Mills programs running at approximately 900 licensed locations in Australia. Over 1 million people take part in a Les Mills class each week.

69 There are eight Les Mills programs. They are all pre-choreographed and may only be conducted by licensed instructors. New versions of each program are released quarterly to maintain interest in the programs. The licence agreement between the fitness centre and the Les Mills organisation entitles the licensee to use the music that provides the basis for the exercises included in the classes that make up the program. The music provided for the classes may not be used in any other environment in or outside the fitness centre licensed to use the programs.

70 As has been noted above, the music to be used for fitness classes often needs modification to make it suitable for use. Mr Robertson informed the Tribunal that Les Mills is not permitted to modify original music without the consent of the copyright owner. Accordingly, where permission to modify a work cannot be readily obtained, a cover version of the work will be made. Mr Robertson advised that approximately 18.3 per cent of the sound recordings used in the 12 month period July-June 2007-2008 were cover versions. Some programs use a higher percentage of cover versions because the nature of the programs does not lend itself to use of original recordings. Les Mills owns the copyright in these cover versions.

71 The cover versions of music produced by Les Mills for use in the Les Mills classes will frequently constitute protected records as New Zealand is a Schedule 3 country.