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**AUSTRALASIAN PERFORMING RIGHT
ASSOCIATION
APPLICATIONS FOR AUTHORISATION**

**AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION
DRAFT DETERMINATION**

**ADDITIONAL SUBMISSION
BY
FREE TV AUSTRALIA LIMITED**

18 November 2005

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1 SUMMARY OF SUBMISSION

1.1 Free TV Australia Limited (**Free TV**) makes the additional written submissions set out below in respect of the following matters:

- (1) Modification of the existing member opt-out provisions in the Articles of Association of the Australasian Performing Right Association (**APRA**);
- (2) Modification of the existing member licence-back provisions in APRA's Articles of Association; and
- (3) The offering of modified blanket licences by APRA to broadcasters.

Member opt-out

1.2 Free TV submits that authorisation of APRA's arrangements by the Australian Competition and Consumer Commission (**ACCC**) should be conditional upon modification of Articles 17(b) and (c) of APRA's Articles of Association, so that a member may require APRA to assign to the member (or the member may reserve on admission) the Performing Right (as defined in the Articles) in respect of a particular work or works, in addition to the current category-based opt-out right in respect of all of a member's works.

Member licence-back

1.3 In reference to APRA's proposal for the liberalisation of conditions of licence-back of works to APRA members, described in section C7 of the Reply by APRA to submissions by Cinema Operators and Free TV to the Draft Determination (**APRA Reply**), Free TV does not consider that proposal to be sufficient, for the reasons set out at paragraph 3.18 below.

1.4 Free TV submits that authorisation of APRA's arrangements by the ACCC should be conditional upon modification of Article 17(h) of APRA's Articles of Association, so that the non-exclusive licence-back of a member's work or works for the purposes of television broadcast (as defined in that Article) is conditional upon notification of the matters specified at paragraph 3.16 below, in place of the current notification requirements.

Blanket licensing

1.5 Free TV submits that the availability to appropriate users of alternatives to an unmodified blanket licence, and the consequent potential for constraints on APRA's monopoly power, should be made more certain by the imposition of suitable conditions on the grant of authorisation by the ACCC.

1.6 In order to assist the ACCC in its consideration and formulation of an appropriate form of condition to which authorization of APRA's arrangements could be made subject, Free TV now submits, in the context of the commercial television broadcasting industry, that authorization of APRA's arrangements should be granted subject to a condition in the form set out at paragraph 4.8 below.

2 INTRODUCTION

- 2.1 These submissions are made by Free TV on behalf of its members, which comprise the licensees of all commercial television broadcasting services in Australia.
- 2.2 Free TV previously made submissions on 2 August 2004 (**Original Submission**) in respect of the applications made by APRA to the ACCC, for authorisation of APRA's standard arrangements for the acquisition and licensing of the performing rights in its music repertoire (**APRA Application**).
- 2.3 Free TV also made submissions on 11 October 2005 (**Second Submission**) in response to the Draft Determination issued by the ACCC in respect of the APRA Application. The ACCC proposes under the Draft Determination to grant re-authorisation to APRA on the same terms as the previous authorisations granted respectively by the ACCC on 14 January 1998 and the Australian Competition Tribunal (**Competition Tribunal**) on 20 July 2000, for a further period of 4 years from the date of its final Determination.
- 2.4 The ACCC held a pre-determination conference (**Conference**) on 13 October 2005, in respect of the ACCC's Draft Determination. APRA has also made the APRA Reply to submissions made by the Cinema Operators on the Draft Determination and Free TV's Second Submission.
- 2.5 Free TV now makes these additional written submissions in respect of certain matters raised in Free TV's Second Submission, the APRA Reply and the Conference.

