



Friday 8 February 2019

**Creative Commons Australian Chapter's Submission to the Australian Competition and Consumer Commission on the Australasian Performing Right Association Ltd.'s Application for Re-Authorisation**

The Creative Commons Australian Chapter ('CCAU') welcomes the opportunity to provide this submission to the Australian Competition and Consumer Commission ('ACCC') on the Australasian Performing Right Association Ltd.'s ('APRA') Application for Revocation of Authorisations A91367 – A91375 and Substitution of New Authorisation A1000433.

Creative Commons<sup>1</sup> is an international non-profit organisation that provides free copyright licences and tools for copyright owners which allow for the legal sharing, reuse and remixing of content. Creative Commons supports the rationale behind collecting societies, such as APRA. We believe there is a "public benefit" in "effective collective administration of rights" which stems from cost savings in the administrative process, monitoring services and the facilitation of compliance with copyright law.<sup>2</sup>

**Creative Commons AU recommends** that three key concerns be addressed in the current re-authorisation process:

1. APRA should empower creators to elect to make use of voluntary licences on a per-title basis;<sup>3</sup>
2. The scope of the Non-Commercial License Back provision should be broadened to include other uses of content such as broadcast and performance; and,
3. APRA should improve their transparency with respect to their operations, including their distribution of royalties and administrative costs.

**1. Voluntary Licensing on a Per-Title Basis**

Voluntary licensing allows musicians to take advantage of new opportunities by allowing them to directly license their works on a per-title basis. As the ACCC recognised, voluntary licensing "provide[s] a degree of competitive constraint on collecting societies" and their monopoly power in the market.<sup>4</sup> The current APRA licensing arrangements make it difficult for APRA members to easily voluntarily license their works for certain uses. In order to ensure competitive market

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<sup>1</sup> CCAU is the Australian Chapter of Creative Commons. The views expressed here are those of the Australian Chapter and are not endorsed by the Creative Commons Global Network, or Creative Commons Headquarters in the United States of America.

<sup>2</sup> Australian Libraries Copyright Committee and the Australian Digital Alliance submission to the ACCC on the Australasian Performing Right Association Ltd 's Applications for revocation and substitution (A91187 to A91194) Interested Party Consultation. November 2009.

<sup>3</sup> See Axel Metzger and Tobias Heinemann, 'The Right of the Author to Grant Licenses for Non-Commercial Use: Creative Commons Licenses and the Directive on Collective Management' (2015) 6(1) *JIPITEC* <<http://www.jipitec.eu/issues/jipitec-6-1-2015/4172>>. This would bring APRA in line with European collecting societies by allowing members to make use of voluntary licenses such as Creative Commons "for non-commercial uses of any rights, categories of rights or types of work and other subject matter that they may choose".

<sup>4</sup> See Draft Determination to assist the Copyright Tribunal in the determination of copyright remuneration, October 2018,

[https://www.accc.gov.au/system/files/Industry%20Structure%20-%20The%20draft%20Copyright%20Guidelines%20for%20public%20consultation\\_0.pdf](https://www.accc.gov.au/system/files/Industry%20Structure%20-%20The%20draft%20Copyright%20Guidelines%20for%20public%20consultation_0.pdf).

solutions, such as voluntary licensing, are able to be utilised, APRA's licensing arrangements need to be flexible and responsive to the digital environment.

Unlike many collecting societies, APRA takes a full assignment of members' performing rights. This prevents creators from being able to directly exploit opportunities to license their work outside of APRA's blanket provisions. Collecting societies around the world have recognised the benefits of voluntary licensing for musicians and habitually manage per-title carve outs. APRA's licensing arrangements do not allow for sufficient flexibility for musicians in instances where they want to manage their own rights. APRA's opt-out provision is limited in scope as it does not provide creators the opportunity to voluntarily license their work on a track by track basis. Its general Licence Back arrangements do not permit licensing of uses outside Australia.<sup>5</sup> And, APRA's Non-Commercial Licence Back provision is not broad enough to allow creators to make use of Creative Commons (see further below).<sup>6</sup>

Many creators are actively engaging with licensing opportunities in the digital environment. Licensing options need to be flexible to ensure efficiency is enhanced and to allow creators to exploit new opportunities. Blanket licensing without flexibility, (such as APRA's model) makes it increasingly difficult for creators to exploit these new opportunities. If APRA continues to require a full assignment of rights by creators, **Creative Commons recommends** that more flexible options to voluntarily license works be implemented. At a minimum, we recommend that APRA should be required to provide a mechanism to opt-out of global licensing on a per-title basis. These types of title-based carve outs are common in copyright industries, where rights are often split between many different owners. There is no apparent compelling reason for this flexibility not to be available to APRA members.

