



AUSTRALIAN
DIGITAL ALLIANCE

Friday 8 February 2019

Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: adjudication@acc.gov.au
Subject: AA1000433 – APRA – submission

To whom it may concern

**Australasian Performing Right Association Ltd application for revocation
of authorisations A91367–A91375 and substitution of new authorisation A1000433**

The Australian Digital Alliance (ADA) thanks the Australian Competition and Consumer Commission (ACCC) for the opportunity to make a submission in response to the Australasian Performing Right Association's (APRA) application to revoke an existing authorisation and substitute it with a new authorisation (A1000433) (application for 're-authorisation').

The ADA is a non-profit coalition of public and private sector groups formed to provide an effective voice for a public interest perspective in copyright policy. It was founded following a meeting of interested parties in Canberra in July 1998, with its first patron being retired Chief Justice Sir Anthony Mason. Its members are from the education, cultural and research sectors and include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals. The ADA unites those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture.

The ADA is supportive of the use of collective licences in Australia's copyright system as an efficient and effective method of addressing practical barriers to the use of copyright material, particularly in relation to large scale uses for which remuneration is appropriate. However, we also have significant concerns regarding the anti-competitive risks of such licences when not subject to appropriate regulation and oversight. These concerns relate not only to the current under-regulation of collecting societies in Australia generally, but also to the specific licensing arrangements utilised APRA.

This submission addresses two areas of particular concern for the ADA:

1. There is a need for greater transparency and accountability of collecting societies in Australia, including APRA
2. The inability of Australian creators to direct license their works.

We support increased transparency and accountability of collecting societies

Collecting societies impact the operations of a number of copyright user groups in Australia. Our members are among those whose operations are impacted by collective licensing. This is particularly acute for our members in primary, secondary and tertiary education and in the libraries, archives, galleries and museums sectors. As we and other interested parties have outlined in previous submissions to Government consultations¹ there is an urgent need for reform of the governance arrangements for collecting societies in Australia, including APRA. To reiterate, the current governance regime:

- does not impose on collecting societies sufficient transparency and accountability obligations;
- grants an inappropriate degree of discretion to collecting societies; and
- does not incorporate sufficient measures for effective oversight, including sanctions for non-compliance and independent mechanisms for external review and amendment.

Oversight that takes into account the public interest is needed. The current system fails to meet the ACCC's guidelines for voluntary codes.² As far back as 2000 the voluntary Code of Conduct for Australian copyright collecting societies has been criticised for providing inadequate powers for the government to direct and oversee the behaviour of individual societies.³ It was also found to not meet the minimum standards required to be an effective regulatory mechanism by the UK Intellectual Property Office's 2012 report *Collecting Societies Code of Conduct*, which specifically examined the Australian code and found '... to be effective a code of conduct needs to be unambiguous, independent and enforceable. Existing voluntary codes of conduct [including that of Australia] struggle to meet these criteria.'⁴ Another criticism of the Code is that it does not include an effective mechanism to respond to criticisms from either members or licensees.

We reinforce earlier calls for wide-reaching reform – in the form of legislative amendments and mandatory guidelines – that set clear standards and incorporate effective enforcement mechanisms, to build in consistency, accountability, and transparency for the Australian collective licensing regime. We would like to see the ACCC play an expanded role in overseeing Australian collecting societies as part of this reform.

We support direct licensing options for members

By virtue of Article 17(a) of APRA's Memorandum of Association members assign to APRA their performing rights (which APRA defines as including both communication and performance) in

¹ See for example the ADA's submission to the Department of Communications and the Arts' 2018 *Review of Code of Conduct for Copyright Collecting Societies*, <http://digital.org.au/sites/digital.org.au/files/documents/ADA%20Collecting%20Society%20Review%20Submission%20-%20final.pdf>.

² See for example recommendations regarding commercially significant sanctions for noncompliance at p.11 of the ACCC's Guidelines for developing effective voluntary industry codes of conduct, <https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>.