3 MEMBER OPT-OUT AND LICENCE-BACK PROVISIONS

- 3.1 Free TV has submitted that, for the reasons discussed in the Second Submission, it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA's Articles of Association providing for member opt-out and licence-back being modified so as to improve the practical utility and efficacy of the operation of such provisions. The specific modifications that Free TV submits are required are described below.
- 3.2 At the Conference, Free TV submitted that APRA's Articles of Association should be modified to allow members of APRA to opt-out of APRA's input arrangements on a work-by-work basis. Additionally, APRA submits that the existing member licence-back provisions in APRA's Articles of Association should be modified in the context of television broadcasting, so as to provide a practical means for members to licence their works directly for synchronisation in television programmes. Each of these proposals is discussed further below.

Opt-out on a work-by-work basis

- 3.3 As noted by Free TV in the Conference, television broadcasters regularly deal directly with composers for synchronisation rights in works, because often music is composed specifically for a television programme being produced by the broadcaster. Due to the existing blanket licence arrangements and restrictive opt-out/licence-back provisions

currently implemented by APRA, composers are forced to enter into complex commissioning and licence arrangements with broadcasters, that involve a circular flow of royalties from the broadcasters to APRA, which is then distributed to the composer and music publisher. The music publisher then pays royalties to the broadcaster, who in turn provides a percentage to the composer. A flow chart setting out the basics of this circular arrangement is contained in Annexure A to this submission. This is unsatisfactory to the composer and broadcaster alike, because not only is it administratively inefficient and burdensome, but significant administration fees are taken out during the process. These fees should not have to be incurred.

- 3.4 If opt-out on a work-by-work basis were available (and alternatives to the blanket licence were implemented as discussed below), a composer could enter into a commissioning arrangement directly with the broadcaster for the work, assign or exclusively licence relevant rights to the broadcaster, and be paid royalties directly by the broadcaster for broadcast and other commercial exploitation of the work. This arrangement would eliminate the current inefficient circular flow of royalties. A flow chart setting out the basics of this hypothetical scenario is contained in Annexure B to this submission. Exploitation and enforcement issues in respect of such a work become the responsibility of the broadcaster and/or music publisher, who address licensing and enforcement issues in respect of the work. Currently such an arrangement is not possible to implement because of the blanket licence arrangements and restrictive opt-out/licence-back provisions implemented by APRA.
- 3.5 Free TV does not consider that opt-out on a work-by-work basis would significantly impact on APRA's administrative costs. In this respect, Free TV notes that it is not apparent that APRA would find it necessary to proactively notify all possible users of APRA's repertoire that a particular work commissioned directly by a broadcaster was not in APRA's repertoire. Given that, in this scenario, the work does not exist until it is commissioned, it is not the case that the work ever formed part of APRA's repertoire. It is therefore not the case that the work was previously available for licence by users of APRA's repertoire and is now being "removed".
- 3.6 Regarding any concerns raised by the prospect of opt-out on a work-by-work basis creating "holes" in APRA's repertoire, Free TV notes that it is already the case that APRA's repertoire contains "holes", in respect of:
- (1) Works of composers that are not members of APRA or any equivalent overseas collecting society that has reciprocal arrangements with APRA; and
 - (2) Works that are the subject of the existing opt-out arrangements. As APRA notes in its Reply (at paragraph 35), there has been utilisation of the existing opt-out procedures in relation to certain categories of rights in works.
- 3.7 Free TV notes in this respect APRA's comments in the Conference (see page 6 of the minutes) that, in the circumstances where a musical work is commissioned by a broadcaster as described in paragraph 3.4 above, if the television programme incorporating the commissioned work is broadcast in public, such as in a pub or club, the proprietor of the premises would not be licensed for the public performance of the work. Free TV acknowledges that such a scenario is possible in respect of a directly commissioned work, but notes that this is also the case in respect of other "holes" in APRA's repertoire as described in paragraph 4.6 above. Additionally, Free TV notes that a broadcaster who commissions a musical work is capable of granting an express or implied licence of general application, for the public performance of the musical

work through receipt and display of the broadcast of the programme incorporating the work. Indeed, a broadcaster has a commercial incentive to do so, to encourage the widest possible audience for its programmes. Consequently, in practice the public performance by a pub or club of a commissioned work incorporated in a broadcast may well be licensed in this manner. Free TV also notes that the composer/lyricist would be compensated for the broadcast of their works through the commissioning agreement with the broadcaster, and in the context of revenue from the broadcast of television programmes, any revenue foregone by the composer and/or the broadcaster in respect of public performance of a work is likely to be relatively insignificant.

