APRA

Application for Authorisation

Reply by APRA to submissions by Cinema Operators and FreeTV to Draft Determination

13 October 2005

Revised on 11 November 2005

A Introduction

1 Although there are a number of collateral findings and assumptions made by the ACCC in the Draft Determination in respect of which APRA takes issue, APRA does not propose to make a detailed response to the Determination.

2 APRA has set out its position in extensive detail in previous written submissions, and does not consider that repetition of its submissions is now productive or appropriate.

3 This paper is confined to a reply by APRA to the submissions in response to the Draft Determination prepared by the Cinema Operators and Free TV Australia.

4 This document was first submitted to the ACCC on 12 October 2005, prior to the pre-decision conference on 13 October. The edits marked in revision mode represent the additions in response to further comments made by interested persons in the conference.

45 In addition to general comments made about the nature of the present APRA operations and competitive environment, both the Cinema Operators and Free TV make specific proposals as to additional conditions upon which any authorisation should be based.

56 These proposals can grouped in the following categories:

(a) Output arrangements;

(b) Domestic input arrangements;

(c) Overseas arrangements.

67 Each is addressed below.

B Output arrangements

78 Although the Cinema Operators embrace the need for the provisions of alternative output arrangements to the present blanket licence, they do not submit that authorisation be subject to express conditions relating to such modifications. It is interesting also to note that the Cinema Operators expressly advocate that a blanket licence be maintained as part of the APRA licensing arrangements: [9].

89 Free TV goes further than the Cinema Operators, and submits that "it is appropriate for the ACCC to impose suitable conditions of general application upon the form of licences granted by APRA to end users": [5.10].

~~9~~10 APRA takes very seriously the ACCC's encouragement of the generation of alternatives to the blanket licence, and proposes actively to explore possible arrangements with interested user groups. It proposes also to modify its present application before the Copyright Tribunal in relation to the licence fee for cinematic exhibition, for the purpose of seeking a determination as to the reasonable terms for a modified blanket licence scheme.

~~10~~11 However, APRA opposes the imposition of any conditions on authorisation in relation to modifications of the blanket licence.

~~11~~12 By way of summary, APRA submits that the submissions of Free TV are flawed in relation to:

(a) Failure to acknowledge the proper role of the Copyright Tribunal in the fixing of licence fees; and

(b) Its erroneous characterisation of the negotiating position previously adopted by APRA in relation to the introduction of modifications to existing output arrangements.

B1 Proper role of Copyright Tribunal

~~12~~13 Free TV's proposal that the ACCC impose conditions which force a modification of the blanket licence reflects a serious misunderstanding of the respective roles of the Copyright Tribunal and the ACCC.

~~13~~14 The Copyright Tribunal is vested with express statutory power to fix the fees and other terms of copyright licences operated by APRA. Although the ACCC would presumably possess the legal power to do so, any attempt by it to fix the terms of licence would constitute an inappropriate usurpation of the jurisdiction of the Copyright Tribunal.

~~14~~15 That the Copyright Tribunal has the responsibility for fixing licence fees was recognised by both the ACCC in the Draft Determination, and the Competition Tribunal in the 1999 APRA decision.

(a) In paragraph 7.23 of the Draft Determination, the ACCC noted that "It is not for the ACCC to determine the reasonableness of licence fees, or other licence terms and conditions. This is a matter for negotiation between the parties, or, failing that, determination by the Copyright Tribunal".

(b) In the 1999 APRA decision, the Competition Tribunal held that: "We agree with the parties that ACCC and this Tribunal has the power, if necessary, to regulate competition, but we consider the Copyright Tribunal is the body with primary responsibility to adjudicate an acceptable balance between the private and social interests" [292].

(c) In the same decision, the Competition Tribunal held further that: "The proposed MBL in Canada and the per program licences in the United States are blanket licences, and differ only from those offered by APRA in that they provide for adjustment of the fee in respect of programs broadcast by the licensee which do not contain licensed music. *It is plainly within the power of the Copyright Tribunal to approve or devise a similar (or different) scheme that allows for a fee adjustment to blanket licences in Australia.* The real and substantial difficulty that

besets the introduction of a blanket licence that allows for such a fee adjustment in Australia is not the monopoly power of APRA but the *complexity of working out how to provide for the calculation of the adjustment - and for the reporting of music use that underlies such a calculation - in a way that does not so increase transaction costs as to defeat the exercise*. The parties did not offer a solution to that difficulty in evidence before the Tribunal. We have noted the nature of the schemes devised in the United States and Canada for adjusting blanket licences' fees to reflect the amount of use of licensed music. There is no reason to believe that a scheme for adjusting blanket licences could not be devised for the Australian copyright environment. *That task is, however, one for the Copyright Tribunal, assisted with evidence and submissions directed to the task" [334]*

~~15~~16 Quite apart from the considerations of the appropriate division of jurisdiction between the Copyright Tribunal and the ACCC, any attempt by the ACCC to fix the terms of the output licence would involve significant and wasted costs. As to this:

(a) Modifications to the existing blanket licence scheme can not be conceived and imposed in the abstract. The imposition of modifications necessarily entails the prescription of price, and other terms relevant to the licence. As noted by the Tribunal in the passage extracted in paragraph 15(c) above, this in turn necessitates a very delicate balance between a range of private and social interests. The proper performance of that task would involve a detailed investigative process, including an examination of any increased transaction costs incurred in the operation of the licence scheme, which costs would be properly incorporated into the licence fee ;

(b) The costs so incurred would be substantially wasted. The prescription by the ACCC of conditions of licence as a condition of authorisation would not deprive the Copyright Tribunal of its express statutory jurisdiction to do exactly the same thing. The parties would be left with the unedifying prospect of a complex and costly investigative process being effectively re-conducted by another tribunal (by reference to different or at least additional criteria).

17 APRA respectfully submits that it would not be appropriate for the ACCC to make the authorisation subject to some vaguely expressed condition to the general effect that APRA make available "reasonable alternatives to the blanket licence". As to this:

(a) Although the ACCC obviously has power to make authorisations subject to conditions, Miller notes that it has not been "definitively determined" what are the consequences of a failure to comply with the conditions: *Miller's Annotated Trade Practices Act, [1.91.8]*;

(b) One obvious possibility is that a finding of non-compliance with a condition removes the immunity otherwise provided by the authorisation, and renders the authorised party liable to prosecution and damages under the Act;

(c) In light of the potentially serious consequences of non-compliance with conditions of authorisation, it is essential that any conditions be articulated with certainty and precision. In considering the analogous question of whether injunctive relief is appropriate under the *Trade Practices Act*, the courts will consider whether the injunction can be drafted "with that degree of precision which would enable it usefully to define the boundaries of an injunctive order": *ACCC v Berbatis Holdings Pty Ltd [2000] FCA 1893, per French J at [9];* the courts will be very cautious about any attempt to embody any "imprecise and evaluative" terms in an injunction: *ACCC v Berbatis Holdings Pty Ltd [2000] FCA 1893, per French J at [9].* This principle is important both as a matter of fairness to the parties the subject of orders, and also to relieve the courts from unduly burdensome tasks related to the supervision and enforcement of the orders. APRA respectfully submits that identical considerations apply to the drafting of conditions for authorisation;

(d) In light of the myriad of conflicting and contestable considerations relevant to the setting of appropriate fees for alternatives to the blanket licence, any general criterion such as "reasonable" would be intractably uncertain. That uncertainty would both unfairly expose APRA to possible prosecution (in the event that a court were ultimately to find that a scheme proposed by APRA were "unreasonable"); and potentially involve the ACCC and the Courts in extremely burdensome supervision. The ACCC would be transformed into the default regulator of licence schemes. In some overseas jurisdictions, the vesting of the competition regulator with such responsibilities may be the only regulatory option available. However, that result is clearly inappropriate in Australia in light of the existence and role of the Copyright Tribunal.

