29 July 2004

Mr Tim Grimwade
The General Manager
Adjudication Branch
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Mr Grimwade

APRA APPLICATION FOR AUTHORISATIONS NOS A90918 – A90925 ("RESTRICTION OF PUBLICATION CLAIMED")

We refer to the ACCC's letter of 4 June 2004 in relation to the application by APRA for Authorisations Nos A90918 – A90925 and make the following submission.

1. RESTRICTION OF PUBLICATION CLAIMED

We seek restriction from publication of this submission because it contains information about confidential negotiations between Commercial Radio Australia and APRA and aspects of the Commercial Radio Licence Agreement between commercial radio broadcasters (**our members**) and APRA.

We are happy to provide any other information you require in order to give effect to this request.

2. NATURE OF THE INDUSTRY'S DEALINGS WITH APRA

2.1 About us and our members

Commercial Radio Australia (formerly FARB) is the peak industry body for commercial radio stations in Australia. We have 251 members stations which are licensed to provide commercial radio services in Australia. This submission represents the views of all our members.

2.2 Industry blanket agreement

Our members operate stations offering a variety of different program formats some of which use music more than others.

Because the act of broadcasting music is an exercise of exclusive rights in several types of copyright, our members require appropriate licences from the copyright owners.

APRA controls the broadcast right in the underlying musical compositions (**musical works**) in recorded music. It relies on an assignment of those rights from the copyright owners.

Commercial Radio Australia has negotiated a blanket licence agreement with APRA which is executed by each of our members separately. The current agreement has been on foot

since 2000 and entitles our members to access and broadcast musical works in APRA's entire repertoire.

2.3 Commercial radio licence fees 2002/03

Fees collected from our members constitute a significant proportion of APRA's annual revenues. According to APRA's 2003 Annual Report (p. 5), the total licence fees paid by Australian commercial radio stations in the 2002/03 financial year was $18.3 million - an increase of 8% on the previous year.

APRA's gross revenues from domestic operations for the same period was $90,285,000 which represents a 6% increase from the previous year.

In total, revenue from the broadcast sector (comprising commercial, national and community radio and TV) and online streaming of music accounts for 73% of APRA's domestic licence revenue.

2.4 Issues for the industry in dealing with APRA

As a general statement, we accept that the collective administration of copyright can deliver public benefits. From our member's perspective, the fact that they can acquire rights to musical works through one collecting agency has administrative advantages.

However, APRA's aggregation of rights gives it monopoly powers in the various markets for the acquisition of performance and communication rights in musical works including the market that relates to our members.

We also recognise that the Australian Competition Tribunal (**ACT**) granted authorisations to APRA in 2000 because it found that the public benefits resulting from APRA's collective administration of rights in musical works outweighed any anti-competitive detriments resulting from APRA's monopoly power.

However, as a pre-condition to granting those authorisations, the ACT made APRA change certain aspects of its operations – namely offering 'opt-out' and licence back rights under its input arrangements and providing new alternative dispute resolution procedures for licensees.

These attempts to divest APRA of some of its monopoly power have failed to produce the intended outcomes. In dealings with our industry, APRA continues to act as an unconstrained monopolist as set out in the following sections.

(a) APRA's approach to negotiations

Because no practical licensing alternatives to APRA have developed since the current authorisations were granted, APRA continues to approach negotiations with our industry from a position of absolute power.

APRA takes the view that it can determine the nature of the scheme and the method pursuant to which the licence fees for our industry will be calculated in the knowledge that no alternative supplier of rights is available and that our members must have to access musical works in its repertoire if they are to broadcast recorded music. This means that negotiations with APRA still resemble an all-or-nothing proposition.

As longs as APRA is allowed to maintain its current acquisition, affiliation and blanket licensing schemes, we believe that that this position will not change.

(b) APRA extracts monopoly fees from our members

Because of its monopoly power, APRA is able to extract monopoly fees from our members for the use of musical works in its repertoire. These rates are much higher than those that would be charged in a competitive market or one in which there was adequate external regulation to constrain APRA's monopoly power.[1]

We can point to the fact that there is intense competition in the music industry (especially amongst record companies) to get airplay of their recordings on our member's stations because of the promotional benefits this provides by exposing the music to a broad market of possible buyers.[2] In other words, airplay of recorded music (for which our members pay three sets of copyright fees) allows composers, publishers, artists and record companies to realise further (and in most cases greater) revenue from the retail sale of recorded music and live concert performances. The impact which radio airplay has in increasing production and sales of recorded music has been established through international and Australian studies.[3]

If competition was allowed to develop in the markets for the performance/communication rights in musical works (or if APRA's monopoly power was adequately constrained through further regulation[4]), we believe that the rates paid by our members to acquire broadcast rights to musical works would be significantly lower than what they currently pay and would be closer to the marginal cost of licensing those rights to our members.