- 3.8 APRA has contended that its transactions costs would increase significantly where it is required to keep records of works it is and is not entitled to licence (see page 4 of the Minutes of the Conference). Further to Free TV's observations above, it is not apparent why APRA's administrative obligations in this respect would be significantly different, or in fact different at all, from what is currently necessary, given:
- (1) the existence and availability of APRA's searchable database of works which APRA is entitled to licence. Free TV notes that members are currently required to register the title and details all of their works with APRA. Therefore a comprehensive database of titles already exists, which is constantly being updated. Works would need to be removed from this database in circumstances where, for example, a member ceases to become a member and therefore APRA is no longer entitled to licence such works;
 - (2) the existence of the current opt-out procedures in respect of categories of rights in works, and the fact that those procedures have been utilised. Presumably this requires APRA to keep a record of such works and the fact that it is not entitled to licence them in respect of the relevant category;
 - (3) the fact that APRA does not currently have licence rights in respect of all works worldwide;
 - (4) the fact that APRA only has non-exclusive rights in respect of the repertoires of the United States collecting societies, thereby requiring APRA to differentiate and keep a record of those works.
- 3.9 In any event, to the extent that APRA's administrative costs may in fact increase, it is perfectly possible for such costs to be reflected in fees charged to the APRA member for utilisation of the opt-out procedure, and/or APRA's licence fees negotiated with broadcasters or the broadcasting industry for modified blanket licences that enable such direct dealing.
- 3.10 Free TV also notes, by way of example, that Screenrights, the Australian collecting society for rightsholders in respect of the copying and retransmission of television broadcasts, allows members to elect to opt-out on a work-by-work basis. Screenrights administers rights in respect of musical, literary, dramatic and artistic works, sound recordings and cinematograph films.
- 3.11 In conclusion, Free TV submits that authorisation of APRA's arrangements should be conditional upon modification of Articles 17(b) and (c) of APRA's Articles of Association, so that a member may require APRA to assign to the member (or the member may reserve on admission) the Performing Right in respect of a particular work or works, in addition to the current category-based opt-out rights.

Licence-back of works

- 3.12 Free TV considers that the current licence-back provisions are too restrictive in their operation to allow licensing of pre-existing works by APRA members direct to broadcasters for the purposes of synchronisation in television programmes.
- 3.13 Free TV notes APRA's comments at paragraph 40 of its Reply that FACTS, the predecessor of Free TV was involved in 1999 or earlier in the drafting of the current licence-back provisions. Free TV's current secretariat is not aware of FACTS' historical involvement. However Free TV understands that the existing licence-back provisions were drafted in the context of, and were ultimately determined by the Competition Tribunal in its Reasons for Decision and Determination. Whether or not FACTS was involved in the drafting of those licence-back provisions is irrelevant to Free TV's current position.
- 3.14 Free TV notes that Article 17(h) of APRA's Articles of Association relevantly provides, in summary, as follows in respect of non-exclusive licensing by members of works for the purposes of television broadcast. It is a precondition of the grant of a non-exclusive licence-back to a member of the Performing Right in respect of the television broadcast of any particular work or works, that the member provide APRA with one month's notice of the following:
- (1) Title of the work or works;
 - (2) Identity of all persons to whom the member intends to grant a sub-licence;
 - (3) The date on which the sub-licence takes effect;
 - (4) The period in respect of which the sub-licence will operate;
 - (5) Any performance dates which are known to the member at the time of entering into the sub-licence;
 - (6) The geographic location of the performances, and
 - (7) The broadcasting or on-line service and the program or content segment in respect of which the sub-licence will be granted.
- 3.15 Free TV submits that notification of all of the above details is impractical in circumstances where a television broadcaster wishes to obtain the rights from a composer to synchronise a musical work in the soundtrack of a television programme. In particular:
- (1) as a television programme may be licensed by the broadcaster to other broadcasters who are not necessarily known at the time of obtaining the synchronisation licence from the composer, it is impractical to be required to identify all sub-licensees;
 - (2) as a broadcaster will want to "clear" the synchronisation rights in respect of a television programme, it is not practical for the licence from the composer to be for a limited period of time, and should be perpetual;
 - (3) it should not be necessary to specify performance dates or geographic location in the context of television broadcasts, as such details are unlikely to be known at the time of negotiating the licence with the composer. In the case of the national television networks, the geographical location will in many cases be Australia wide; and