~~16~~18 The simple fact is that no party opposes the continued existence of the blanket licence. Authorisation is required and should be provided unconditionally. The specific terms of the licence should be properly left to negotiation or the Copyright Tribunal.

19 In the course of the pre-decision conference, a number of interested persons expressed scepticism as to the capacity of the Copyright Tribunal properly to fulfil its function. APRA submits that such remarks are inappropriate and entirely without foundation. As to this:

(a) APRA repeats the matters set out in paragraphs 43 to 48 of its submissions served on 19 November 2004 titled "Reply by APRA to submissions by other interested parties" ("**APRA Reply**");

(b) The efficacy of the Copyright Tribunal was exhaustively considered by Competition Tribunal in the 1999 APRA application, and nothing has changed since then to justify a reconsideration of the Competition Tribunal's findings. The Competition Tribunal held:

> "The Copyright Tribunal provides an effective constraint against APRA abusing monopoly power in dealing with major users of music" [311]

"In Australia the powers of the Copyright Tribunal are extensive, and extend to the consideration of licence schemes generally, not just to schemes involving the traditional form of blanket licences. So much was recognised by FACTS in its 1993 application to the Copyright Tribunal for an order specifying a complex scheme incorporating multiple categories of blanket and per program licences, based on new fee structures. In the determination of conditions and charges under such a licence scheme by the Copyright Tribunal it is difficult to see how APRA (or FACTS, for that matter) could exert any monopoly power over the result"

20 A number of parties in the pre-decision conference made specific complaint that the Copyright Tribunal was not sufficiently constrained by "competition principles" in its deliberations. As to this:

(a) The Copyright Tribunal has power to determine "reasonable" terms of licence schemes: sections 154, 157 Copyright Act;

(b) In making that determination, it is uncontestable that the Copyright Tribunal has jurisdiction to take account of competition principles. Questions of economic efficiency would inevitably be highly material to any final determination;

(c) It is equally uncontestable that the Copyright Tribunal has jurisdiction to take into account matters above and beyond questions of economic efficiency;

(d) The fact that the Copyright Tribunal has a mandate to take into account mattes unrelated to economic efficiency reflects the will of the parliament. That mandate should be respected, rather than questioned and subverted;

(e) It is preposterous to suggest that the Copyright Tribunal can not be trusted to properly discharge its legislative function. The President of the Tribunal is a judge of the Federal Court of Australia. The qualifications for the other members are stated in section 140 of the Copyright Act as follows:

"(a) he or she is or has been a Judge;

(b) he or she is enrolled as a legal practitioner of the High Court, of another federal court or of the Supreme Court of a State or Territory and has been so enrolled for not less than 5 years;

(c) he or she has had experience, for not less than 5 years, at a high level in industry, commerce, business, public administration, education or the practice of a profession;

(d) he or she has obtained a degree of a university, or an educational qualification of a similar standing, after studies in the field of law, economics or public administration; or

(e) he or she has, in the opinion of the Governor-General, special knowledge or skill relevant to the duties of a member"

21 It was also suggested by a number of speakers in the pre-decision conference that it was essential that ACCC prescribe a more prescriptive and constricting

framework within which the Copyright Tribunal should be authorised to set the terms of licence. The unspoken corollary of that suggestion is that the ACCC's draft determination does not adequately prescribe such a framework. In response, APRA submits that the draft determination does in fact establish an appropriate framework, by reason of the following matters:

(a) It authorises the framework which is essential to generate the undisputed public benefits associated with the operation of collecting societies;

(b) The input arrangements (as developed in section C7 below) are as flexible as is reasonably possible, without unduly undermining the framework;

(c) Within the framework, the Copyright Tribunal has a completely unfettered capacity to authorise alternative licence schemes (which prevent APRA from exercising whatever market power is vested in APRA within that framework);

22 An argument repeated in the pre-decision conference was that the present application lodged by APRA in the Copyright Tribunal in respect of the cinemas reflected the unbridled market power of APRA. With respect, that argument is absurd. APRA repeats the submission it made in the paragraph 33(b) of the Reply: namely, it is unable to understand how it can seriously be contended that the mere application to the Copyright Tribunal for a determination can be characterised as an "unconstrained expression of market power". Whatever market power is possessed by APRA, it counts for nothing in any hearing before the Copyright Tribunal.

B2 Erroneous characterisation of APRA's position

~~17~~23 Free TV submits that:

> "Free TV considers APRA's submission, referred to at paragraph 6.80 of the Draft Determination, that it has always been (and remains) willing to consider other licence proposals and has never indicated that it is not prepared to consider licensing on terms other than blanket licences, to be self serving. To Free TV's knowledge, APRA first volunteered this information in the context of its current authorisation application, and has never in the past indicated any willingness to consider alternative licensing models to the unmodified blanket licence" [5.2]

~~18~~24 In response, APRA submits that:

(a) Free TV has failed to disclose the existence of a scheme proposed by APRA to the commercial television stations. Following the 1999 decision of the Competition Tribunal, APRA filed in the Copyright Tribunal proceedings CT 2 of 1993, an Amended Reference (copy attached). The licence scheme for music broadcast on commercial free to air television is a blanket licence with alternative licence fee calculations (that is, a modified blanket licence) – one based on a percentage of revenue with no reference to music use, and the other a sliding scale of revenue percentage based on the percentage of APRA repertoire actually used. The Federation of Australian Commercial

Television Stations (**FACTS** – the predecessor to FreeTV) was a party to these proceedings. Subsequently, FACTS negotiated with APRA on behalf of its members the terms of a blanket licence for a lump sum industry wide fee for five years.