(c) Limitations of the Copyright Tribunal

While the Copyright Tribunal, in theory, regulates APRA's monopoly power, it would be untenable to refer matters to the Copyright Tribunal whenever the industry agreement is re-negotiated. In addition, it is unclear if the orders which the Tribunal is able to make are can adequately regulate the terms and conditions on which APRA makes its repertoire available.

---

1 By analogy, the broadcast right in sound recordings which is administered by the Phonographic Performance Company of Australia (PPCA) operates under a statutory licence by virtue of section 109 of the *Copyright Act* 1968 (Cth) and the royalty rate for commercial radio stations is capped at a maximum of 1% of gross revenue by virtue of section 152(8) of the Copyright Act.

2 Traditionally, record companies spend less on radio advertising than other mediums like TV and print.

3 For an Australian study, see Paul Mason (2003), "Assessing the Impact of Australian Music Requirements for Radio", (research paper prepared for the Music Council of Australia and published at http://www.mca.org.au/research.htm). For a US analysis, see Alan Montgomery and Wendy Woe (2002), "Should Music Labels Pay for Radio Airplay? Investigating the Relationship between Album Sales and Radio Airplay", (a research paper prepared by two marketing academics and published at http://www.andrew.cmu.edu/user/alm3/).

4 For example, by forcing it to set prices equal to the marginal cost of supplying the relevant rights.

This industry and APRA have only been involved in one reference to the Copyright Tribunal. In that instance, the Copyright Tribunal fixed new royalty rates that have resulted in significant, and in our view unjustified, increases in fees for our members.[5]

The fact that the matter took 4 years to be heard by the Copyright Tribunal and significant legal costs were incurred by our industry highlights what we consider to be limitations of the Copyright Tribunal in regulating APRA's monopoly power.

The ACCC has also recognised these limitations and notes that:

> *The Copyright Tribunal does not appear to be a sufficiently practical forum for many users of musical works and may not have the opportunity to consider competition issues in matters before it, the result being that it does not appear to effectively constrain APRA in the use of its market power.*[6]

Further, APRA has pointed out that the new dispute resolution process has only been used twice and has also referred positively to the new *Collecting Society Code of Conduct.* However, it has not provided any evidence to justify its conclusions that these new processes have significantly "reduced", "eroded" or "eliminated" its monopoly power. We are not persuaded that either of these processes has had an impact on APRA's monopoly power.

(d) Current issues in negotiations with APRA

5 *Australasian Performing Right Association Ltd v Federation of Australian Radio Broadcasters Ltd* [1999] ACopyT 4 (17 September 1999).

6 *Australasian Performing Right Association Limited* (1998) ATPR (Com) ¶50-256

3. COMMENTS ON APRA'S APPLICATION

3.1 The relevant market

APRA has characterised the relevant market, for the purposes of the application for authorisation, as the market in Australia for the acquisition of the "performing" and "communication" rights in musical works – i.e. the widest definition of the market.

In our view, this characterisation of the market is wrong as the ways in which APRA's repertoire is used by all licensees varies from case-to-case. We believe that there are distinct markets in the acquisition of rights for each of the various public performance (e.g. bars and nightclubs, jukeboxes, retail outlets), broadcasting and communication uses and that the effect of APRA's input, output, distribution and affiliation agreements must be considered in each of those markets separately.

The relevant market for our purposes is the market for the right to broadcast musical works on commercial radio stations. In this market, supply-side substitution does not exist and so there is no competitive pressure on APRA to set commercial prices for access to its repertoire. On the demand side, those of our members that wish to acquire access to music in APRA's repertoire (which according to APRA is the entire worldwide repertoire of published music) cannot currently, acquire these rights from anyone else. This gives rise to APRA's all-or-nothing approach to negotiations.

As we have set out below, the various markets for the acquisition of rights by our members are contestable. The same is likely to be true for markets involving other users. However, the way in which APRA currently operates precludes the development of competition in those markets.