- (4) for the reasons noted at (1) above, it is impractical to identify all broadcasting or on-line services in respect of which the sub-licence will be granted.

3.16 Free TV considers that, provided the following details are notified to APRA:

- (1) Title of the work or works;
- (2) The identity of the broadcaster entering into the synchronisation licence with the composer, and any sub-licensees of that broadcaster known at the time (such as related bodies corporate of the licensee broadcaster);
- (3) The class of persons who may additionally be sub-licensed by the broadcaster licensee (e.g. all commercial television broadcasters in Australia);
- (4) The date on which the sub-licence takes effect;
- (5) The period of the licence, including, if applicable, a perpetual licence;
- (6) The scope of the communication rights in respect of the work or works for which the broadcaster is licensed, and
- (7) The name of the programme, series of programmes, or content segment in respect of which the sub-licence will be granted,

this should be sufficient for APRA's administrative purposes and enable APRA to identify non-infringing performances of the work. If necessary, the composer could additionally be required to notify APRA of any additional sub-licensees licensed by the broadcaster from time to time. Such a notification requirement could be passed through to the broadcaster in the licence agreement between the composer and the broadcaster.

3.17 As APRA itself acknowledges, the possibility of non-exclusive licence-back of works to members does not give rise to the issues raised by APRA in respect of liberalised opt-out procedures addressed by Free TV above. APRA's principal objection to liberalised licence-back arrangements is that APRA needs to know those parties to whom it is not required to offer a licence and in respect of whom APRA is not required to enforce its rights. Free TV submits that the details referred to in the above paragraph provide APRA with all necessary information to achieve these objectives in the context of synchronisation of works into television programmes for the purpose of television broadcasting.

3.18 In reference to APRA's proposal for the liberalisation of conditions for licence-back, described in section C7 of the APRA Reply, Free TV does not consider that proposal to be sufficient, for the following reasons:

- (1) Regarding the identity of sub-licensees, APRA states at paragraph 82 that it will now formally require specification only of such details as are reasonably necessary to identify whether a particular user has been granted a licence. This is unsatisfactory as it is uncertain as to what details APRA will consider reasonably necessary in any particular circumstance. In order to achieve certainty that the licence-back provisions will be workable and practical, it is necessary for the licensee identification requirements in respect of television broadcasting to be specified in the Articles, in the manner referred to in paragraph 3.16 above;
- (2) APRA's comments regarding dates of performances are not directly relevant to Free TV's expressed concerns, as the provisions of Article 17(h) in respect of

television broadcasting are not as prescriptive in this respect as the generally applicable provisions;

- (3) Regarding the geographical area of performances, APRA relevantly states at paragraph 88 that it will now formally require specification only of such details as are reasonably necessary to identify whether the licence extends to a particular area. APRA states in paragraph 89 that this will make it clear that there may be no need to specify the precise areas, and that it may be sufficient to identify by reference to broad area. This is unsatisfactory as it is uncertain as to what details regarding geographical location APRA will consider reasonably necessary in any particular circumstance. In order to achieve certainty that the licence-back provisions will be workable and practical, it is necessary for the geographical identification requirements in respect of television broadcasting to be deleted from the Articles. As noted at paragraph 3.16 above, the details specified there should be sufficient for APRA's administrative purposes and enable APRA to identify non-infringing performances of works licensed for television broadcast.

