

CAG submission to the Australian Competition and Consumer Commission on APRA's Application for Re-Authorisation

8 February 2019

Mr Gavin Jones
Director
Adjudication
Australian Competition and Consumer Commission
By email: adjudication@accc.gov.au

AA1000433 - APRA - submission

This submission is made by the Copyright Advisory Group to the Council of Australian Governments' Education Council (CAG). CAG represents the Australian school sector on copyright issues. CAG is made up of representatives of State and Territory Governments as well as the National Catholic Education Commission and the Independent Schools Council of Australia. CAG is supported by the National Copyright Unit, a Secretariat which manages copyright licences for the school sector, as well as providing copyright advice for teachers.

CAG has always had a collaborative and cooperative relationship with APRA. NCU has negotiated three national, blanket music licences used across the Australian school sector (government and non-government schools):

1. The APRA Licence permits schools to perform publicly music and accompanying lyrics.
2. The AMCOS Licence permits photocopying of whole printed musical works (sheet music) by or on behalf of schools.
3. The APRA AMCOS ARIA Licence ('School Event Licence') permits schools to make sound recordings to play at school events.

The importance of direct licensing arrangements

CAG strongly supports the ACCC's views on the importance of direct licensing expressed in the ACCC's *Draft Guidelines to Assist the Copyright Tribunal in the determination of copyright remuneration*¹ (Draft Tribunal Guidelines) that:

¹ ACCC, October 2018 <https://www.accc.gov.au/regulated-infrastructure/communications/intellectual-property/copyright-guidelines-2018>

As a broad principle ... collective licensing of copyright material via blanket licences should only occur when direct licensing is not efficient. The ACCC considers that competitive market solutions are preferable in general and should be encouraged where possible. If licensees have the option of negotiating a licence directly with the copyright owner, it is likely to place some competitive constraint on collecting societies in setting blanket licence terms and conditions.²

CAG also agrees with the ACCC's view in the Draft Tribunal Guidelines that as technology continues to develop, this may lead to more efficient methods of licensing and may provide greater ease and efficiency in direct licensing.³ This has been the experience in Australian schools, where teachers are increasingly relying on content licensed under Creative Commons licences, or use web resources such as free educational sites, or YouTube videos where content creators choose to licence the products of their creativity for educational and other non-commercial purposes. For example, the NCU highlights the benefits of Creative Commons licensed resources on the Smartcopying website⁴ (a copyright information website for Australian teachers). Teachers increasingly choose to licence their own teaching resources online under CC licences to enable sharing of educational resources more widely.

General comments about transparency

CAG has made submissions over a number of years about what it believes to be deficiencies in the governance arrangements for Australian collecting societies. Most recently we raised these concerns in the context of the Department of Communications and the Arts review into the code of conduct for collecting societies.⁵ This review arose out of concerns raised by the Productivity Commission into the governance arrangements for Australian collecting societies.⁶

CAG encourages the ACCC to have regard to the issues raised in the code of conduct review process in assessing whether greater standards of transparency are required as part of re-authorising APRA's arrangements.

Issues concerning licence back and sub-licence arrangements

Despite our overall positive relationship with APRA, CAG wishes to highlight a number of aspects of APRA's arrangements with its members that we submit are standing in the way of allowing Australian musicians (and teachers and students) to embrace the positive benefits that can arise from the new forms of licensing arrangements enabled by the internet.

² Draft Tribunal Guidelines, p14.

³ *ibid.*

⁴ <http://www.smartcopying.edu.au/open-education/creative-commons>

⁵ <https://www.communications.gov.au/have-your-say/review-code-conduct-copyright-collecting-societies>

⁶ <https://www.communications.gov.au/departmental-news/government-response-productivity-commissions-intellectual-property-report>

APRA's licence back arrangements for non-commercial uses

APRA allows members to licence back their works in relation only to the “right to communicate to the public online”, and for non-commercial purposes⁷, which are defined as:

*Non-Commercial Purposes means: (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** (emphasis added).*

CAG submits there are at least five competition concerns with APRA's current non-commercial licence back arrangements:

1. The definition of non-commercial is highly restrictive and would exclude musicians from allowing use of their music for free in the majority, if not all, Australian schools, TAFEs and universities. Although Australian schools do not operate with the purpose of commercial advantage or profit, virtually all receive some form of public or institutional funding, excluding them from APRA's definition of “non-commercial”. This means that APRA members are completely precluded from licensing back their works in order to make them available for non-commercial educational uses in Australian schools (and by many other not for profit organisations such as charities or organisations assisting people with disabilities).
2. The definition of non-commercial includes arrangements made for consideration. Under Australian law, consideration can include non-financial actions such as a promise to do something, or an undertaking not to do something. There is no requirement for money to change hands. This means musicians would be prevented from licensing their music in exchange for some non-monetary benefit, such as a promise to include the music in an online compilation of new music.
3. The licence back arrangements apply only to the communication right. This means that musicians are not permitted to licence their works for non-commercial purposes to enable them to be played in a school or an organisation assisting people with disabilities.
4. APRA requires musicians to pay the administrative costs incurred by APRA in administering the licence-back request. This operates as a significant disincentive to enter into direct licensing arrangements for non-commercial purposes -

⁷ https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf

musicians are required to pay APRA a fee in order to allow free uses of their music.

5. The narrowness of the definition of non-commercial uses excludes musicians from using Creative Commons licences to permit non-commercial uses of their music. The limitation of the non-commercial licence to the communication right also operates as a block to musicians adopting Creative Commons uses for their musical works. These licences are used extensively in the school sector and CAG sees any conduct by APRA to prevent their members from using Creative Commons licences as a significant competition issue as this would operate as an impediment to open licensing arrangements which operate as a substitute for the licences offered by APRA. CAG has had the opportunity to review the submissions made by Creative Commons Australia and the Australian Digital Alliance on this issue, and supports the observations made by those organisations on this issue.

APRA's sub-licence arrangements for commercial uses

APRA does enable sub-licence arrangements for 'commercial' uses (ie, those that fall outside APRA's overly narrow definition of non-commercial uses discussed above). However, there are a number of ways in which this sub-licensing system prevents or disincentives musicians from licensing Australian schools:

1. Australian schools do not operate on a commercial or for-profit basis. It is therefore unclear whether the commercial sub-licence arrangements of being used by musicians who wish to licence their works using Creative Commons non-commercial licences, or other educational uses in Australian schools.
2. Even if those uses are capable of being included in the 'commercial' sub-licences offered by APRA, the musician must pay a fee of up to \$200 for each request for a sub-licence. This operates as a practical disincentive for musicians adopting the commercial sub-licence scheme for non-commercial uses, even if this were technically possible. The costs of seeking sub-licensing arrangements may also operate as a disincentive to musicians exploring new business models involving direct licensing, due to the costs of sub-licensing their works back from APRA for experimental or innovative uses.

Additional conditions required prior to re-authorisation

For the reasons highlighted above, CAG is concerned that APRA's licence back arrangements prevent or discourage their members from allowing their works to be used for educational purposes or entering into direct licensing arrangements with Australian schools. They also prevent or discourage musicians from using alternative licensing arrangements such as Creative Commons, and the costs of sub-licensing and licence back arrangements may prevent musicians from exploring innovative direct monetisation opportunities afforded by the internet.

As such, CAG submits that the ACCC should impose conditions before granting any subsequent authorisation of APRA's licensing arrangements to ensure at a minimum that:

1. APRA members are permitted to licence back the performance and broadcast rights as well as the communication right;
2. Ensure that the definition of 'non-commercial' in APRA's licence back arrangements is broad enough to include uses commonly considered to be non-commercial, including non-commercial educational uses;
3. APRA should not be able to prevent their members from using open licensing methods such as Creative Commons.

CAG also submits that the ACCC should examine whether the costs and other limitations imposed by the APRA's licence back and sub-licence arrangements are encouraging direct licensing arrangements, enabling Australian musicians to share, monetise and market their creativity online, and whether any impediments to direct licensing opportunities should be removed.

Thank you for the opportunity to provide the ACCC with these comments. If you have any questions in relation to any of the issues raised in this submission please contact Ms Delia Browne, National Copyright Director delia.browne@det.nsw.edu.au or 02 7814 1241.

Yours sincerely



Delia Browne
NATIONAL COPYRIGHT DIRECTOR