## 2. Non-Commercial License Back

Many professional creators want to be able to offer a non-remunerated licence to non-commercial users of their works. Creative Commons offers a suite of licences that includes 'Non-Commercial' licences which allow the unlimited distribution and use of copyright material for purposes that are not primarily directed for monetary gain. These licences are extremely popular globally - they provide a mechanism for creators to increase their exposure and to allow socially beneficial uses without harming valuable commercial licensing markets. Non-commercial licences provide opportunities for creators to reach new markets. These licences also provide the opportunity for creators to support the greater good by making creative expression accessible in non-commercial settings.

The purpose of Creative Commons is to enable creators to make direct licensing decisions regarding their own works through the use of voluntary licences to complement other licensing arrangements, such as collective licences.<sup>7</sup> In the Australian context, this means enabling Australian creators to use Creative Commons licensing to authorise the use of some of their works, for non-commercial purposes, without affecting their rights to make use of APRA's licensing arrangements for commercial uses.<sup>8</sup>

The introduction of the Non-Commercial License Back provision in 2008 was a positive step towards facilitating the wishes of its members "who had expressed a desire to be able to share

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<sup>5</sup> [http://apraamcos.com.au/media/5908/managing-your-rights\\_optout.pdf](http://apraamcos.com.au/media/5908/managing-your-rights_optout.pdf)

<sup>6</sup> Such as the the Creative Commons NonCommercial licence.

<sup>7</sup> Mia Garlick et al, 'Creative Commons Further Submission to ACCC on Re-Authorisation of Collective Administration of Music Performing Rights by APRA' <<https://www.accc.gov.au/system/files/public-registers/documents/D05%2B70075.pdf>>; Brian Fitzgerald and Jessica Coates, 'Response to ACCC from Creative Commons on APRA Applications for Revocation and Substitution (A91187 to A91194) Interested Party Consultation' <<https://www.accc.gov.au/system/files/public-registers/documents/D09%2B185821.pdf>>; *ibid*; Brian Fitzgerald et al, 'Creative Commons Submission to the ACCC on Re-Authorisation of Collective Administration of Music Performing Rights by APRA' <<https://www.accc.gov.au/system/files/public-registers/documents/D05%2B61451.pdf>>.

<sup>8</sup> Garlick et al, above n 4, 2.

their works with others online, particularly for promotional purposes”.<sup>9</sup> Despite this, the Non-Commercial License Back provision does not provide the flexibility and freedoms that would enable APRA members to take advantage of many voluntary licences.<sup>10</sup> The current Non-Commercial License Back provision, which is limited to ‘purposes online’,<sup>11</sup> does not permit licensing for broadcast or performance (uses which other voluntary licenses permit such as Creative Commons licences). In a technological age where there are many new and innovative ways to distribute and promote content, limiting the ability for creators to legally share and distribute their content can have potentially stifling effects on creativity.<sup>12</sup>

One of the long-standing complaints among professional musicians in Australia who want to use Creative Commons licensing is that APRA’s license-back options are incompatible with their needs. We believe that a Creative Commons NonCommercial licence (or other direct licence) should be an option for members who have secured a Non-Commercial License Back from APRA. Further, the definition of non-commercial used for the License Back provision is too narrow in scope, preventing creators from being able to use direct licensing options such as Creative Commons NonCommercial licenses.<sup>13</sup> The APRA definition is not only far more restrictive than that used by Creative Commons,<sup>14</sup> it also fails to align with common definitions of non-commercial. The limitation in the current APRA definition to a “not for profit entity ... that does not receive public or institutional funding” would appear to exclude all uses by individuals, schools, libraries and most non-profit organisations (the vast majority of which receive some form of public or institutional funding).