(b) APRA licensed, and has for many years licensed, commercial radio on terms that require payment of a differential percentage of revenue dependent on actual use of music in APRA's repertoire, as set out below:

Music Use Percentage	Percentage of Gross Earnings
80%+	3.50%
75-79.99%	3.00%
70 -74.99%	2.75%
65 - 69.99%	2.50%
60-64.99%	2.25%
55 - 59.99%	2.00%
50 - 54.99%	1.75%
45 - 49.99%	1.50%
40 - 44.99%	1.25%
30 - 39.99%	1.00%
10 - 29.99%	0.50%
0 - 9.99%	0.05% for each percentage point (or part thereof) of music proportion

A radio station can therefore significantly alter its APRA licence fees, by adjusting the amount of APRA controlled music broadcast.

(c) From time to time APRA has granted licences to public performance licensees the terms of which are adjusted to reflect the fact that not all of the music performed on particular occasions is controlled by APRA;

(d) Free TV has never approached APRA for the provision of a modified licence;

(e) APRA has never refused to enter negotiations with any party in relation to the introduction of a modified blanket licence.

C Domestic input arrangements

C1 Overview of parties' positions

~~19~~25 The Cinema Operators propose that any authorisation be subject to a number of conditions relating to the modification of the "input arrangements", being:

(a) Amending "opt-out" arrangements, to "allow members to opt out in respect of certain types of users within a particular category of works"; and

(b) Amending "licence back" arrangements, to "allow members to nominate the name of a particular user and a particular musical work when exercising the licence back right, rather than a whole category of users or rights"

~~20~~26 Free TV submit that "it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA's member opt out

and licence back provisions being modified so as to improve the practical utility and efficacy of the operation of such provisions." [4.10]

27 In the course of the pre-decision conference, numerous interested parties advocated modifications to the input arrangements, which allowed for opt out in relation to individual works.

~~21~~28 By way of summary, APRA submits that the flaws in the submissions of Cinema Operators and Free TV include the following:

(a) Failure to acknowledge that the determination of the appropriate structure for APRA's operations necessitates a balance between the competing goals of promoting competition, and the efficient operation of APRA as a collecting society;

(b) Failure to acknowledge the extent of detriment caused to the efficient operation of the APRA operations, by further modification of the input arrangements;

(c) Failure to acknowledge the capacity of the existing input arrangements to accommodate direct dealing;

(d) Exaggeration of the need for reform in order to facilitate direct dealing;

(e) Failure to interpret properly the reasoning of the Draft Determination; and

(f) Failure to articulate meaningful and workable proposals.

~~22~~29 Each is addressed below.

~~23~~30 In section C9 below, APRA outlines its present proposals in relation to the modification of the existing input arrangements.

C1 Need for balance

~~24~~31 The Cinema Operators acknowledge in passing that the ACCC recognises "public benefit stemming from APRA's arrangements": [3]

~~25~~32 However, the Cinema Operators fail to acknowledge that:

(a) the delivery of those benefits is significantly contingent on maintaining the integrity of the present APRA arrangements;

(b) modifications to the present structures calculated to promote direct dealing may prejudice the public benefits generated by APRA's arrangements;

(c) any proposal for modification can only properly be assessed by reference to a balance between the scope for increased competition, and the consequential prejudice to the public benefits associated with APRA's arrangements.

33 In relation to the critical need to weigh up the prejudice to the APRA system caused by the promotion of competition, it is worth repeating the following findings by the Competition Tribunal in the 1999 decision:

(a) "It cannot be taken for granted that a copyright owner's every preference can be accommodated. A parallel tension arises in regard to licensees and groups of licensees. Their commercial choices are

certainly limited by APRA's effective monopoly of the licensing of the performing right repertoire in Australia, compounded in their effect by the administrative simplifications adopted by APRA. However a variation in procedure that allows licensees wider commercial options may not be practicable without seriously detrimental consequence to the overall functioning of the administrative process" [128]

(b) "While it may be the case that the few Australian writers who write for film, TV and radio can deal directly with these users at transaction costs close to dealing through APRA, the question at issue is the impact that this relaxation of the input arrangements would have on the efficiency of the overall APRA system. This was an issue that was discussed at length in evidence but with nothing other than speculation offered as to which direction the costs and benefits would move." [300]

~~26~~34 The Cinema Operators fall into the trap of regarding the promotion of competition as the sole objective of regulatory supervision. "It is important to note (as the Tribunal pointed out in Media Council (No 2) at 48,418-9) that conduct which answers the statutory description of anti-competitive lessening of competition does not necessarily constitute anti-competitive detriment for the purpose of section 90. It is erroneous to equate anti-competitiveness with detriment. Anti-competitive behaviour may in certain circumstances be a benefit": *Re 7-Eleven Stores Pty Ltd (1994) ATPR 41-357, at 42,654.*

~~27~~35 The submissions of both the Cinema Operators and Free TV (and also the Draft Determination) also fail to acknowledge the implications of the fact that in key respects APRA is a natural monopoly. The Competition Tribunal found that APRA was a natural monopoly in the 1999 APRA decision, and then held:

"[292] Given the existence of a natural monopoly for the purpose of enforcing copyright in music composition, and given that it is not in society's interest to have more than one such collecting society, it is imperative that there is appropriate regulation to ensure competition in the provision of policing of copyright where possible and an acceptable balance between, in this case, the rights of writers and the rights of the rest of society.

[293] The existence of only one collecting society in virtually all member countries of CISAC, except in the unusually large United States market, appears to confirm that a collecting society is a natural monopoly in these circumstances. However, this does not necessarily mean that all aspects of the supply of performing rights are integral to the natural monopoly. Therefore, the Tribunal has considered the benefits and costs of changes to the APRA system as well as the benefits and costs of the existing system. It should also be pointed out that while a natural monopoly may be anti-competitive, such anti-competitive behaviour may not necessarily constitute a public detriment. Since average costs decline as output increases, society is best served by the single monopoly. The key issue is regulation of its operations to ensure that it does not take advantage of its monopoly position."

~~28~~36 It follows that regulatory attention should not be focussed exclusively on promotion of competition generated by other collecting societies (or otherwise). Focus should also be directed to ensuring that the natural monopoly is not exploited, and to ensuring the delivery of the public benefits associated with the arrangements.

C2 Failure to address detriment caused by modifying input arrangements

~~29~~37 In its Draft Determination, the ACCC observes that "it is difficult to assess whether further refinements to [the opt-out and licence-back arrangements] would increase their utility, without undermining the essential features of APRA's system of collective administration of performing rights, unless there is provision for discounts on existing opt out and license back provisions to be tested": [7.25]

~~30~~38 APRA strongly endorses the ACCC's concern to preserve the features of APRA's arrangements which are essential to deliver the associated public benefits.

~~31~~39 The Cinema Operators fail to identify (let alone properly analyse) the nature and extent of prejudice to the efficiencies of the APRA arrangements caused by further tampering with the input arrangements.

~~32~~40 Beyond the bald assertion that modifications can be made to the input arrangements "without impairing essential components of APRA's operations", Free TV also fails to consider the nature and extent of prejudice caused by significant modifications to the input arrangements.

