

13 October 2005

The General Manager
Adjudication Branch
Australian Competition & Consumer Commission
PO Box 1199
DICKSON ACT 2602

Dear Sir/Madam

ACCC DRAFT DETERMINATION ON APRA'S REQUEST FOR AUTHORISATION

We refer to the ACCC's draft determination of 31 August 2005 which deals with APRA's request for authorisation for its input, output, distribution and overseas arrangements (**draft determination**).

1. General comments

We note that the ACCC has identified some significant public detriments in APRA's arrangements. The ACCC's views on these detriments are consistent with the views of Commercial Radio Australia as expressed in our submission of 29 July 2004 (**earlier submission**).

Notwithstanding these public detriments, the ACCC has determined that on balance, there is a net public benefit in APRA's arrangements. The ACCC now proposes to issue an authorisation to APRA for a period of four years. In doing so, the ACCC has made a number of qualifications in relation to its decision.

For example, we note that the ACCC has expressed support for the need for further refinements to APRA's input, output and reciprocal agreements to facilitate the development of competing avenues for administering rights in the musical works in APRA's repertoire.

Under these circumstances, Commercial Radio Australia (on behalf of the commercial radio industry in Australia) does not oppose the ACCC's proposal to issue the authorisation to APRA. However, we would like to make some additional comments which are set out in the following sections.

2. Support for further modifications to APRA's arrangements

We note that the ACCC has accepted the broad thrust of our earlier submission which is that the combination of APRA's present input, output and reciprocal arrangements has the effect, if not the purpose, of removing incentives for the development of alternative means of administering or licensing performance rights in musical works.

This entrenches APRA's monopoly position with the effect that APRA is able to exert maximum leverage in negotiations with users. The effect of this position, we believe, is that commercial radio stations have been forced to pay monopoly fees for access to APRA's repertoire.

Commercial Radio Australia supports any further modifications that can be made to APRA's arrangements to constrain its ability to exercise its monopoly power in negotiations with users.

3. Digital rights management

We note again that the ACCC has accepted our earlier submission which identified the potential use of digital rights management (DRM) technology to provide alternative means for administering performing rights in musical works. DRM technology has the ability to lower or remove the transaction costs involved in establishing those alternatives.

In our earlier submission, we referred to the example of the service called MusicPoint which is used to deliver music to radio stations via the Internet. We note that the draft determination at paragraph 6.59 (repeated at 7.44) states that "the practical utility of DRM as a tool, for administering performing rights, is limited to music delivered online". It's not clear on what basis the ACCC came to this view. However, we believe that those comments are not entirely accurate.

DRM technology works on the basis of the format in which the content is stored (digital) rather than the means by which it's delivered. Online delivery of DRM enabled music is convenient because the internet can provide a 'back channel' through which information about the use of that music can be sent back to the source. However, if the same DRM information is included in music delivered in a physical format (such as a CD), it is not clear why the same reporting process (using the internet) couldn't be utilised.

Since our last submission, we have also become aware of developments in broadcast monitoring technologies that do not use the internet but which track music use by analysing broadcast signals. These technologies use software applications to monitor radio broadcast signals and are able to detect and record songs broadcast either through information embedded in the audio track (audio watermarking) or by recognising the unique characteristics of a song such as its audio waveforms (audio fingerprinting).

Strictly speaking, audio fingerprinting is different from DRM as it does not involve embedding any additional information into the music. Further, audio fingerprinting technology can be used to identify music regardless of whether it's stored/broadcast in an analog or digital format. There are already a number of commercial applications of those technologies such as MusicTrace¹ and BlueArrow which is owned by the US performing rights organisation BMI.²

¹ <http://www.musictrace.de/>.

² <http://www.bmi.com/news/200508/20050830a.asp>.