**Creative Commons recommends** that the Non-Commercial License Back provision be broadened to accommodate a wider range of potential uses of the creators’ work. The broadening of this provision would ensure musicians are afforded the opportunity to make use of voluntary licences, such as Creative Commons licenses, should they wish to. Further, broadening the Non-Commercial License Back provision would align APRA’s practices with those of other collecting societies internationally who have recognised the importance of creators’ rights with respect to non-commercial licensing of their works.<sup>15</sup>

### 3. Transparency

Transparency of Australian collecting societies is an ongoing issue.<sup>16</sup> Recent review bodies have commented on the issue of transparency in collecting societies (including APRA), specifically regarding the processes and methods for calculating, collecting and distributing licensing revenue.<sup>17</sup> We believe that APRA has a responsibility to provide greater transparency in reporting data, providing information and disclosure about their processes and additionally, in relation to the

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<sup>9</sup> APRA, ‘APRA Response Regrading Reauthorisation’ <<https://www.accc.gov.au/system/files/public-registers/documents/D09%2B170766.pdf>>.

<sup>10</sup> See Fitzgerald and Coates, above n 4.

<sup>11</sup> APRA AMCOS, ‘Notice Under Article 17(j) Request for Licence Back Non-Commercial Purpose Online’ <[https://apraamcos.com.au/media/3526/17j\\_request-for-licence-back-for-non-commercial-purposes-online\\_distributed.pdf](https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf)>.

<sup>12</sup> See Kylie Pappalardo et al, ‘Imagination Foregone: A Qualitative Study of the Reuse Practices of Australian Creators’ (Australian Digital Alliance, November 2017) 39 <<https://eprints.qut.edu.au/115940/2/QUT-print.pdf>>.

<sup>13</sup> APRA’s definition of 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-licensor is a not for profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding.” See [https://apraamcos.com.au/media/3526/17j\\_request-for-licence-back-for-non-commercial-purposes-online\\_distributed.pdf](https://apraamcos.com.au/media/3526/17j_request-for-licence-back-for-non-commercial-purposes-online_distributed.pdf)

<sup>14</sup> Creative Commons Attribution-NonCommercial 4.0 licence states, ‘NonCommercial means not primarily intended for or directed towards commercial advantage or monetary compensation.’ See <https://creativecommons.org/licenses/by-nc/4.0/legalcode>.

<sup>15</sup> Metzger and Heinemann, above n 3; Paul Keller, ‘European Directive on Collective Rights Management: Collecting Societies Must Allow Use of CC Licenses’ on *Creative Commons* (26 November 2013) <<https://creativecommons.org/2013/11/26/european-directive-on-collective-rights-management-collecting-societies-must-allow-use-of-cc-licenses/>>; Adriano Bonforti, ‘Europe Forces the European Collecting Societies to Adopt Creative Commons Licenses’ on *MediaLaws - Law and Policy of the Media in a Comparative Perspective* - (22 April 2014) <<http://www.medialaws.eu/europe-forces-the-european-collecting-societies-to-adopt-creative-commons-licenses/>>.

<sup>16</sup> Australian Government, Productivity Commission, ‘Intellectual Property Arrangements - Inquiry Report No. 78.’ (23 September 2016) 766, 160; Department of Communications and the Arts, ‘Discussion Paper: Review of Code of Conduct for Copyright Collecting Societies’.

<sup>17</sup> Australian Government, Productivity Commission, above n 12 above n 12.

collection and distribution of funds. Transparency in the arrangements of collecting societies, (including APRA) are critical to ensure “the efficiency of collecting societies and their distribution practices and facilitate fair negotiations between users and rights holders”.<sup>18</sup> We acknowledge that complete transparency is not always achievable, however, **Creative Commons recommends** improvements in the amount of information, and the quality of the data that is shared with APRA members and the Australian public.<sup>19</sup>

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<sup>18</sup> Australian Productivity Commission, ‘Intellectual Property Arrangements - Inquiry Report No. 78 Overview and Recommendations’ (23 September 2016) 45, 32.

<sup>19</sup> Australian Government, Productivity Commission, above n 12, 160; Kylie Pappalardo et al, ‘Review of Code of Conduct for Copyright Collecting Societies’ <<https://eprints.qut.edu.au/116724/1/10781-queensland-university-of-technology-school-of-law.pdf>>; Ormston, ‘APRA AMCOS Year in Review 2018’ (2018).