~~33~~41 APRA deals in detail with these matters in paragraphs 85 to 144 of APRA's Submissions in Reply filed on 19 November 2004. It does not propose to repeat those submissions here.

42 As noted previously, a number of speakers at the pre-decision conference strongly advocated that a condition for authorisation be provision for opt-out of individual works. In addition to referring to its Reply submissions (identified in paragraph 41 above), APRA makes the following further submissions about individual opt-out:

(a) It is worth noting again the findings by the Competition Tribunal in relation to this issue:

> "In our opinion it is notable that notwithstanding pressures from major users for a more liberal modification of the exclusivity rules, the changes settled upon in the United Kingdom and Ireland were so restricted in their application. We think this reflects a recognition that the exclusivity rule is central to the operation of a collecting society. Unless the collecting society is able to obtain and retain the ability to licence a comprehensive repertoire of works, the many benefits which have maintained the viability of collecting societies will be lessened. Licensees will not simply obtain comprehensive protection against infringement, transaction costs for licensees will increase, administration costs of the society in respect of recording input information, monitoring use, and effecting distribution will increase significantly, and monitoring and enforcement of copyright by the society will become difficult. Those who attempt self-administration are

likely to face an imbalance of bargaining power when dealing with producers and large users of music, and to encounter considerable difficulty in policing their copyright, particularly in respect of overseas performances, and will be at risk of losing royalties. It is understandable that suggested modifications to the requirement of exclusive assignments have been approached with great caution, and we think this Tribunal should proceed in the same way" [350].

"We consider that the introduction of an opt-out system on a work-by-work basis which permitted a member either to withhold commissioned work, or to obtain a reassignment of the work already within APRA's repertoire, should not be required as a condition of authorisation. We think that the risk of harm to the essential structure of APRA, in the ways mentioned above, is too great" [353]

(b) Merely by way of example of one aspect of the enormous administrative difficulties created by individual opt-out, every time a work is withdrawn from the APRA repertoire, it will arguably be necessary for APRA to notify every single licensee who might otherwise have relied upon the APRA licence by way of authorisation for the performance. To ensure no subsequent breach of copyright, every notified licensee must thereafter either negotiate a direct licence with the copyright owner, or monitor the music content of its broadcasts to ensure that it does not permit the performance of the exempted work. The widespread use of individual opt-out would render unworkable the collective administration of performing rights;

(c) It is of course true that the extent of the consequential difficulties depends upon the particular context. However, APRA respectfully submits that many of the speakers at the pre-decision conference failed to acknowledge the wider ramifications of opt-out to the overall system of rights management. By way of example, in relation to Free TV, Ms Longstaff for Free TV noted that it was "not clear why" work by work could not be accommodated in TV (Minutes, 9.7); Mr Abrahams for Free TV "argued that if composers were able to opt out on a work by work basis, then....APRA's costs would not increase because a work commissioned directly by the television network would never enter APRA's repertoire in the first instance" (Minutes, 7.3). A simple answer to that position is that grave consequences flow from the vast numbers of downstream users of copyright in respect of works performed in television broadcasts. Every single public broadcast of television program constitutes an infringement of copyright in respect of the musical works included in the broadcast (unless the performance is licensed). If there has been a complete opt-out in respect of an individual work, then that public broadcast will give rise to an infringement of copyright in respect of that work (unless the person authorising the broadcast is licensed otherwise than through APRA). This is the fundamental problem with "holes in the repertoire". The arrangement of non-exclusive licence back avoids these difficulties.

(d) Mr Dawson for Channel 9 suggested that it was relatively easy for large users like television networks to identify holes in the APRA repertoire

by utlising "APRA's website" which he said had a "search function which allows music users to ascertain whether a particular work is contained within the repertoire" (Minutes, 10.8). In response, APRA submits that:

- The APRA website does contains a facility known as "Works Search". The facility allows any member of the public to search APRA's database for information relating to works, by title. The facility was originally designed to assist broadcast users with completion of cue sheets and broadcast logs.
- Even for "large" users like television networks, it does not provide an efficient method of determining whether a work is within the repertoire. Merely to look up every work embedded in television programs would be a very significant undertaking. Further, the website is not a complete list of all works in APRA's repertoire. The disclaimer attached to the works search facility expressly states: "The results of your search will not include jingles, background music for films and television productions, and non-copyright (public domain) works. Furthermore, if the work you searched for is not listed it does not necessarily mean that the work is not within APRA's repertoire. Through APRA's arrangements with affiliated overseas music copyright collecting societies, APRA's repertoire extends to musical works written by their members. Some of those overseas works, as well as unregistered local works, will not appear in your search results"
- Furthermore, Mr Dawson himself acknowledged that the situation would be different for users like "cafes". Needless to say, it would be inconceivable that most users have the capacity to verify the licence status of musical works before they cause the performance of them. And therein lies the problem. In relation to Free TV and commercial radio there are a plethora of downstream users of musical works embedded in radio and television broadcasts. If APRA can not offer those downstream users a licence in respect of those works, either the public broadcast of radio and television would be prevented, or copyright infringement would be rampant.

43 Some speakers at the pre-decision conference suggested that non-exclusive input arrangements operated satisfactorily in the US and other jurisdictions, and should therefore be capable of application in Australia. As to this:

(a) By reason of the licence-back arrangements in Australia, it is of course possible for the copyright owners to cause APRA to be vested only with non-exclusive rights;

(b) It is true that a fundamental difference between the regimes in Australia and the United States is that APRA is vested with ownership of the copyright (subject to licence-back), whereas United States collecting societies receive only a non-exclusive licence. There is an important reason why the American regime is inappropriate in the Australian regulatory environment:

(i) Under Australian legislation, the owner of the copyright in a work must be a party to proceedings for infringement. A non exclusive licensee has no standing to commence proceedings for infringement of copyright, and therefore requires the consent of the copyright owner (s115). The necessity to procure the consent of copyright owners in enforcement proceedings would create a very significant restriction on the efficient enforcement of copyright: see APRA Reply, para 124. .

(ii) No similar difficulty applies in the United States. In the US, for many years it was a prerequisite to copyright protection that works were registered with the Register of Copyrights. This is contrary to the provisions of the Berne Convention, and when the US acceded to Berne it removed registration as a prerequisite for protection. However, it remains a requirement that works must be registered if statutory damages for infringement are to be obtained, and accordingly the vast majority of US works are registered with the US Copyright Office. Registration is prima facie evidence of copyright ownership;

(c) In Canada, there is no provision for composers to take their works out of the repertoire of collecting societies, on an exclusive or non-exclusive basis;

(d) In Europe, there is no provision for the opt-out of individual works. The opt-out provisions are typically similar to the category-based opt-out regime presently used by APRA. (Indeed, the APRA scheme was based on the model approved by the European competition authorities for the German society GEMA).

C3 Failure to acknowledge capacity of the existing input arrangements to accommodate direct dealing

3444 The Cinema Operators and Free TV enthusiastically embrace statements in the Draft Determination which refer to the general extent to which "strict conditions" of the opt-out and licence-back frustrate direct dealing.

