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8 November 2005

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

Dear Sir / Madam,

Creative Commons International and Creative Commons Australia, a collaborative project between Creative Commons International and project lead Queensland University of Technology (together "Creative Commons") thank the Australian Competition and Consumer Commission for their attention to this matter and the recent opportunity to participate in the hearings on 13 October, 2005, relating to the application of the Australasian Performing Rights Association (APRA) for re-authorization of its arrangements.

Creative Commons makes this further submission to the ACCC to clarify some of the comments made during the hearings and also to address APRA's Reply to Creative Commons ACCC Submission.

Creative Commons respectfully submits as follows:

- Creative Commons provides voluntary private tools for individuals to have the choice of creating public goods — namely, creative, copyrighted works licensed on terms that clearly signal that certain use and reuse is permitted. Creative Commons promotes balance in intellectual property law by giving creators more options as to how they wish to make their works available *and* make money from their works. Creative Commons does not promote perpetual, unremunerated use of creative works. That this is not Creative Commons' purpose is apparent for several reasons.

Firstly, Creative Commons' non-exclusive licenses dictate what *others* may do with a work. Thus, if a musician applies a Creative Commons license to their work, they are not, by virtue of the Creative Commons license, precluded from entering into another revenue-generating license in respect of the same work.

Secondly, as outlined in Creative Commons' earlier submission to the ACCC, there are several real-life examples to date of creators earning money as a result of, or in addition to, applying a Creative Commons license to their works. In its earlier submission, Creative Commons gave real-life examples of artists earning revenue through Creative Commons licensing, specifically: (i) 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; (ii) Creative Commons licenses 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; (iii) Creative Commons licensed works can advertise a musician's talents and secure them a commercial arrangement for different or future works.

Thirdly, Creative Commons has made this submission to the ACCC and reached out to APRA in the past precisely because Creative Commons wishes to enable its licensing to complement APRA's licensing arrangements, thereby enabling Australian musicians to use Creative Commons to authorise certain uses of some or all of their works, whilst still having the option to receive royalties from APRA in relation to those same or different works. Approximately two-thirds of Creative Commons license adopters choose a license that contains a NonCommercial license option. This suggests that most licensors wish to reserve the right to collect royalties through other means, including collective rights management agencies such as APRA. Creative Commons welcomes the opportunity to work with APRA to achieve this in future.

Fourthly, Creative Commons is currently working with collecting societies and technology companies in North America to include the ability to purchase commercial rights for an otherwise Creative Commons NonCommercially licensed work. Under these proposals, the existing Commons Deed for a NonCommercially licensed work would contain a statement inviting a user who wished to make a use of the work greater than that permitted by the Creative Commons license, such as a commercial use, to activate a link to a site that would facilitate a commercial rights license. In this way, Creative Commons is actively working on enabling creators to secure remuneration for their works and thereby harness the benefits of both the Creative Commons licensing system and other rights management methods and thus, towards a system by which the Creative Commons' model and the APRA model could be mutually beneficial.

- The contention that Creative Commons is based on an open source software model and is, therefore by implication, ill-suited to music is inaccurate.

Whilst it is fair to say that the Creative Commons model drew its inspiration, in part, from the free and open source software licensing methods that preceded the establishment of Creative Commons, the implementation of Creative Commons has been different and specifically tailored to the world of content, such as music.

Creative Commons' licensing is similar to the free and open source software licensing model in that it consists of public licenses that are applied to copyrighted works. However, Creative Commons licenses differ remarkably in several important respects. Creative Commons gives creators a range of license term options by which to create a license that suits their preferences, which terms (Attribution, NonCommercial, NoDerivatives, Sharelike etc.) are specific to how content, such as music, is used and exploited. Creative Commons license terms are not focused on whether or not the "source code" (a term peculiar to the software world) is made available; this being a key issue for free and open source software public licenses. Additionally, the Creative Commons' licensing model includes both the human-readable interface and metadata to better enable people to identify and understand the Creative Commons license terms that apply. By simplifying the process by which people can find Creative Commons-licensed works, such as via the Yahoo! CC-customized search engine (discussed in greater detail in our earlier submission) or by the Google CC-customized search engine which was unveiled on November 3, 2005,<sup>1</sup> and by which people can understand what they can and cannot do with a particular piece

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<sup>1</sup> See the press release, 'Google Advanced Search Enables CC-Customized Searching', 04 November 2005 <<http://creativecommons.org/press-releases/entry/5692>>

of content, Creative Commons is seeking to enable those musicians who wish to collaborate across space and time to do so. However, the Creative Commons licensing model is not dependent on such collaboration. Creative Commons licensing is as equally available to a musician who creates their lyrics and music alone, as it is to those musicians, such as those on ccMixter (also discussed in greater detail in our earlier submission), who enjoy the process of sampling and recontextualising the works of others. As noted earlier, Creative Commons seeks to provide creators with more options—not to dictate a creative method.

- Contrary to APRA's assertion that Creative Commons licensing is not a means of "self administration," by virtue of giving creators the tools to select which rights they wish to license to the public and which rights they wish to reserve, Creative Commons licenses empower creators to administer the rights copyright gives them. In particular, Creative Commons' NonCommercial licenses reserve to the licensor the right to collect royalties for public performance and future commercial rights licensing projects. In this way, Creative Commons licensing offers a highly tangible vehicle for Australian musicians to utilize digital technologies to manage their copyright, directly and as they wish.