3.19 In conclusion, Free TV submits that authorisation of APRA's arrangements should be conditional upon modification of Article 17(h) of APRA's Articles of Association, so that the non-exclusive licence-back of a member's work or works for the purposes of television broadcast (as defined in that Article) is conditional upon notification of the matters specified at paragraph 3.16 above, in place of the current notification requirements.

4 BLANKET LICENSING

4.1 Free TV has submitted in section 5 of its Second Submission that it is appropriate for the ACCC to only grant APRA authorisation if such authorisation is conditional upon APRA granting modified blanket licences and/or per-program licences to end users, which must take account of licensing of works by the end user direct from the copyright owner or from third parties, for the reasons set out in the Second Submission and further discussed at the Conference.

4.2 Free TV notes APRA's comments at paragraph 18 of its Reply that FACTS, the predecessor of Free TV, was a party to Copyright Tribunal proceedings in 2001 in which APRA filed an Amended Reference to a proposed alternative licence scheme. Free TV acknowledges that, based on the documentation provided by APRA, that licence scheme appears to provide for licence fee bands based on the average percentage of APRA music in a television licensee's programmes (although the Amended Reference itself refers to licensing of commercial radio stations). Free TV does not comment on the historical conduct of the Copyright Tribunal proceedings referred to by APRA, or FACTS' involvement therein. However Free TV notes that, the fact of whether any alternative licence scheme to an unmodified blanket licence scheme has historically been proposed by APRA to the free-to-air television broadcasting industry, is not relevant to Free TV's current position as elaborated below.

4.3 Free TV welcomes APRA's statement in the APRA Reply that it 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. However Free TV considers that the availability of suitable alternative licensing models to the unmodified blanket licence should be made more certain and not be left to the

discretion of APRA. If it were left to APRA's discretion to determine the circumstances in which alternatives to the modified blanket licences might be appropriate, and the suitable form of such alternatives, it would mean there would be no certainty for users that any appropriate licensing model would be proposed, or that any real constraint on APRA's monopoly power would eventuate. Effectively it would be left up to APRA to impose its own constraints on its own monopoly power.

- 4.4 Free TV submits that the availability to appropriate users of alternatives to the unmodified blanket licence, and the consequent potential for constraints on APRA's monopoly power, should be made more certain by the imposition of suitable conditions on authorisation by the ACCC.
- 4.5 Free TV's position regarding the appropriate role of the Copyright Tribunal in this respect has already been canvassed in Free TV's Second Submission and at the Conference.
- 4.6 As noted in the Second Submission, Free TV does not disagree with the ACCC's statement at paragraph 7.23, that it is not for the ACCC to determine the reasonableness of licence fees, or other licence terms and conditions, for public performance of APRA's repertoire in each instance. However Free TV submits that it is appropriate for the ACCC to impose suitable conditions of general application upon the form of licences granted by APRA to relevant end users.
- 4.7 Free TV has referred by way of example to the Consent Decrees entered into by the United States Government with ASCAP and BMI, and notes that such Decrees contain conditions which apply to the general form of the output arrangements that must be offered by ASCAP and BMI to appropriate licensees (i.e. per-program licences must be offered). The licence fees and other licence terms and conditions applicable to each particular licensee are then negotiated between ASCAP/BMI and that licensee, and failing agreement between the parties, are determined by a Rate Court which determines such matters in respect of each licensee within the general framework set up by the Consent Decree.
- 4.8 In order to assist the ACCC in its consideration and formulation of an appropriate form of condition to which authorization of APRA's arrangements could be made subject, Free TV now submits, in the context of the commercial television broadcasting industry, that authorization of APRA's arrangements should be granted subject to a condition to the following effect:
- "C1 APRA is to offer to a Broadcaster, upon written request, as an alternative to a Blanket Licence, a licence that authorizes the Broadcaster to exercise the Communication Right in respect of the APRA Repertoire, the fee for which is reduced taking into consideration the extent to which the Broadcaster exercises the Communication Right:
- (1) in respect of works for which such Communication Right has been assigned by APRA to, or reserved by, a member of APRA; and/or
 - (2) in respect of works from the APRA Repertoire for which the Broadcaster has otherwise acquired a licence to exercise such Communication Right.