3545 However, the ACCC did not express an unqualified conclusion that the input arrangements of themselves precluded direct dealing in all cases. The ACCC clearly contemplated that there would be contexts in which direct dealing would not be frustrated by the present input arrangements. The consistency of the present input arrangements with "direct dealing" is undeniable, in light of the extensive utilisation of opt out procedures in relation to certain categories of works, such as "music on hold" (which is an area where total revenue was substantial - $1.6 million in 2003/4).

Cinematic exhibition

3646 The Cinema Operators fail to acknowledge that public performance through cinematic exhibition is another context in which the "strict conditions" of opt-out and licence-back do not of themselves frustrate direct dealing.

3747 In relation to "licence-back":

(a) The licence-back conditions predominantly relate to the advance notification of various details relating to the context in which particular

works are to be performed. (The detailed conditions are summarised in paragraph 77 of APRA's Submissions in Reply);

(b) The specification of such details may be difficult for contexts in which there is a large and unpredictable volume of effectively spontaneous performance of musical works;

(c) However, there would appear to be no insurmountable difficulties in relation to the performance of works in cinematic exhibition. In their Further Submissions dated 22 March 2005, the Cinema Operators responded to a submission by APRA film distributors and cinema operators "may not have sufficient notice of the repertoire of musical compositions in films to be able to negotiate a licence for the performing rights before the film's release". They submitted that: "...the Cinema Operators are confident that Australian distributors would be able to obtain cue sheets during production, which for both Australian and foreign produced films usually concludes several months before the film is released in Australia" [19]. As a general matter, the content of embedded works, and the location and timing of cinematic exhibition appear to be relatively predictable.

48 (It is of course true that licence-back does not permit particular cinema operators to acquire exclusive rights in relation to any particular musical works embedded in films. However, it is difficult to contemplate what commercial purpose cinema operators may wish to secure through exclusivity. Whether intended or not, the widespread practice of securing exclusive rights to musical works embedded in films has a great capacity to constrain competition in the cinema market. The exclusive possession of a copyright licence to perform works embedded in a particular film empowers a cinema operator to exclude competition entirely in respect of the screening of that film – no film can be lawfully screened without a licence to perform the embedded music. It would likely be the independent cinema operators who are most vulnerable to such exclusion. APRA respectfully submits that the ACCC should be wary of any proposal which has the significant potential to prejudice competition in another market.

~~38~~49 In relation to "opt-out" in connection with cinematic exhibition:

(a) There are presently no significant restrictions on utilisation of the procedures, except for the requirement that the re-assignment of copyright be in relation to a *category* of performing right. In the case of cinemas, that category is "the performance in public by the exhibition of cinematographic film";

(b) The critical importance of "category-based" opt-out was set out in paragraph 86(a) of APRA's Submissions in Reply;

(c) It is of course a consequence of "category-based" opt out that "the member must forgo all revenue that would otherwise be received from all APRA licence holders in respect of the entire category of use": Cinema Operators, [11(b)]. This is logical, as the purpose of the opt out is for the APRA member to enter into a direct licence arrangement (or assignment) with a third party, at a price to be negotiated. It would be

wrong for the member to expect also to receive money from APRA for the same use;

(d) In any event, the extent to which that fact of itself frustrates direct dealing in relation to cinema exhibition should not be exaggerated;

(e) Cinema exhibition is but one of 10 categories of performance. Licence fees collected from the exhibition of film is a relatively minor source of APRA revenue (and composer income): in 2003/4, the total APRA revenue was $99,499,000, of which $2,666,175 (or 2.7%) was generated from cinema;

(f) Because the number of locally produced films (and the body of musical works within them) is relatively limited, it is feasible for rights owners to seek to undertake direct dealing with their full body of their work in relation to cinematic exhibition. In 2003/4, of the 347 films screened in Australia, only 32 were Australian films (in which 1237 local works were performed).

Commercial TV

~~39~~50 Similar considerations apply in relation to commercial TV, at least in relation to licence-back.

~~40~~51 The licence back provisions were in fact drafted in collaboration with, and consented to by, FACTS before the discharge of the 1999 Competition Tribunal proceedings. FACTS subsequently negotiated a licensing arrangement with APRA for a lump sum blanket licence, in spite of an offer by APRA to charge less where less APRA music was used.

~~41~~52 To APRA's knowledge, no user in the field of commercial television has ever sought to deal directly with APRA's members (through the utilisation of the opt-out or licence-back provisions).

~~42~~53 In all the circumstances, APRA submits that there is simply no basis for the submission that the licence back arrangements are "unworkable" in relation to commercial television.

General

~~43~~54 As noted in its Submissions in Reply, APRA submits that the present input procedures provide considerable scope for direct dealing. For example, in relation to public performance through cinematic exhibition:

(a) any APRA member with a significant body of work in film may well elect to "opt out" under Article 17(b)(v) in relation to film performance, leaving him or her (or their publisher) to negotiate terms with individual cinema operators. Such a copyright owner may be able to negotiate exclusivity with a cinema operator, so that films containing works by that composer could not be screened in competing cinemas (something APRA cannot do);

(b) alternatively, a composer or publisher who had relevantly opted out of APRA could negotiate with the maker of a film at the time of negotiating the synchronisation rights, so that the public performance rights were "bundled" with the film. The maker of the film could then

enter into negotiations with cinema operators for the public performance rights in films;

(c) a composer or publisher could take a non exclusive license back in order to grant a non exclusive licence to a particular cinema operator or operators in respect of all of that composer's or publisher's works in a film or films. There is nothing in the present licence back provisions, certainly not as they operate in practice, that would prevent such an arrangement.

~~44~~55 Nevertheless, APRA is prepared to further liberalise the conditions for licence back, in the manner described in section C7 below.

C4 Exaggeration of the need for reform of input arrangements

~~45~~56 Free TV effectively submits that the Draft Determination generates a Catch 22 dilemma in relation to the modification of input arrangements. The argument runs as follows: [4.5]

(a) The ACCC proposes that modifications to the input arrangements be made only if modifications to the blanket licence are insufficient to generate the desired competitive effect;

(b) However, no modifications to the blanket licence will be effected until there are modifications to the input arrangements. This is because users have no incentive to procure a modified blanket licence, unless the input arrangements are modified (in a way that facilitates direct dealing).

~~46~~57 This is the reverse of the Cinema Operators' argument, which is that no use is made of the licence back/opt out provisions because there is no modified blanket licence available.

~~47~~58 Free TV submits that this Catch 22 dilemma can only be resolved by the ACCC now imposing the modifications to the input arrangements.

