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**RE: re-authorisation of collective administration of music
performing rights by APRA**

Dear Sir / Madam,

We are writing to you as representatives of Creative Commons International Corporation and Creative Commons Australia, a collaborative project between Creative Commons International and project lead Queensland University of Technology (together "Creative Commons"), in relation to the draft determination of the Australian Competition & Consumer Commission (ACCC) regarding the applications of Australasian Performing Rights Association (APRA) for authorization dated August 31, 2005.

At the outset, Creative Commons wishes to emphasise that it supports appropriate collective rights management including the role that APRA serves in negotiating, collecting and representing the interests of Australian musicians and musicians of other jurisdictions through its international relations. Creative Commons makes this submission to the ACCC both to support APRA and to also highlight recent developments in the licensing of music that have arisen in the 5 year period since 1999, being the commencement year of APRA's previous authorization, that Creative Commons believes are relevant to the ACCC's consideration of APRA's application. These developments, we submit, are the commencement of Creative Commons licensing and the impact digital technologies can, and are, having on rights management. In particular,

there are two areas in APRA's application in relation to which the ACCC currently may not have sufficient information based solely on APRA's application. Firstly, APRA has indicated that it is not aware of any other relevant changes to the market since its arrangements were first authorised. We would submit that Creative Commons licensing, which commenced in 2002, is a significant and relevant development that has arisen in the specified period. Secondly, APRA has stated that it is impossible for users to self-administer their rights. Creative Commons believes that digital technologies, both those that have already developed and deployed widely since 1999, and those that are likely to be developed and deployed in the future, offer the potential for effective self-administration. Creative Commons licenses, as explained below, harness much of the potential these technologies offer.

Creative Commons respectfully submits that the ACCC review its draft determination with respect to APRA's arrangements, and in particular the apparent public benefits of APRA's licensing arrangements, against this more comprehensive background. Creative Commons has specific recommendations as to how APRA's arrangements can be tailored to facilitate the rise of open content licensing models such as Creative Commons, which in turn should give Australian musicians and users the opportunity to take advantage of these developments and/or APRA's existing systems, consistent with their specific preferences.

About Creative Commons

Creative Commons International is a non-for-profit company limited by guarantee, incorporated in the United Kingdom, that works to promote the use of Creative Commons licenses and tools around the world. Creative Commons aims to promote balance in intellectual property regulation and to promote collaboration between creators across time and space by expanding the amount of flexibly licensed content available.

To this end, Creative Commons provides free standard copyright licences, which are simple to use and understand both for users and creators of copyright material. These licenses were first made available in late 2002. In 2005, the Australian version of these licenses was launched. To date, the licenses have been adapted for the laws of a total of 21 jurisdictions including, for example, Brazil, Germany, Japan, South Korea, South Africa. Work is underway in another 25 jurisdictions to 'port' (linguistically and legally adapt) the Creative Commons licenses. In total, Creative Commons is in talks with project teams in 70 jurisdictions around the world.

In the three short years since the initial release of the Creative Commons licenses, their adoption has been considerable. Within a year after Creative Commons was launched in December 2002, we counted over 1,000,000 link-backs to the Creative Commons licenses. At a year and a half, the number counted was over 1,800,000. At two years, the number counted was just about 5,000,000. At two and a half years (June 2005),

the number counted was just over 12,000,000. Yahoo! searches currently indicate over 53,000,000 link-backs to Creative Commons licenses. Note too that the number of objects licensed under Creative Commons licenses may be much more than the number of link-backs to our licenses, as "link-backs" are not a count of how many objects are licensed under Creative Commons licenses – for example, a single license could cover 100,000 songs in a music database. Given Yahoo! now indexes around 20 billion web pages, that means approximately 1 out of every 377 online web pages are linked-back to Creative Commons licences.

The Creative Commons licences are based on the existing copyright system and provide a simple way for owners of copyright to retain their copyright and clearly signal to the public that they may make certain uses of their creative works, without engaging in the time and expense of individual rights clearance, in other words that only "some rights [are] reserved." This is distinct from the traditional, default "all rights reserved" approach that has been the hallmark of established copyright practices, (including assumptions informing the original establishment of Collecting Societies and schemes) pursuant to which any person who wishes to use a copyrighted work, other than for reading, viewing or one of the other limited implied activities, must engage in the time and cost of separately identifying, contacting and negotiating with the rightsholder to obtain permission, if it is obtained at all. Creative Commons licensing empowers creators to provide clear and advanced signalling of the uses that they are happy for others to make of their works and thereby, enables easy identification of CC-licensed works and their ready use and reuse.