"APRA Repertoire" means those works in respect of which APRA has or will have the right to licence the Communication Right or part thereof from time to time.

"Blanket Licence" means a licence that authorizes the Broadcaster to exercise the Communication Right in respect of the APRA Repertoire, the fee for which does not vary where the Broadcaster exercises the Communication Right:

- (1) in respect of works for which such Communication Right has been assigned by APRA to, or reserved by, a member of APRA; and/or
- (2) in respect of works from the APRA Repertoire for which the Broadcaster has otherwise acquired a licence to, exercise such Communication Right.

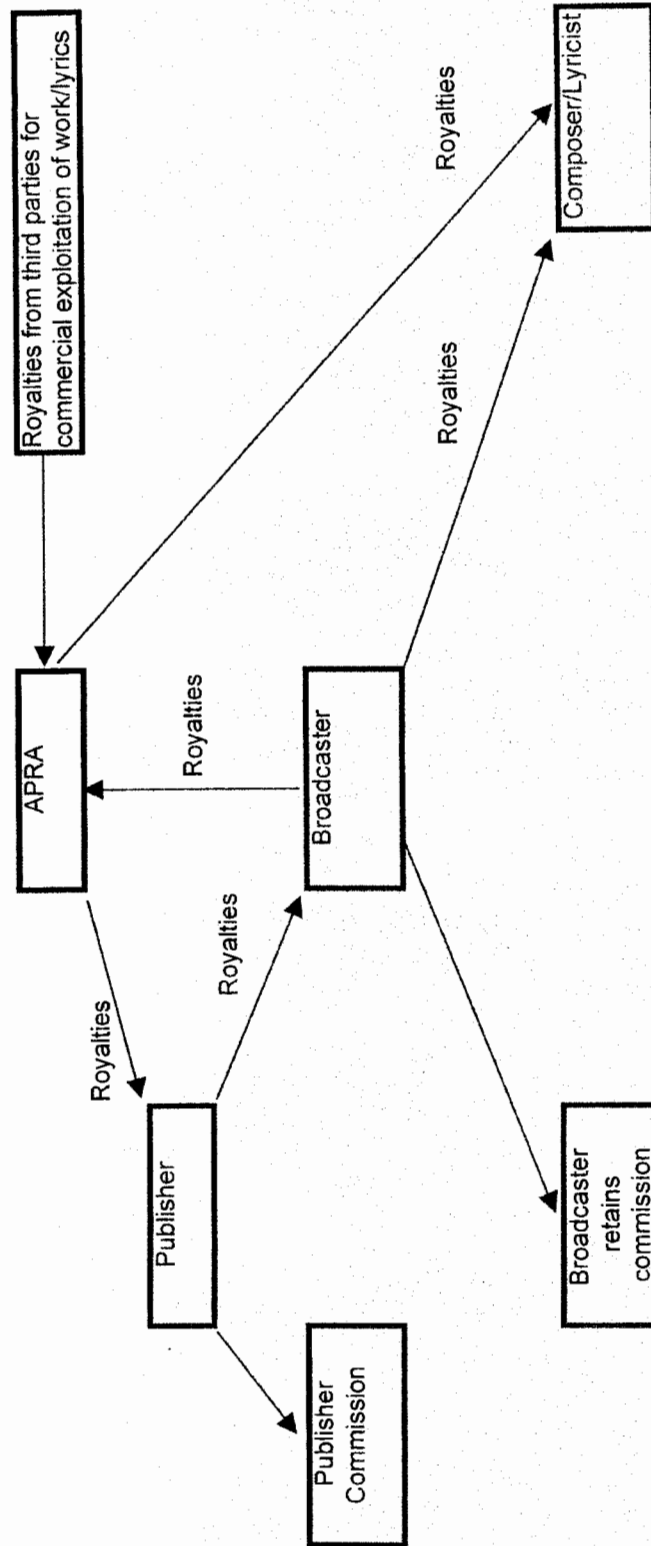
"Broadcaster" means an entity that provides a broadcasting service within the meaning of the Broadcasting Services Act 1992.