3.2 Cost efficiencies are overstated

The most commonly stated justification for a single collecting society like APRA is usually put in terms of cost efficiencies that can be achieved by a one-stop shop for the licensing of broadcast rights. On the demand side, the case rests on the argument that users of copyright materials can save on transaction costs that would be incurred in negotiating with a large number of copyright owners. On the supply side, the argument rests on the basis that a single collecting society makes it easier to exploit the potential economies of scale and scope from collective administration and enforcement of rights.

While we have acknowledged that public benefits can occur under such a system of collective copyright administration, we feel that particular features of APRA's operations (i.e. the way in which APRA acquires and licences rights) leads to unjustified anti-competitive outcomes.

Further, APRA has referred to the fact that the relevant copyright holders (its members) are so widely dispersed that substitution possibilities do not arise. APRA also reports that its repertoire comprises over 2.9 million musical works including those which are available to APRA as a result of reciprocal arrangements with international collecting agencies.

APRA suggests that the alternative to dealing with it in acquiring rights to musical works would be for a potential user to locate and negotiate with:

- more than 36,000 individual composers and around 300 publishing companies - in the case of Australian musical works; and

- a host of equivalent international collecting agencies.

In our view, this picture of a highly dispersed market of rights holders is not accurate given the tendency of composers to deal with their rights through another set of intermediaries – music publishing companies. Further, rights in popular musical works (which are the rights that our members usually require) are likely to be concentrated even further and controlled by the major record companies through the publishing arms of their businesses.

The ACCC has acknowledged this view of the industry by noting that:

> *"Publishers play a major role in the industry and **are often associated with recording companies**. They usually enter into contracts with composers, songwriters and*

musicians pursuant to which the publisher agrees to arrange for the artists' works to be recorded and promoted in return for payment ..."[7] (our emphasis)

As a result of high levels of vertical and horizontal integration, the global music industry has become extremely concentrated and is now controlled by a few major entertainment conglomerates known as the "Big 5": Warner Music, EMI Group, Universal Music Group, BMG and Sony. Each of these global giants also dominate the world market for music publishing.[8]

Our searches on the websites of the publishing companies of the Big 5 confirms this view of a highly concentrated music publishing industry. For example, EMI Music Publishing is reported to own the rights to more than a million compositions; Warner/Chappell Music (over 1 million); BMG (more than 700,000) while Sony/ATV (a joint venture between Sony and Michael Jackson) has amongst its titles 180 of the Beatles songs and the largest country music catalogue in the world.[9] Universal Music Publishing reports that it owns the rights to over 1 million titles.[10]

Using the annual list published by the Phonographic Performance Company of Australia (**PPCA**) called the "Top 100 Most Broadcast Recordings (2003)" which is based on information from radio and TV broadcast logs, we have conducted searches on the relevant publishing company web sites and developed a profile of the publishing companies which own or administer rights in those recordings.[11] Of the 89 recordings on which we were able to find such information, the publishing rights in 82 (or 92%) of those recordings are either owned by or administered by a publishing company affiliated with one of the Big 5.

Casual empiricism also supports our view of a highly concentrated music publishing industry especially in the market for popular music. According to its constitution, APRA's Board of 12 directors is to comprise 6 "writer directors" and 6 "publisher directors". APRA's 2003 Annual Report shows that 4 of the 6 publisher directors are from publishing companies which are affiliated with the Big 5 (i.e. Universal, EMI, Warner Bros and Sony) while a fifth is the publishing business of the Australian record label Festival Mushroom. The other publisher director (J Albert Son Pty Ltd) is one of Australian's largest independent music publishers and controls the rights to a large repertoire of classic Australian rock music.

Scanning APRA's website for the names of its publisher members confirms that the record company affiliated publishers are overwhelmingly outnumbered in terms of the total publisher membership and yet dominate the representation on the APRA Board – confirming that they contribute the bulk of APRA's repertoire.

While APRA rightly says that very few writer members would be in a position to administer their own performing rights, we wonder if the same can be said of the major music publishing companies and especially those owned by record companies. These publishing companies already pool rights in essentially all of the most popular musical works and might be capable

---

7 ACCC, *Determination and Notice: Applications for Authorisation and Notification – Australasian Performing Right Association Limited*, (14 January 1998), p. 16, para 2.3.3

8 David Throsby, (2002), "The Music Industry in the New Millennium: Global and Local Perspectives", (paper prepared for the Global Alliance for Cultural Diversity, UNESCO at http://portal.unesco.org/culture). This paper estimates that approximately 80% of the global music industry is controlled by the Big Five.