Creative Commons' core licensing suite allows a creator to decide what specific use others may make of their work: whether or not others may make commercial use of their work; whether or not others may make derivative works; and, if they may, whether those derivative works must be made available to the public on the same licensing terms. All Creative Commons licenses require attribution as specified by the author.

In this way, authors can structure their private rights to create public goods - creative works set "free" for certain uses, consistent with the author's specific intent.

Once a license is selected, the licensor receives their license in three formats: in human-readable format – the Commons Deed, which sets out a summary of the key license terms; in lawyer-readable format – the Legal Code, which is the document that is drafted to be enforceable in a court of law; and, in machine-readable format – Resource Description Framework (RDF) metadata, which describes the work according to the key license terms. The metadata enables online works, licensed under a Creative Commons license, to be searched for and identified based on their licensing terms. In March 2005, Yahoo! launched a search engine specifically for the purpose of locating Creative Commons licensed works, which is now incorporated in its Advanced Search page. Utilizing the

Yahoo! CC-customized search engine, the metadata enables me, for example, to find pictures of guitars that I can use commercially or that I can build upon or modify.

Similar to this general web search, Creative Commons is working with technology companies to develop audio-specific searches that will identify Creative Commons-licensed music files that people can download and remix consistent with the applicable license terms.

In addition to the licenses, Creative Commons offers technical tools that make it easy for creators such as musicians to publish their works online under Creative Commons' more flexible licensing terms.

One such tool is a free desktop client — ccPublisher — that enables the "drag and drop" marking of audio and video files with Creative Commons licenses, and the uploading of those files to the Internet Archive. The Internet Archive offers free hosting to any Creative Commons content. Creative Commons developed ccPublisher in recognition of the fact that many creators are keen to post their works online but lack the resources to do so for larger files such as audio and video. The ccPublisher software can be adapted and utilized by anyone to enable easy uploading of large files to the Internet under Creative Commons licensing.

Another free publishing tool offered by Creative Commons is ccMixer, a site that invites musicians to exercise their rights to rip, mix and mash-up under those Creative Commons licenses that allow derivative works and sampling. The site enables musicians to see both who has remixed their work and to display the work they have remixed in creating their own music. People can see the relationships between the sampled tracks—similar to a genealogy of creativity.

The ccMixer site was launched in December 2004 in conjunction with Creative Commons' Fine Art of Sampling Contest. This contest was held following the release of the Wired Rip. Sample. Mash. Share. CD. This CD contained 16 tracks by high profile musicians such as the Beastie Boys, David Byrne, Chuck D, Thievery Corporation, Zap Mama and Gilberto Gil all—licensed to the public under Creative Commons Sampling licenses¹ that permit transformative reuses of the tracks. To encourage people to exercise their right to sample, Creative Commons hosted the Fine Art of Sampling Competition and encouraged remixers to post their works to ccMixer. The number of tracks on ccMixer, all licensed under Creative Commons licenses that permit remixing, has now totalled over 600 (and of course, many are new tracks, not related to the original Wired CD).

As noted above, there are over 53 million online link-backs to the Creative Commons licenses. Our experience indicates that in general, there are

¹ Creative Commons' Sampling licenses are customized licenses that have been developed in response to specific community demand. All of the Sampling licenses authorize transformative sampling and reuse of copyrighted works and some also permit verbatim copying and distribution of the entire work (ie. file sharing).

four broad categories of license adopters: (1) the idealist who is committed to the principles of sharing and open content licensing; (2) the pragmatist who is just starting out and wants to utilize the viral marketing opportunities the web offers in the hope of getting noticed, such as, a new, unsigned band; (3) the educator or academic for whom sharing knowledge is their profession; and, (4) the artist for whom remixing and contextualization is their artform. For these artists, similar to those on the Wired CD, giving back to the "commons" is a recognition of the interpretative and appropriationist nature of their expression that causes them to regularly take from the "commons".

Creative Commons licenses do not allow for royalty payments to be made under the license (although all CC-licenses that contain a NonCommercial license condition are drafted to enable musicians to receive royalties for commercial, public performances). Nonetheless, Creative Commons licenses do not mean that artists are shut off from receiving compensation for their work. Our experience to date suggests that artists who adopt Creative Commons licensing may receive compensation in at least three different ways.

Firstly, Creative Commons licenses can be applied to a work in a particular format to encourage awareness of the work and, thus, sales of the work in a different format. In the music space, the innovative Berkeley record label Magnatune, started in 2002, releases streams and downloads of its artists under a Creative Commons Attribution-NonCommercial-ShareAlike license but sells CDs and merchandize, splitting the royalties 50/50 with artists.