"Communication Right" means the right to communicate to the public.

"communicate to the public" means in respect of a work to communicate the work to the public within the meaning of the Copyright Act 1968, and any equivalent term in any amendment or replacement of that Act."

Annexure A

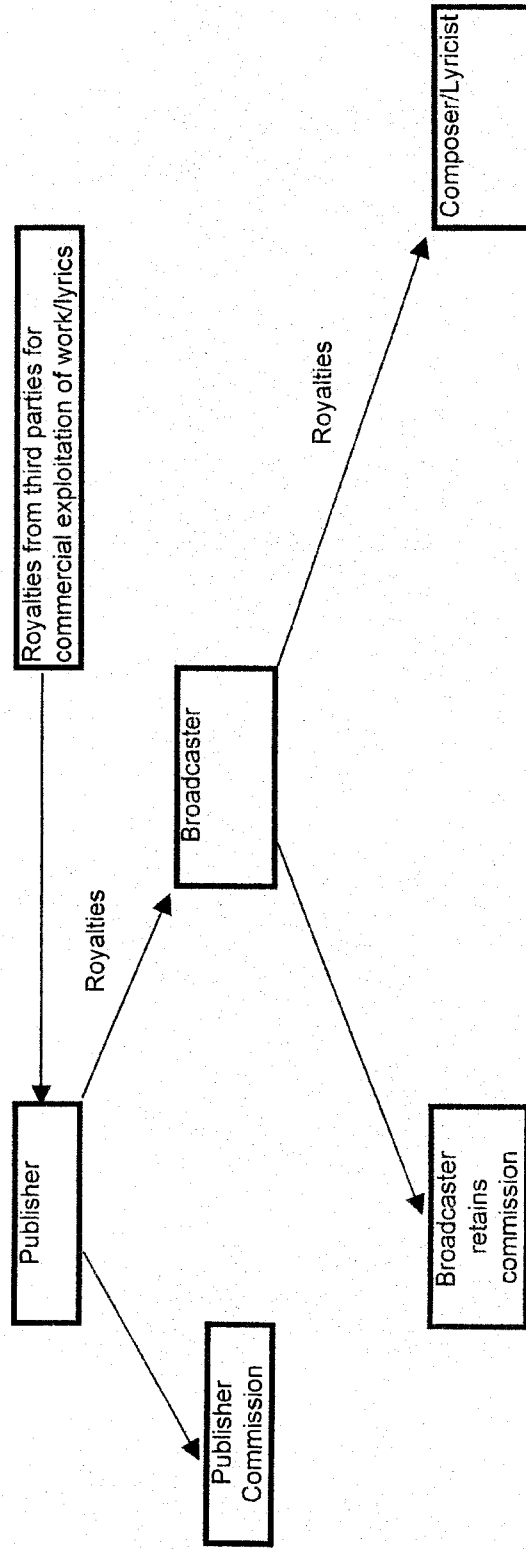
ROYALTY FLOWCHART
Work/Lyrics Commissioned
by Broadcaster



Broadcaster owns residual copyright other than rights owned by APRA/AMCOS and appoints publisher to exploit residual copyright. Broadcaster pays APRA licence fees for performances. APRA distributes royalties to composer/lyricist and publisher. Publisher distributes to Broadcaster. Broadcaster distributes to composer/lyricist.

Annexure B

HYPOTHETICAL ROYALTY FLOWCHART
Work/Lyrics Commissioned
by Broadcaster and opted out of APRA's Repertoire



Broadcaster owns copyright, and appoints Publisher to commercially exploit work/lyrics on a commission basis. Broadcaster pays composer and lyricist for broadcast rights plus commercial exploitation royalties.