9 From the business information portal *Hoovers Online* at: www.hoovers.com.

10 Published on its website at: www.universalmusicpublishing.com.

11 The "PPCA Top 100 Most Broadcast Recordings of 2003" can be accessed at: www.ppca.com.au/most_broadcast_recordings.htm.

of acting as an alternative source of performance and communication rights in the relevant musical works.

Therefore, if the number and identities of the parties that could be approached for broadcast rights clearance is smaller and more well defined than is claimed by APRA, it is possible that scale economies in rights administration and licensing could be exploited effectively by several 'specialised collecting agencies' (by record label or music genre for instance) rather than a monopoly collecting society like APRA.

Because of this, we feel that APRA's arguments in relation to the cost efficiencies of its current operations must be re-examined. We suspect that the true size of the industry is smaller than that claimed by APRA and that the lion's share of the fees collected by APRA (especially from commercial radio stations and other broadcasters) are actually distributed to record companies through their publishing businesses or to a handful of well established independent composers.

We think that a true indication of the size of the actual market needs to be provided by APRA. In addition, APRA should provide information showing the number and types of its members that actually receive the royalties that it distributes.

3.3 Arrangements not conducive to the development of competition

APRA claims that the low level of use of its 'opt out' and 'licence back' schemes is *ipso facto* proof that APRA's arrangements are the most efficient means of dealing with those rights.

APRA's has not provided any evidence which supports this view. We feel that it is equally arguable that the failure for alternatives to develop is due to the high barriers to entry as a result of APRA's input agreements and the lock-in effects of the blanket licences it offers to our members.

(a) Input arrangements

In our view, APRA's input arrangements under which it takes an assignment of rights from the relevant owners hinders the entry of competition in the various rights markets.

As we have already set out above, we disagree with APRA's assertion that the licence back and opt-out rights available to its members have eliminated any detrimental effects from its monopoly by allowing its members to deal directly with users.

Because APRA still requires its members to *assign* their communication/performance rights to it (in addition to the fact that APRA only offers our members blanket licences), its monopoly position has not been affected and a significant amount of inertia has to be overcome before the stated outside options can be used. In fact, we argue that the low level of use of the outside options attests to the fact that the barriers are still too high.

We see no reason why the transfer of rights to APRA by its members cannot take place by way of a non-exclusive licence. The US collecting agencies ASCAP and BMI have operated on that basis for 50 years. An assignment of rights by composers/publishers to APRA followed by a licence back of some rights by APRA is significantly different from a non-exclusive licence from composers/publishers to APRA. The first scenario involves a change of ownership in favour of APRA whereas in the second scenario, the composers/publishers retains ownership of the relevant rights. For prospective users, the two scenarios produce significantly different negotiations.

APRA asserts that it needs an assignment so that it can take effective action to protect the rights of its members in case of copyright infringement. However, even as a non-exclusive licensee, APRA would be in a position to prosecute copyright infringement cases (if it's members so desired) under a power of attorney.

More to the point, (and as discussed above), if the most sought after works are those in the control of the record company affiliated publishers, those companies have the resources and experience to conduct investigations and prosecute cases of copyright infringement on their own.

By way of analogy, we draw the ACCC's attention to the PPCA which controls the communication and performance rights in sound recordings.

PPCA's input arrangements are based on a non-exclusive licence of rights from relevant record companies. This has not hindered PPCA's ability to operate. Further, to the best of our knowledge, copyright infringement cases are not prosecuted by PPCA but by the Australian Recording Industry Association (**ARIA**).

(b) Blanket licence

In our view, another key reason why competition in the market for rights has failed to develop is because of APRA's blanket licence scheme. The modifications made by APRA to its input arrangements at the direction of the ACT cannot have any meaningful impact without an equivalent modification to APRA's output arrangements.

Blanket licences impede the ability of APRA's members or any other person to offer alternatives to APRA's licence schemes and act as a significant disincentive for users to engage directly with other intermediaries because they create artificial switching costs.

If as described above, the market for broadcast rights which commercial radio stations acquire is highly concentrated, APRA should be prepared offer alternative licences (for example a "per programme" licence) as an option to blanket licences with appropriate reductions in the level of fees for stations to account for the fact that a particular licensee does not require access to all of APRA's repertoire. The blanket licence fees would also need to be adjusted down on a prorated basis to reflect the level of use of that scheme.