Secondly, a Creative Commons license can be applied to a work to signal to the general public the terms on which they may use the work and then interested parties may enter into a commercial side-deal in relation to the work. By reason of the Creative Commons' metadata and Creative Commons-specific search engines (discussed above), Creative Commons licensed works can be more readily located by persons interested in making commercial uses of a work. By licensing content within the Creative Commons network, access to a person's creativity can be substantially increased. Business 2.0, for example, reported on the story of a Slovakian artist who used Creative Commons licenses to make his music available. That then translated into two lucrative commercial contracts to use his music for creative agencies within the United States. (See Andy Raskin, Giving It Away (for Fun and Profit), Business 2.0, April, 2004)

Thirdly, Creative Commons licensed works can advertise a musician's talents and secure them a commercial arrangement for different or future works. One such example is that of 'MinusKelvin', a physics and calculus teacher by day, a composer by night. He makes tracks available to podcasters using Creative Commons licenses and earlier this year joined the ccMixer site. Runoff Records, Inc. signed MinusKelvin, shortly after discovering him on ccMixer. Together with another ccMixer musician, Pat Chilla, these artists will now be working with the label to compose and produce music for the next three seasons of America's Next Top Model.

Creative Commons is also working on incorporating additional tools into its licensing system that will enable artists to directly and efficiently manage the commercial rights to their work, where they have selected a Creative Commons license with a NonCommercial restriction.

As is evident from the above outline, Creative Commons licences are very popular with musicians around the world. Unfortunately, musicians in Australia are disadvantaged when it comes to making a choice about the terms on which they wish to make their work available. APRA's current input arrangements do not allow Australian musicians to have the choice of utilizing the benefits of Creative Commons licensing in respect of some of their music and APRA's system in respect of other of their music. And even if an Australian musician does eschew the APRA model and adopt Creative Commons licensing, perhaps an idealist committed to the principle, for example, APRA's output arrangements could act as a disincentive to Australian users from selecting and enjoying that artist's CC-licensed music.

The Dilemma New Australian Musicians Face

In Australia, Australian musicians starting out have two choices. One is to choose to become an APRA member. Alternatively, if they presently wish to, or think they may wish to at some stage in the future, apply a Creative Commons license to one or more of their works, Australian musicians must avoid becoming an APRA member. Although choosing Creative Commons licensing will facilitate interaction and cultural dialogue with a myriad of other musicians around the world who have similarly adopted Creative Commons licensing, the inflexibility of APRA's arrangements means that these new musicians are precluded from receiving any public performance or communication royalties that APRA may collect for the use of their work, even if those musicians opt for a Creative Commons NonCommercial license that would therefore reserve to that artist the right to collect such royalties. This inflexibility seems inevitable based on the fact that APRA, in its application, in no way suggested that its recording and collection methods account for (and will not charge for) the use, by Australian users, of Creative Commons licensed material, or other free-licensed or public domain works.

As the ACCC knows, in Australia, all royalties for the public performance and communication rights of composers, songwriters, and publishers are collected and distributed by APRA. Australian musicians have a strong incentive to join APRA in order to collect royalties from TV and radio stations, venues, concerts, and on-line businesses. For users of music, APRA issues blanket licences to a large number of Australian organisations, and uses statistical models to distribute the funds to its members based on those users' play time.

As the ACCC is also aware, when a musician joins APRA, the terms of APRA's membership agreement requires that he or she assigns all the

performing and communication rights in his or her music to APRA, *including* any future works produced. This means APRA owns the rights to perform current and future music in public and to communicate current and future music to the public, and in return, APRA promises to collect royalties on the musician's behalf.

After becoming an APRA member, a musician no longer owns all of the rights to his or her current *and* future music. This means that they are shut out from being able to share any of their current or future repertoire under a Creative Commons licence because the APRA agreement precludes effective re-assignment or re-licensing of their public performance and communication rights. The Creative Commons licensing model requires the musician or their authorized representative to retain all rights to their work, in order to effectively license and exploit those works, consistent with their wishes.

Consequently, all Australian musicians who make the choice to join APRA cannot experiment with or enjoy any of the benefits offered by Creative Commons licensing and cannot participate in the global network of Creative Commons licenses and tools that facilitate global dissemination and enjoyment of their work. An Australian musician who wishes to apply a Creative Commons license to even one of their works must decide never to join APRA and thereby forego all of the performance and communication revenues APRA collects in respect of any uses of their work.

Practically, this means that Australian musicians are disadvantaged relative to many other musicians around the world because they are not able to make their music available online under flexible, self-determined licensing terms such as Creative Commons licenses, where they could gain widespread exposure and recognition for their work.