~~48~~59 There are two flaws in the argument:

~~49~~60 First, the argument falsely assumes that there is no present scope for direct dealing under the existing input arrangements. APRA refers to the scope under existing arrangements (see C3 above), and the further liberalised conditions for licence back described in C7 below. It is difficult to conceive that any user would be deterred from pressing for the introduction of modified blanket licences, by reason of the concern that existing input arrangements will forever preclude direct dealing with composers and rights owners. If demand by users for direct dealing is generated by modifications to the blanket licence, the input arrangements will permit that dealing to occur.

~~50~~61 Secondly, the argument falsely assumes that the introduction of modifications to the blanket licences will only be driven by "users". This is not the case. APRA is presently formulating an amended application to the Copyright Tribunal which makes provision for the implementation modified blanket licences for cinemas. It has done so in the past for commercial television (rejected by that industry) and for commercial radio (the present scheme).

C5 Failure properly to construe the Draft Determination

~~51~~62 The Cinema Operators submit that "the ACCC has acknowledged the difficulties with which users are faced when attempting to exercise their rights under opt out and licence back mechanisms. However, in the Draft Determination the ACCC does not provide any indication of how these mechanisms can be amended to make them more flexible and attractive to users": [33(b)]

~~52~~63 The Cinema Operators fail to recognise the subtlety of the analysis and conclusions underpinning the Draft Determination.

~~53~~64 As noted above, the ACCC observed that "it is difficult to assess whether further refinements to [the opt-out and licence-back arrangements] would increase their utility, without undermining the essential features of APRA's system of collective administration of performing rights, unless there is provision for discounts on existing opt out and license back provisions to be tested": [7.25]

~~54~~65 That statement neatly encapsulates:

(a) the recognition that the existing input arrangements hinder competitive pressures, but also facilitate public benefit;

(b) the necessity to strike a balance between promoting competition, and protecting the public benefits associated with the APRA arrangements;

(c) the difficulties in striking that appropriate balance, by reason of the inherent uncertainties associated with modifications to the existing arrangements;

(d) the recognition that there is a significant possibility that modifications to the output arrangements (without immediate modifications to the input arrangements) have the potential to generate adequate levels of competitive pressure for the operations of APRA.

~~55~~66 The ACCC of course made findings that input arrangements hinder competition. However, the ACCC's election not to make authorisation conditional upon modifications to the input arrangements does not constitute a failure to follow those findings through to their logical and inevitable regulatory conclusion.

~~56~~67 Rather, it reflects a carefully considered conclusion that the maintenance of the status quo with respect to input arrangements is appropriate, in light of the tensions, uncertainties, and possibilities referred to in paragraph ~~65~~54 above.

~~57~~68 The appropriateness of the adoption of a "wait and see" approach is enhanced by the fact that there is no basis for inferring that APRA's conduct is presently characterised by abuse of its monopoly power, or monopolist slackness.

~~58~~69 As to this matter, it is worth repeating some of the observations made by the Competition Tribunal in the 1999 decision:

(a) "As regards the extent of "slackness" or inefficiency in APRA's operations as the result of its monopoly status, the economists agreed that this is always possible with such cooperative forms of management as a collecting society. However, no evidence was offered to substantiate any claims of such inefficiency. The Tribunal notes from

other evidence that APRA compares very well with overseas collecting societies in terms of the proportion of revenues going to administration. Further, the evidence was that there is pressure on APRA to perform well in this regard from other collecting societies and from its own members" [306].

(b) "We further note that the evidence does not support any claim that APRA fees are high in comparison with other countries. One example of evidence in this respect suffices here. Tabulations were exhibited of the percentages of cinema gross revenue payable as blanket licence fees for the performing right in numerous other countries. None is as low as the 0.33 per cent payable in Australia; all are significantly higher; and in several European countries, the rate exceeds 1 per cent. It appears that, if the blanket licence is a device for predatory copyright administration, then APRA is behindhand in its exploitation" [207].

(c) "APRA is far from the largest collecting society in the world. Nevertheless, APRA's costs of administration appear to compare very well with the costs incurred by other major collecting societies. In its report on "Performing Rights" in February 1996 the Monopolies and Mergers Commission (UK) appended at Appendix 97 a summary of administrative costs of many collecting societies (the summary related to 1993) APRA's total administrative costs in relation to total revenue were the lowest by nearly two percentage points. In a review of APRA's costs and revenue efficiency ratios conducted by KPMG in November 1995, the authors concluded that "APRA's expenses to revenue ratio is 49.3 per cent below the average expense to revenue ratio of other collecting societies in the developed world" [176].

(d) "The manner in which the performing right is administered in Australia, as described in the preceding pages, might be considered unexceptionable and even praiseworthy. APRA does the job that it was set up to do, of administering the performing right of all Australian writers of music that wish to join, and of distributing collected royalties to them. That task is given legitimacy by the terms of the Copyright Act 1968 and of the Berne Convention, which are directed to ensuring that the interests of the creators of literary and musical material are duly protected, and that their work is not pirated or otherwise used without due reward to the writer. Despite the scale, complexity and international reach of the task, APRA appears to do its job comprehensively, systematically and with a pleasing efficiency. It is possible to cavil at certain details of procedure, but it is inevitable that the administration of very large numbers of performances require that some simplifying assumptions be adopted" [183].

~~59~~70 There has been no material change in those circumstances since the time of that decision. When APRA provided the Cinema Operators with comparative overseas rates for the relevant licence scheme in January 2004 in the course of the present Copyright Tribunal proceedings, it noted that rates in Europe are around 1% (in the majority of the European territories) – 3% (in the Netherlands) of gross box office. APRA's present reference to the Copyright Tribunal seeks a rate of 0.85% of gross box office.

C6 Failure to articulate meaningful and workable proposals.

~~607~~1 Free TV fails to identify any concrete proposal for the nature of modifications that should be made to input arrangements

~~617~~2 The Cinema Operators propose that:

(a) amending "opt-out" arrangements to "allow members to opt out in respect of certain types of users within a particular category of works"..

(b) amending "licence back" arrangements to "allow members to nominate the name of a particular user and a particular musical work when exercising the licence back right, rather than a whole category of users or rights".

Opt out

~~627~~3 As noted above, the Cinema Operators propose amending "opt-out" arrangements to "allow members to opt out in respect of certain types of users within a particular category of works".

~~637~~4 There are a number of problems with this proposal.

~~647~~5 First, it is unclear what is meant by "certain types of users", and what is intended. We assume for the purpose of this analysis that what is sought is a right to opt-out for the purpose of assigning to the end user the right to use particular music.

~~657~~6 Secondly, on APRA's preliminary consideration of this matter, the proposal is arguably not legally coherent. As to this:

(a) "Opt out" involves the re-assignment of copyright to the member. Assignment is a process by which ownership is transferred;

(b) Dealings with copyright are very flexible and assignment may clearly be limited by reference to class of act, geographical area, and time: see ss30, and 196 of the Copyright Act 1968);

(c) However, it is difficult to conceive how assignment could be limited by reference to the identity of "end users". This is because the rights transferred appear to lack two key indicia of "ownership";

(d) The first such indicia is the capacity to *transfer* ownership. That capacity logically can not properly exist, if the rights are held by the end-user and limited by reference to the identity of that user;

(e) The second such indicia is exclusivity of rights. If the end user holds rights "limited by reference to the identity of end users", that end user does not hold rights which are exclusive (by reference to class of acts, geographical area, time, or any other criterion).