- APRA, in its Reply, states that:

"[t]he plain fact is that if the Creative Commons licence is for "non commercial" use, the vast majority of Creative Commons licensees will not require performing rights licenses—the concept of performance in public excludes for all practical purposes performances in a domestic context. Any other performances are commercial in character, and require an APRA licence. Accordingly, by simply excluding APRA rights from the license, the Creative Commons agreement could sit easily with the APRA membership."

This statement is confusing to the extent that many uses of music will be for noncommercial purposes yet communicated beyond the "domestic context". For example, if an Australian musician, who is a member of APRA, writes and records a song at home and gives a copy of it to a friend to play in their home there is no exercise of the public performance right because this is a domestic context. However if the musician who recorded this song wants to upload it to her website, then she is communicating it to the public, which is something that APRA (due to the assignment of the performance and communication rights) has the legal right to control. The song cannot be uploaded for sharing with other Internet users for noncommercial purposes (such as their personal enjoyment) from the musician's own website under a Creative Commons NonCommercial licence, even for the purpose of making them more well known, unless APRA gives permission; and even then it appears the musician would be limited to permission on the basis of

APRA's current inflexible license back or opt out models. Furthermore, under the current model downstream users of the song loaded to the website, for example, would not have the right to further communicate the song for noncommercial purposes without paying an APRA licence fee.

APRA's current model is focussed on collection for performance and communication to the public regardless of whether it is for a commercial or noncommercial purposes. Creative Commons seeks to allow musicians to distribute their work for noncommercial use for free yet under the current APRA model they do not have the right to do so without APRA's permission. To this end an exception to APRA's current membership arrangements needs to be created that will allow Australian musicians to flexibly licence their material directly to users under Creative Commons NonCommercial licences via websites or other digital networks, if they wish to do so.

The number of Australians that upload their content to websites and weblogs as a form of communication is continuously growing. This type of activity is also an important part of an Australian and global creative innovation system driven by the dynamic and serendipitous creativity enabled by the Internet. At the moment Australian musicians cannot easily participate in such activity.

In summary, Creative Commons licenses and tools seek to empower Australian musicians by allowing them to retain copyright and license their works in ways that matches their preference. By requiring an assignment of rights in present and future works, APRA's current membership model denies Australian musicians the opportunity to participate in the Creative Commons licensing schema and the accompanying opportunity to participate in a global trend of Internet-enabled creativity and interactivity.

While APRA is correct to say that this conflict exists not only in Australia but also in many countries in Europe, we note that it does not, most importantly, exist in the United States where collecting societies take only a non-exclusive license of rights. As is self-evident, the United States has a thriving music industry. Thus, it would be interesting to understand the reasons underlying APRA's comment in its Reply that "APRA must also retain the limited copyrights it acquires in order to effectively license and exploit those rights."

- The issue of the enforceability of a Creative Commons license is a complex one that would depend on the circumstances, just as it would in relation to any license of a copyrighted work.

A Creative Commons licensed work has not yet been the subject of any formal court proceedings. Any cases of infringement have so far been resolved by the creator seeking general assistance from more experienced members of the Creative Commons community on the various Creative Commons email discussion lists and then personally approaching the infringer. In each instance to date, the matter has been amicably resolved.

In general, however, it is worth noting that, under the terms of the Creative Commons license, a licensee's right to use the work terminates if they breach the license terms. Thus, a musician who applied a Creative Commons license to their music can use this as leverage in negotiating a satisfactory resolution of any improper use of their work and, to the extent the infringing use of their work is being hosted by a third party, notify that third party of the infringement, which will typically cause that third party to immediately remove the work.

Additionally, a CC-licensor can pursue normal enforcement procedures, such as through mediation or the volunteer lawyer advice nights at places such as the Arts Law Centre of Australia and/or a private attorney. To clarify any misunderstanding generated by comments made at the oral submission on 13 October 2005, Creative Commons International does not provide legal advice but its General Counsel will alert people to the options suggested above and explain how the licences work.

- Creative Commons notes that APRA indicates that, to date, 10 of its members had asked about Creative Commons. In view of the fact that the Australian Creative Commons licenses were only launched in January 2005, Creative Commons views this as a positive, initial indication of the attractiveness of Creative Commons licensing for APRA members.
- Finally, Creative Commons welcomes APRA's representation in its Reply that it would "likely waive the 6 month notice requirement" in the event that an APRA member sought to adopt Creative Commons licensing and urges the ACCC to consider whether this undertaking, together with other changes, can be introduced into APRA's arrangements to enable greater flexibility and options for Australian musicians in relation to how they license each individual piece of their music. Due to the current conflict between the APRA model and the Creative Commons licensing model, as explained in Creative Commons' original submission, musicians are effectively locked into one model or the other for all of their creative works and neither the musicians or users of Creative Commons licensed music can realise the benefits the Creative Commons licensing model offers.

Creative Commons looks forward to working with APRA in future to better assist Australian musicians and urges the ACCC to consider arrangements that will enable the co-existence of Creative Commons licensing and APRA's collective rights managements such that Australian musicians are able to take the benefits of both, at their choosing.

Yours Sincerely

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