³ Review of intellectual property legislation under the Competition Principles Agreement, the final report of the Intellectual Property and Competition Review Committee (September 2000), p. 127, https://www.ipaustralia.gov.au/sites/g/files/net856/f/ergas_report_september_2000.pdf.

⁴ Intellectual Property Office, *Collecting Societies Codes of Conduct*, BOP Consulting in collaboration with Benedict Atkinson and Brian Fitzgerald (December 2012), p. 52, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310172/ipresearch-collecting-071212.pdf.

current or future works or parts of works of which they are the composer, author and/or publisher or in works 'vested' in them. The ACCC has noted in the past that this assignment allows for more efficient administration, monitoring and enforcement of the royalty collection process, which is a public benefit.⁵

However, assignment of the performance and communication rights to APRA has significant disadvantages for creators and licensees. APRA members who wish to undertake common direct licensing practices such as (for example) licensing a work or works under a Creative Commons licence, on third party services akin to Spotify and YouTube,⁶ or even via direct sales on their own website, are unable to legally do so under the current APRA system. Often members are not even aware of this limit and put themselves at risk by licensing their material in ways that are technically invalid.

The inability of APRA members to effectively directly license their works has been flagged as a concern by the ACCC and interested parties on a number of occasions. As long ago as 1999 the Competition Tribunal compelled APRA to introduce its first licence back mechanism to address the issue,⁷ and it was raised again in APRA's re-authorisations in 2010 and 2014.⁸ The ACCC's recently drafted *Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration* also place a strong emphasis on the importance of direct licensing as a competitive constraint on collecting societies.⁹

⁵ See ACCC Determination in relation to Application for revocation and substitution of authorisations A490918, A490919, A490921, A490922, A90924, A490925, A90944 & 490945, p iii, <https://www.accc.gov.au/system/files/public-registers/documents/D10%2B3541839.pdf> and ACCC media release dated Friday 16 April 2010, <https://www.accc.gov.au/media-release/music-rights-licence-body-to-simplify-rules-under-accc-authorisation>.

⁶ Although we note that APRA appears to have agreements with these popular services, it does not appear that there is a legal option for members wishing to directly license to such services, particularly if it is a smaller or foreign service that does not have APRA licences.

⁷ In the decision the Tribunal stated: 'The Tribunal considers a scheme which permits a non-exclusive licence back to a member of APRA of the performing rights in Australia for a specific work or works to allow the member to grant a sub-licence would not threaten the integrity of the APRA system, and should be required.' See The Australian Competition Tribunal, Re Applications by Australasian Performing Right Association Ltd [1999] ACompT 3, http://www.competitiontribunal.gov.au/decisions/year/1999/acomp-1999?sq_content_src=%2BdXJsPWWh0dHAIM0EIMkYIMkZ3d3cuanVkZ21lbnRzLmZIZGNvdXJ0Lmdydi5hdSUyRmp1ZGdtZW50cyUyRk1p1ZGdtZW50cyUyRnRyaWJ1bmFscyUyRmFib21wdCUyRiE5OTkiMkYxOTk5YWNvbXBOMDMmYWxsPTE%3D.