~~667~~7 Secondly, even if the proposal were legally permissible, the utlility of the proposal is dubious in the context of cinematic exhibition.

~~677~~8 The conditions for "opt-out" were summarised in paragraph 76 of APRA's Reply Submissions. They presently facilitate "opt-out" by reference to selected "categories" of use (one of which is performance through cinematic exhibition).

~~68~~79 Therefore, the only additional modification apparently proposed is that it be permissible to narrow further the opt out, by reference to "certain types of users" within a selected "category".

~~69~~80 It is difficult to understand what is the intended purpose and utility of the proposed further narrowing of the scope of the opt-out. If opt-out is to operate at all in relation to cinematic exhibition, it would presumably only be feasible if the negotiations were between the rights owners (on the one hand), and some representative on behalf of all Cinema Operators (either a film producer, distributor, or peak body for cinemas). In those circumstances, it is difficult to see why the present "category opt-out" would not be adequate, and why there is a practical utility in narrowing the scope of opt-out by reference to "certain types of users".

~~70~~81 Thirdly, even if it could be implemented, the proposal would significantly increase transaction costs for APRA. As to this

(a) For APRA to conduct its business, it is necessary for it to know what it is entitled to license. This is required for contractual certainty, but also because the Copyright Act prohibits the making of unlawful threats (s202) which would include a threat to enforce a copyright that was not in fact owned by APRA.

(b) APRA therefore must maintain a database of members and works – this database is maintained on an international basis in relation to the world's repertoire of works, as has been detailed by APRA in submissions;

(c) If members could remove works for a particular user this would result in a significant increase in transaction costs for APRA, which would be required to maintain records, and to license works for users not the object of the opt out, even where such documentation and licensing would be inefficient.

Licence back

~~71~~82 The Cinema Operators propose amending "licence back" arrangements to "allow members to nominate the name of a particular user and a particular musical work when exercising the licence back right, rather than a whole category of users or rights".

~~72~~83 This submission reflects a profound misunderstanding of the present licence-back arrangements (described in paragraph 77 of APRA's Reply Submissions).

~~73~~84 What the Cinema Operators propose is presently possible under the existing arrangements. Licence back is already available for deals with individual users, and in respect of individual works.

C7 APRA's proposed modification to input arrangements

~~74~~85 APRA remains willing to discuss any modifications to the licence back conditions, which can be accommodated without unduly frustrating the underlying purpose of those conditions.

~~75~~86 The underlying purpose of the conditions is to ensure that APRA knows in advance whether a particular user is licensed. This is of critical importance because:

(a) APRA undertakes enforcement action in relation to users which APRA understands not be licensed;

(b) The Copyright Act prohibits the making of unlawful threats (s202). That prohibition would extend to threats to enforce a copyright that was not in fact owned by APRA, or threats against persons who were licensed otherwise than by APRA;

(c) If APRA has not licensed a user, and APRA is not aware that the user has otherwise been licensed by a member (after having taken a licence back), then APRA might commence enforcement action without reasonable cause. This would lead to possible exposure under section 202, and also wasted costs.

~~76~~87 Each of the conditions for the operation of licence-back were introduced to ensure that APRA was properly notified in advance of any licence provided by members to end-users.

~~77~~88 APRA does not consider that the existing conditions have caused practical difficulties in the facilitation of direct dealing. However, In light of the concern expressed by the ACCC that direct dealing may be unduly restricted by the present conditions of licence-back, APRA has reviewed the conditions imposed under its Constitution with a view to identifying what conditions may be further liberalised without undue prejudice to the underlying purpose of the conditions.

~~78~~89 In light of that review, APRA is able to indicate that it will modify the formal conditions of licence-back in the following respects.

Timing of notice

~~79~~90 Presently, the Articles provide that 2 months notice must be given.

~~80~~91 APRA will now formally require only 1 month's notice.

Identity of persons

~~81~~92 Presently, the Articles provide that the member must give notice of the "identity of person to whom the member intends to grant a sub-licence".

~~82~~93 APRA will now formally require specification only of such details as are necessary reasonably to identify whether a particular user has been granted a licence.

~~83~~94 This will make it clear that there may not be any need to specify the precise names of users, and that it will be sufficient to identify users by reference to a class of persons. For example, it may be sufficient for the notice to specify "all commercial radio stations in NSW".

Date

~~84~~95 Presently, the articles provide that the notice must specify the "date or dates on which the performance under the proposed sub-licence is to take place".

~~85~~96 APRA will now formally require specification only of date or dates of the performances, or the period of the sub licence, as appropriate for the circumstances of the case.

~~86~~97 This will make it clear that precise dates of performance may not be necessary.

Geographical area

~~87~~98 Presently, the articles provide that the notice must specify "Geographic location of the performance, and the venue of the performance"

~~88~~99 APRA will now formally require specification only of such details as are necessary reasonably to identify whether the licence extends to a particular area and venue.

~~89~~100 This will make it clear that there may be no need to specify the precise areas and venues, and that it may be sufficient to identify by reference to classes of venue or broad areas.

D Overseas arrangements

C1 Overview

~~90~~101 The Cinema Operators propose that any authorisation be subject to a number of conditions relating to the modification of the "input arrangements", one of which was requiring that arrangements with overseas societies be non-exclusive".

~~91~~102 Free TV submit that APRA's exclusive overseas arrangements inhibit competition, although it concedes that where APRA's rights are non-exclusive (in respect of the US repertoire) it appears the US societies choose not to exercise their rights to license in Australia [at 6.5]. Free TV's submission is unclear on this issue, but APRA presumes the intention is to advocate non-exclusive international arrangements.

~~92~~103 By way of summary, APRA submits that the proposal to make arrangements with overseas collecting societies "non-exclusive" would:

(a) Be gravely prejudicial to the cost effective enforcement of copyright in foreign works;

(b) Have no significant practical benefit for local users.

Prospects of competition from foreign collecting societies

~~93~~104 APRA agrees that it appears unlikely that foreign collecting societies will commence licensing in this market. This is because of the barriers to entry to the market. Although those barriers include the exclusivity of restricted access to APRA's membership, other barriers to entry are unrelated to the nature of APRA's input arrangements. They include:

(a) The relative efficiency of APRA's operations generated by APRA's economies of scale; and

(b) The fact that the society is unlikely to be able to offer repertoire sourecd otherwise than from its home territory. This is because the scheme of reciprocal arrangements between national collecting societies confers

rights on societies which are limited in territorial scope to the country in which the societies are situated.