4. Characterising the use of music by commercial radio stations

In discussing the benefits/detriments of APRA's monopoly and the fact that its blanket licence offers access to the entire worldwide repertoire of musical works, the draft determination (at paragraph 6.238) states that:

" ... [T]he ACCC notes that such benefits are predominately in respect of users whose use [of music] is spontaneous and unpredictable, such as radio broadcasters, cafes, fitness centres, etc, many of whom are unlikely to care, or even know, what music is played. As noted above, where use of music is predictable and planned, access to the whole of APRA's repertoire is often not required. For such users, there is less benefit in the certainty of the repertoire that APRA's blanket licences provide." [our emphasis]

We believe that those comments are inaccurate to the extent that they refer to use of music by commercial radio stations.

Firstly, it is incorrect to assert that commercial radio broadcasters do not care or know what music they broadcast. Programming commercial radio stations is a lot more sophisticated than that. Commercial radio stations that include music as a part of their programming mix, are careful to ensure that the music they broadcast fits within their overall image or brand.

The music 'bought' by commercial radio stations is combined with other inputs (such as high profile personalities/presenters, comedy segments, news or station promotions) to form an overall station format designed to attract specific demographic groups and therefore advertisers. Any incongruity between the music broadcast by a commercial radio station and the other programming inputs would upset this balance and alienate the target audience. For this reason, music is carefully researched and selected by commercial radio stations.

Secondly, Commercial radio stations can be distinguished from cafes and fitness centres by the fact that they do not use music just to create an 'ambience'. Music broadcast by radio stations is consumed by listeners as a form of entertainment in its own right. Further, listeners rely on radio airplay and on-air track announcements as a major source of information about music that is available for commercial sale or for information about composers or artists or upcoming concerts. All of this, as acknowledged in the draft submission, is a free form of advertising which enables the underlying rights holders to earn revenue from other sources.

Finally, while commercial radio stations are exposed to a lot of music (due to the marketing efforts of record labels), the music that each station ultimately chooses to broadcast usually falls within a limited range from the choice of available music. Generally speaking, that range can usually be delineated by genre (e.g. pop or rock or urban) or by era (e.g. adult contemporary or classic hits).

Considering that APRA's entire repertoire includes nearly 3 million works, the amount of music actually 'bought' by commercial radio stations is relatively small. Therefore, while

commercial radio stations are not necessarily in a position to pre-select all the music they wish to 'buy', it's clear that they do not need access to APRA's entire repertoire.

5. APRA's response to the submissions of interested parties

Finally we wish to respond to a comment made by APRA in its response to the submissions of interested parties on 22 November 2004. That comment was in relation to negotiations with Commercial Radio Australia over licenses for real time streaming of music over the internet by commercial radio stations.

Firstly, it's disappointing that APRA saw fit to publicly comment on the detail of negotiations that we considered confidential. You will recall that in our earlier submission, all comments relating to the detail of negotiations with APRA were masked and are not contained in the published version of that submission.

Secondly, we note that APRA has asserted that during negotiations, Commercial Radio Australia "denied the need for such a scheme". The implication of these comments is that Commercial Radio Australia or our members would ignore the provisions of the Copyright Act which give APRA's members exclusive rights over such activities or that commercial radio stations would evade payment to APRA for streaming of their broadcasts over the Internet.

We have reviewed our correspondence and found nothing to support APRA's comments. We can only surmise that APRA misconstrued comments made by Commercial Radio Australia in the course of negotiations.

In the course of negotiations, we have sometimes expressed concerns about the specific licence proposals put forward by APRA but not the right of APRA or its members to seek licences from our member stations for online streaming of their radio broadcasts. Our overriding concern has always been to ensure that fees charged are appropriate in light of the limited extent to which streaming activities take place, the fact that they do not attract any significant audiences or revenue for stations, the additional costs for stations in providing such services and the fact that commercial radio stations already pay significant broadcast fees to copyright owners.

We look forward to your response to the issues in this letter. If you would require further information or clarification of any of the issues discussed in this letter, please call Moses Kakaire, Manager Legal & Regulatory on (02) 9281 6577.

Yours sincerely



Joan Warner
Chief Executive Officer