In our view, APRA has maintained its output agreements in their current restrictive form to ensure that maximum leverage is available when rights, particularly those in the lucrative broadcast sector, are negotiated.

4. ADDITIONAL COMMENTS

4.1 Proposed copyright term extension

As the ACCC is aware, the broad policy aim of copyright law is to strike a balance between the interests of copyright owners and users. For this reason, copyright operates as a set of exclusive rights which provide incentives to authors and artists to create original works.

Because there are recognisable public benefits in such creative material being available for access by others, copyright law imposes certain limits on the excusive rights of copyright owners. Examples include statutory licences such as that under section 109 of the Copyright Act which applies to rights in sound recordings. Another, limitation is the fact that the copyright term expires, in the case of musical works in APRA's repertoire, 50 years after the death of the composer(s). At that time, the work falls into the public domain and can be used freely and without the need for permission.

We are aware of proposals under the Australia/US free trade agreement to extend the copyright term by another 20 years. As a result of this extension, APRA's repertoire will increase in volume (and by extension so will APRA's monopoly power) as works take longer to fall into the public domain.

In considering APRA's request for authorisation, the ACCC must have regard to the effect which an extended copyright term will have on the various markets for rights in the musical works in APRA's repertoire.

4.2 Changing circumstances

APRA has argued that the market (using its wide definition) for the purposes of its application "has many of the aspects of a natural monopoly". For the reasons described in this submission, we do not necessarily agree with that view.

However, as demonstrated by the telecommunications market in recent times, conventional wisdom about a markets which are considered to be natural monopolies has been re-evaluated in light of changes in technology.

In our view, to the extent (if any) that there are any natural monopoly characteristics in the various markets for rights currently controlled by APRA, these reflect a relationship between the existing market demand and the current technology of supply.

Contrary to what APRA's submission says (at paragraph 2.1.7) new technology, known "digital rights management" (**DRM**), has been developed since the current authorisations were granted and has the capacity allow copyright owners (or intermediaries acting on their behalf) to directly licence musical works to users and at the same time monitor or record the use of that music. In effect, DRM has the potential to remove most of the rationales for APRA's centralised operations and monopolistic behaviour.

We draw the ACCC's attention to the digital music delivery service currently provided by the company MusicPoint through its web site at https://www.musicpoint.com.au/Login.aspx which suggests the direction which DRM is capable of taking.

In light of this, APRA is incorrect in asserting that there have not been any relevant technological changes since the authorisations were granted in 2000. In fact, the development of DRM has the capacity to dramatically alter the market so that the detriments from APRA's monopoly will outweigh the public benefits.

5. CONCLUSIONS

It is our view that APRA's submission is deficient in many material respects because of the paucity of evidence APRA has presented to justify its conclusions that the public benefits resulting from its current operations continue to outweigh the anti-competitive detriments resulting from its monopoly power.

We point to the failure by APRA to provide a through analysis about the true size of the market of rights holders in musical works. Merely providing the numbers of its membership is insufficient and in our view distorts the true nature of a market which our evidence suggests is much more highly concentrated.

In our view, APRA has also failed to provide adequate evidence to justify its conclusion that the lack of direct licensing in the last 4 years is evidence that such a system cannot work. As we have shown above, the combined impact of APRA's input and output arrangements has

to be re-examined because they are not conducive to the development of competition with APRA.

In respect of the input arrangements, further changes are necessary to APRA's operations to ensure that APRA obtains rights from members by way of a non-exclusive licence rather than an assignment. An equivalent modification to the APRA's output arrangements is also required to provide alternatives to APRA's blanket licences (for example "per programming licences) with appropriate reductions in the level of fees.

In terms of additional issues, the impact of a 20 year copyright term extension on APRA's monopoly power will be significant as it will contribute directly to the growth of APRA's repertoire. Accordingly, this too must be considered by the ACCC in reviewing APRA's request for authorisation.

Finally, because of rapid advancements in DRM technology, it is our view that any authorisation to APRA should be confined to a short time frame (a few years at the most) in order to re-examine the state of play as DRM technology develops.

If you wish to discuss any of the issues raised in this submission, please feel free to contact me or Moses Kakaire on (02) 9281 6577.

Yours sincerely

Joan Warner
Chief Executive Officer