⁸ The ACCC's Determinations in 2010 and 2014 place an increasing emphasis on the importance of direct licensing. For example in 2010 the ACCC stated: 'There is little incentive for users to deal directly with members if APRA does not offer a genuine discount on blanket licensing to reflect direct licensing.' See ACCC Determination in relation to Application for revocation and substitution of authorisations A490918, A490919, A490921, A490922, A90924, A490925, A90944 & 490945, p iii, <https://www.accc.gov.au/system/files/public-registers/documents/D10%2B3541839.pdf>. The ACCC media release related to that Determination also states, '... in some cases it might be more attractive and efficient for composers and users to deal directly and the ACCC has been concerned that APRA's membership rules unnecessarily restrict such direct dealing.' See 'Music rights licence body to simplify rules under ACCC authorisation' dated Friday 16 April 2010, <https://www.accc.gov.au/media-release/music-rights-licence-body-to-simplify-rules-under-accc-authorisation>. In 2014 the ACCC made it a condition of authorisation that APRA take '... steps to increase awareness of the licence back and opt out provisions. See ACCC Determination in relation to Application for revocation and substitution of authorisations A91187-A91194 and A91211, pp. iii, 81 and 89, <https://www.accc.gov.au/system/files/public-registers/documents/D14%2B72965.pdf>. See also 'ACCC requires improved dispute resolution in performing rights arrangements' dated Friday 6 June 2014, <https://www.accc.gov.au/media-release/accc-requires-improved-dispute-resolution-in-performing-rights-arrangements>.

⁹ See in particular Section 3.2 of the draft Guidelines, in which the ACCC states that "collective licensing arrangements should not limit the ability of parties to conduct direct licensing negotiations." See *Draft ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright Remuneration* (Oct 2018), p.15, https://www.accc.gov.au/system/files/Industry%20Structure%20-%20The%20draft%20Copyright%20Guidelines%20for%20public%20consultation_0.pdf.

As a result of pressure from the ACCC and its own members, APRA now provides four options for those wishing to directly license their music.¹⁰ However, each of these options are extremely restrictive, and even in combination they are inadequate to accommodate the above common licensing practices. In summary:

- Opt out – APRA permits its members to remove their entire repertoire from APRA’s scheme for a particular category of use (eg public performance).¹¹ This allows musicians to directly license their works for this use worldwide. However, it provides no solution for musicians wishing to only directly license certain works, or for one-off licences, while still making use of APRA’s services for other works/licences.
- License Back – APRA will grant its members permission to license individual works for one off performances or communications that take place in Australia. This allows musicians to, for example, directly license their work for a performance in Australia, or to an Australian radio station.¹² However, it provides no solution for musicians wishing to license their materials for uses that will take place overseas or in the online environment, which operates worldwide (eg for the soundtrack of a student video which the school wishes to post online).
- Personal Website Licence – APRA will also grant its members permission to publish music on their website, to allow individuals to download or stream music for free.¹³ However, this provides no solution for musicians wishing to facilitate direct sales on their website or via a third party service, or to allow streaming or download by entities other than individuals. It is also limited to music that is not the subject of a publishing contract.
- Non-Commercial License Back – To address this licensing shortfall in the APRA model, in response to criticisms by the ACCC, in late 2008 APRA introduced a third ‘Non-Commercial Licence Back’¹⁴ option for worldwide, noncommercial licensing of musical works by members online. However the very narrow definition of ‘non-commercial’ in APRA’s existing Non-Commercial License Back undermines the utility of the mechanism even for common non-commercial uses. As the operation of this mechanism is particularly complex we discuss it further below.

Non-Commercial License Back definition of ‘non-commercial’

Article 17(j) of the APRA constitution – which relates to the Non-Commercial License Back – provides the following definition of non-commercial:

‘Non-Commercial Purposes means:

¹⁰ Three of these options are discussed in detail at http://apraamcos.com.au/media/5908/managing-your-rights_optout.pdf.

¹¹ See http://apraamcos.com.au/media/3863/17b-opt-out-request_distributed.pdf.

¹² See http://apraamcos.com.au/media/3524/17g-request-for-licence-back_distributed.pdf.

¹³ See http://apraamcos.com.au/media/3872/free-personal-website-licence_distributed.pdf.

¹⁴ See Article 17(i), (j) and (k), Memorandum of Association of Australasian Performing Right Association Limited, <http://apraamcos.com.au/media/corporate/APRA-Constitution.pdf>. See further description in the online request form available at https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf.