~~94~~105 This fact is relevant for assessing the practical implications of any modifications to the present arrangements in relation to overseas works.

Enforcement of copyright in foreign works

~~95~~106 Limiting APRA's rights to a non-exclusive licence would be counter productive in the extreme to APRA's ability to enforce copyright

~~96~~107 The Copyright Act provides that only a copyright owner or exclusive licensee may bring proceedings for infringement of copyright (ss115(1), 119). As a non exclusive licensee of the foreign repertoire (albeit one that effectively controlled the relevant rights in the market), APRA would not be able to commence proceedings for infringement of copyright. That action would have to be taken by the copyright owner. In the majority of cases this would involve a party located overseas, with all of the attendant costs, including security for costs applications, and delays. It would simply not be realistic for APRA to join as a party to infringement proceedings writers of overseas catalogue. That the writers would certainly require independent advice is merely the starting point for litigation costs of hugely inefficient proportions.

~~97~~108 It is for this reason that APRA does not now rely on works from the US repertoire in its infringement proceedings, although when required to do so it is able to demonstrate – at great cost - the validity of its non exclusive licence and the absence of any prior licence.

~~98~~109 The almost inevitable end result of receiving rights to foreign works on a non-exclusive basis would be that APRA would take no enforcement action in relation to infringement of the copyright of foreign works. This would lead inevitably to an increase in the infringement of copyright.

Practicality of "direct dealing" in relation to foreign repertoire

~~99~~110 If APRA's rights in the foreign repertoire were non exclusive, and users were therefore able to procure a licence for the foreign repertoire from overseas, the practical question remains: what practical benefit is there to users?

~~100~~111 As noted above, it would be very unlikely that any foreign collecting society would establish itself in Australia in competition with APRA. Consequently, any dealings by local users in respect of foreign works would have to be with overseas entities.

~~101~~112 The question of which entity (if any) would be able and willing to negotiate with Australian users in relation to a direct licence for the performance of foreign works in Australia would be determined by the legal structures and commercial practices of foreign jurisdictions.

~~102~~113 However, it is little shy of fanciful to suggest that foreign collecting societies or composers would be interested in engaging in substantial direct dealings with users in relation to a market as relatively small and insignificant as Australia. The regime of reciprocal arrangements between international collecting societies was established for the very purpose of avoiding this type of transaction.

~~103~~114 It seems similarly fanciful to suggest that local users would seriously contemplate seeking to engage in negotiations with a range of foreign collecting societies and composers. It should be noted that there is no basis for believing that any single foreign collecting society would be able to provide a licence in Australia for the world repertoire of music. It is the legal and commercial reality (which the ACCC can not change) that the international reciprocal arrangements between collecting societies do not provide for world-wide licences. As noted above, the licences typically received by each collecting society are limited to the territory of the jurisdiction in which the collecting society operates. Therefore, if a user wished to substitute directly sourced licences for the foreign repertoire covered by APRA's blanket licence, it would need to procure a massive number of separate licences (from entities unlikely to be willing to negotiate).

~~104~~115 APRA further notes that its present opt out mechanism was adopted from the model approved by the European competition authorities for the German society GEMA, and that most European societies now have similar provisions. Thus, if a member of an overseas society "opts out" of that society for a particular use, the relevant works are not in the APRA repertoire, and Australian users are free to deal directly with those copyright owners. In other words, there is a capacity to engage in direct dealing with foreign copyright owners.

116 Further, because the American collecting societies do not have exclusive rights in relation to American musical works, it is already possible for music users in Australia to negotiate directly with the rights-holders in the US.

E Creative Commons

117 By way of general response to the Creative Commons submissions, APRA submits that:

(a) The significance of the Creative Commons scheme is relatively limited in the context of APRA's application;

(b) There appear to be intractable inconsistencies between the licensing regimes managed by each of APRA and Creative Commons, on the present structure of Creative Commons;

(c) There is nonetheless significant scope for compatible operation of the Creative Commons scheme with the regime of the draft authorisation.

118 Each of these is addressed below.

E1 Limited significance of the Creative Commons scheme

119 In its written submission, Creative Commons ("**CC**") states that there has been counted 53 million link-backs to a CC: page 3.1. It is not exactly clear what constitutes a "link-back". In any event, there is no basis for the inference that the recorded activity relates somehow to the licensing of music.

120 The CC system also relates to copyright material other than music, including text and digital images. The figures provided by CC give no indication of the level of music licensing.

121 On the basis of APRA's dealings with its members, CC is of very limited significance to the licensing of rights to music. The CC website contains a

large warning notice that APRA members should contact APRA before licensing through CC. However, only 10 APRA members have made inquiries with APRA regarding CC. Notwithstanding the undisputed nobility of the CC ideal of the free sharing of ideas and works, APRA believes that its members are typically not straining to find more ways to distribute their work free of charge. Rather, APRA's members are focussed on securing a commercial return from the use of their works. As Mr Cottle stated in the pre-decision conference: "one thing the world was not short on was unremunerated online use of music".

122 The scope for CC licensing to expand is also critically constrained by the fact that the terms of the CC licence would appear to be contrary to the terms of most publishing agreements throughout the world.

123 Further, it is to be remembered that CC comes out of the open source software movement, which is focussed on the free licensing of copyright. Although public benefits associated with its operation may theoretically weigh in the "public benefit" balance in an authorisation application under the *Trade Practices Act*, CC licensing falls outside the realm of economic activity which is the primary focus of regulation under the Act.

E2 Intractable inconsistency

124 In its written submission, CC states that "the Creative Commons licensing model requires the musician or their authorised representative to retain all rights to their work, in order to effectively license and exploit those works": page 7.3.

125 To the extent that such a requirement necessitates the musician owning the copyright in his or her works, the requirement necessarily entails an "opt-out" of the work from the APRA repertoire.

126 The opt-out of individual works creates the problem of "holes in the repertoire", which is addressed in paragraphs 41 to 42 above.

127 It is fundamentally inconsistent with the continued efficient operation of APRA as a collecting society.

128 Another fundamental problem as to the compatibility of CC with the APRA scheme is that the operation of CC appears to be based on a dichotomy between "commercial" and "non-commercial" use. The term is not defined in the Copyright Act. The term is not compatible with licence-back and opt-out categories in the APRA regime. The terms would appear to be fundamentally unsuitable as a foundation for licensing and regulation in view of the inherent uncertainty associated with it.

E3 Scope for compatibility

129 Subject to participation in CC not being contingent on the "opt out" of works from the APRA repertoire, there would appear to be significant scope for the operation of "non commercial" licensing through CC within the framework established in the Draft Determination.

130 First, to the extent that the licensed "non commercial" use does not involve "performance in public", there is no need for any licence from APRA to use the work.

131 Secondly, to the extent that a composer wishes to license works on CC in a manner which might involve "performance in the public", it is not clear why the licence-back regime (in the stream-lined form described in section C7 above) would not be adequate for the purpose.