APRA's Input Arrangements Are Too Inflexible To Enable Existing APRA Members to Experiment with Creative Commons-licensing

Although there are two mechanisms by which an APRA-signed musician can apply to have his or her music licensed back from APRA, neither of these options provides a practicable solution to this issue. APRA cites the fact that only 14 members have utilised the opt-out or license-back provisions since November 2000 as evidence for the proposition its arrangements meet the requirements of both owners and users. Creative Commons acknowledges that the data can be read to support this conclusion but, nonetheless, highlights the fact that this data can also be interpreted as evidence that the current opt-out and license back provision are too inflexible to enable all musicians and APRA members who wish to engage in more flexible licensing, to do so. In view of the fact that current statistics indicate that there are approximately 20,000 online link-backs to the Creative Commons Australia license, it seems

unlikely that less than 20 Australian creators are interested in exploring alternative licensing models.

In sum, the license back and opt-out provisions provided by APRA are unsuitable for a musician who wishes to release some of his or her music under a Creative Commons licence. Moreover, the notice periods, fee payments and license-back time period limitations are apparently inflexible and burdensome to musicians seeking a license-back.

Consequently, it is not practicable, at the moment, for an existing APRA member to release any of his or her music under a Creative Commons licence and the current APRA arrangements limit Australian musician's licensing choices.

APRA's Output Arrangements Have Not Been Demonstrated to Take Account of Creative Commons-licensed Music

The operation of APRA's output arrangements are unclear in that, to our knowledge, they do not adequately discriminate between APRA licensed music and royalty free Creative Commons licensed material.

We are concerned that APRA licensees may feel aggrieved that their use of Australian and overseas Creative Commons licensed music is not reflected in their blanket licence fee. Alternatively, those who enjoy Creative Commons and other royalty free music may deliberately choose to entirely avoid APRA-licensed music due to the apparent unfairness of blanket licensing.

Conclusion

Creative Commons fully supports the appropriate collective management of copyright rights. Creative Commons is concerned to ensure that the benefits of open content licensing and digital technologies are enjoyed by those who can, and do, need it most, namely the creators and users of creative works. Consistently mindful of this aim, Creative Commons offers licenses and tools to enable creators to have a range of choices about the ways in which they license their works. Creative Commons licenses and tools are also designed to enable creators and users to have the benefit of the democratising force of digital technologies. Now, anyone can be a creator, producer or distributor.

Open content licensing enhances the ability of artists to create new works, using the raw materials created by earlier artists. Creativity is rarely born of a vacuum – it is always building upon and extending the work of others. Open content allows artists to remix, reuse, and re-imagine the work of previous artists, if they chose, without worrying about copyright

infringement. The Creative Commons clearly state what can and what cannot be done with any given work, which means artists are free to create, rather than having to continually negotiate for copyright clearances.

We believe that Australian musicians are at a significant disadvantage with regards to other musicians around the world. Due to APRA's current licensing and contract arrangements, Australian musicians do not have the flexibility to distribute their music on terms of their choosing. We are not suggesting that all Australian musicians will choose to license their works under a Creative Commons licence. We do believe, however, that they should have the choice.

There are successful models in other jurisdictions of collective rights management that are co-existent with open content licensing systems. Notably, collecting societies in the United States of America do not require an assignment or an exclusive licence from the artists they represent. This disparity is highlighted by the current harmonisation of Australian and US copyright law pursuant to the Australia-US Free Trade Agreement.

We encourage the ACCC to consider APRA's input and output arrangements in light of these recent developments, such as are described in the discussion above, and we recommend that the ACCC consider ways in which to require APRA to build flexibility into its input and output arrangements so that Australian musicians and users of music are able to take advantage of open content licensing such as Creative Commons licenses. Options to consider would include APRA discharging its duties by acting as an agent for its members or making APRA's opt-out and license back provisions much simpler for artists who wish to opt-out of collection for any given work in their repertoire, or who wish to allow non-commercial use of their work.

References

- Creative Commons website: <http://creativecommons.org>
- The Internet Archive: <http://archive.org>
- ccMixer: <http://ccmixter.org/>
- ccPublisher: <http://creativecommons.org/tools/ccpublisher>
- Creative Commons™ internationalization project: <http://creativecommons.org/worldwide/>
- Magnatune: <http://www.magnatune.com/>
- MinusKelvin: <http://www.lessig.org/blog/archives/002890.shtml>
- Raskin, Andy: Giving it away for fun & for profit. Business 2.0, April 20, 2004, <http://www.business2.com/b2/web/articles/0,17863,608619,00.html> (last accessed July 19, 2005).

- Wired CD: <http://creativecommons.org/wired/>
- Yahoo! Advanced Search:
<http://search.yahoo.com/search/options?fr=fp-top&p>>

Yours Sincerely

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