- (i) that there is no consideration or financial incentive whether directly or indirectly received by any party for the communication or any subsequent use of the Work under any sub-licence; and
- (ii) any sub- licensee is a not for profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding.¹⁵

We are concerned that the practical effect of this definition is so limited as to not only exclude actions ordinarily considered to be noncommercial, but also to arguably exclude almost all uses of the material. By being limited to 'not for profit entities' the definition would appear to exclude licensing to individuals, and the requirement that the entity not receive 'public or institutional funding' would appear to exclude almost all common open not for profit entities such as schools, universities, libraries, museums or disability groups.

To provide an alternative, the definition of noncommercial in the Creative Commons Attribution-NonCommercial 4.0 licence is: '... not primarily intended for or directed towards commercial advantage or monetary compensation.'¹⁶

Use of noncommercial Creative Commons licences by members

Even if the definition of noncommercial were altered to be more in line with community expectations, the Non-Commercial License Back would not be an appropriate mechanism to allow an APRA member to license works in the APRA repertoire under common licences such as the noncommercial Creative Commons licence. This is because:

- CC licences cover all copyright uses (including performance and broadcast, both of which are assigned to APRA) whereas the Noncommercial License Back is limited to communicating works to the public online; and
- The Noncommercial License Back requires a specific sub-publisher, while CC licences are made available by the creator themselves to the population in general.

Creative Commons Australia¹⁷ (CC Au) has had lengthy discussions with APRA on the incompatibility between the APRA system and the CC licences, and the ACCC itself has noted the issue in past authorisations and stated that this '... would generate a public detriment,'¹⁸ yet the incompatibility continues. It is therefore clear that it is time for a formal obligation to be placed on APRA to resolve the issue, and those relating to other direct licensing options for its members.

Recommendations

¹⁵ See Article 17(j), Memorandum of Association of Australasian Performing Right Association Limited, <http://apraamcos.com.au/media/corporate/APRA-Constitution.pdf>. See also Request for License Back For Non-Commercial Purposes Online, https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf.

¹⁶ See <https://creativecommons.org/licenses/by-nc/4.0/legalcode>.

¹⁷ In the interest of disclosure please be aware the ADA is an Institutional Member of the Creative Commons Global Network (CCGN) and works with the CC Australia Chapter.

¹⁸ The ACCC stated: 'To the extent that APRA's licence back provisions, or the uncertainty as to their applicability, inhibits the non-commercial sharing of musical works for private use, such as through creative commons licenses, this would generate a public detriment.' See paragraph 6.86 in ACCC Final Determination in relation to APRA's authorisations A90918, A90919, A90921, A90922, A90924, A90925, A90944 and A909A5 dated 8 March 2006, <https://www.accc.gov.au/system/files/public-registers/documents/D06%2B13571.pdf>.

The ADA recommends that APRA's re-authorisation be made contingent on the improvement of their system to permit all direct licensing desired by its members, including:

- the use of Creative Commons licences; and
- direct licensing to nonprofit entities such as schools, universities, cultural institutions and disability groups for online uses.

We also note that in the past the ACCC has hosted forums for stakeholders to assist in resolving issues of difference.¹⁹ The ACCC may want to consider hosting a similar meeting between the ACCC, APRA and interested parties about direct licensing.

We also recommend that the government undertake a review of governance arrangements for the statutory licences, which will enable consideration of the role the ACCC could play both in overseeing Australia's collecting societies and ensuring a public interest test is applied to their activities.

The ADA would welcome the opportunity to be involved in further discussions related to this consultation. Our principal contact for inquiries related to this submission is Jessica Coates, who can be contacted at jessica@digital.org.au or on 02 6262 1118.

Yours sincerely



Derek Whitehead
Chair
Australian Digital Alliance

¹⁹ See, for example, 'Pre-Decision Conference' convened by the ACCC on Friday 21 March 2014 about APRA's alternative dispute resolution process, the minutes of which form part of the documents related to the re-authorisation in 2014, <https://www.accc.gov.au/system/files/public-registers/documents/D14%2B43899.pdf>.