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Mr Gavin Jones
Australian Competition & Consumer Commission

BY EMAIL

Dear Mr Jones

APPLICATION FOR AUTHORISATION BY AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED

We refer to the submissions made on behalf of Commercial Radio Australia dated 13 October 2005, FreeTV dated 18 November 2005, Cinema Operators dated 23 November 2005, and Creative Commons dated 8 November 2005.

APRA believes that the issues raised in these submissions have been dealt with by APRA in its earlier submissions. However, APRA makes the following brief comments in relation to the matters in each of the submissions.

1. Commercial Radio Australia

1.1 CRA does not propose specific modifications to APRA's existing arrangements.

1.2 CRA submits that "DRM technology has the ability to lower or remove the transaction costs" involved in establishing "alternative means for administering performing rights in musical works" (paragraph 3). As to this:

(a) In response, APRA submits that there is no present application of DRM that facilitates the establishment of a realistic alternative to the APRA system for the licensing and enforcement of performance rights. On this matter, APRA repeats its submissions set out in paragraph 171ff of its Submissions in Reply submitted on 19 November 2004 (**Reply Submissions**).

(b) CRA relies on digital rights management in support of its argument that music use can be precisely identified and managed, at least in the context of commercial radio. APRA agrees that commercial radio (at least in metropolitan areas) is well placed to track music use with a high degree of accuracy. However, APRA notes that DRM is information that is embedded into sound recordings of musical works, not into musical works themselves. The owners of the copyright in the musical

work have no control over those who make sound recordings of the work and then cause such recording to be publicly performed (noting the existence of the statutory licence for the making of records of musical works contained in Part III Division 6 of the *Copyright Act 1968*).

(c) The latest "broadcast monitoring technologies" to which CRA refers have been investigated by APRA. Significantly, they do not link writer and other ownership information to the details of recordings broadcast. There is no basis upon which it can be seriously contended that this emerging technology is relevant to the structure and operation of the present market for the licensing of performing rights, or the public benefit balance in relation to the APRA scheme.

1.3 The rates paid under the APRA commercial radio licence scheme are not an example of "commercial radio stations [being] forced to pay monopoly fees for access to APRA's repertoire". APRA and CRA (then FARB) engaged in proceedings before the Copyright Tribunal under which APRA's proposed scheme was resisted by FARB. The scheme was determined by the Tribunal after a contested hearing in which FARB was represented by specialist broadcasting and intellectual property lawyers and counsel.

2. FreeTV

2.1 FreeTV requests the ACCC to require the following changes to APRA's existing arrangements:

(a) That APRA members be able to "opt out" of APRA on a work by work basis;

(b) That a member of APRA only be required to notify APRA of minimal information relating to a licence back;

(c) That APRA should be required to offer an alternative to the blanket licence at a reduced fee.

2.2 FreeTV submits in paragraph 3.3 that broadcasters deal regularly with composers regarding the synchronisation right in music for television programs. APRA submits that the extent of programming actually made by television broadcasters should not be overstated. In any event, to the extent that broadcasters actually make programs, APRA notes that although FreeTV contends the existing arrangements are unsatisfactory for "composers and broadcasters alike" in fact no composers or music publishers have made such a claim. The arrangements described by FreeTV are standard industry arrangements that occur throughout the world, ensuring payment for actual use rather than on an estimate of likely success of a program that might never be put to air.

2.3 FreeTV submits that individual opt-out would not significantly impact on APRA's administrative costs: paragraph 3.5. In response, APRA submits that:

(a) Notwithstanding Free TV's assertion to the contrary, there is a real question as to whether APRA would be legally obliged to notify users in relation to any work the subject of opt-out (even if the work had been commissioned directly by a broadcaster): see Reply, [86(a)]. Free TV

submits that such directly commissioned works would "never form part of APRA's repertoire", and for that reason alone need not be the subject of notification to licensees by APRA. This is not the case. Upon creation, every work of an APRA member immediately forms part of the APRA repertoire. Even if a single directly commissioned work was the subject of an individual "opt-out", the work must logically first comprise part of the APRA repertoire before the opt-out is effected. In any event, whether or not there is presently a strict legal obligation to notify licensees of holes in the repertoire, if large holes developed it is very likely that licensees would insist upon notification by APRA of the scope and limitations of the APRA licence. Such notification would be of obvious importance to the responsible management of the licensee's use of music: only through such notification can the licensee identify what works must either be the subject of direct licence negotiation with the rights holder, or must not be performed at all (to prevent breach of copyright). The requirement of notification of holes in the repertoire would generate extremely significant administrative costs, which must ultimately be passed on to the licensees or the rights holders: see Reply Submissions, [86];

(b) Individual work "opt-outs" would also increase APRA's transaction costs, in relation to the monitoring of music performance (because it would be required to determine which performed works is outside the APRA repertoire); and the calculation of licence fees (to make due allowance and discount for the performance of the "opt-out works").

(c) In paragraph 3.8 of its submissions, Free TV seeks to identify various matters which militate against the inference that opt-out will increase APRA's transaction costs. None of those matters materially affects the nature and scope of the increased transaction costs described above. Further, FreeTV's submission in 3.8(1) in relation to the nature and significance of APRA's "searchable database" has disregarded APRA's submissions in relation to this matter: see Further Reply, [42(d)]. The public database is not and does not purport to be a comprehensive list of APRA's repertoire. It does not contain a large amount of information that is required for the proper licensing of musical works

(d) The cost increases associated with the creation of holes in the repertoire are borne not only by APRA, but also licensees. If licensees cannot be assured of effective blanket licence from APRA, then to avoid infringement of copyright they must monitor the copyright status of the works they propose to perform, and seek to negotiate a licence in respect of works which fall outside the scope of the APRA licence. The associated transaction costs would be potentially massive.

(e) The overall effect of creating significant holes in the repertoire will be to drive up licence fees and otherwise increase licensee costs. APRA refers further to paragraphs 37 to 42 of its further submissions in reply dated 11 November 2005 (**Further Reply**)

2.4 FreeTV seeks to downplay the detriment associated with "holes in the repertoire" caused by opt-out, by reference to the facts that: first, such holes already exist; and secondly, any difficulties can be substantially addressed by the provision by the broadcaster of "an express or implied licence". In response, APRA submits:

(a) It is simply not the case that there are presently large holes in the APRA repertoire. Few songwriters in Australia or elsewhere whose works are performed in public are not members of a performing right collecting society. Those members of APRA who have opted out for some types of use are writers of music that does not receive widespread performances outside that use (in particular, purpose written music on hold).

(b) In any event, the fact that there may already exist modest administrative problems associated with existing holes in the repertoire, does not address the submission that such problems will be significantly exacerbated by increasing the size of those holes;

(c) the proposal of "an express or implied licence of general application, for the public performance" of musical works, is both complex and uncertain. Whatever is contemplated, such a proposal does not eliminate the costs and inconvenience described in paragraph 2.3(a) above. .

2.5 The comparison with Screenrights is misleading. Screenrights is a declared collecting society, and as such does not require an assignment to ensure integrity of repertoire.

2.6 In relation to licence back, APRA is not aware of any instance where the existing licence back provisions have proved too inflexible to allow a licence back. Further, APRA submits that the modifications proposed by APRA to the licence back conditions in the Further Reply, create sufficient practical flexibility to address all the concerns raised by FreeTV in relation to the scope of licence-back.

2.7 In relation to blanket licensing, APRA submits that the condition proposed by FreeTV in paragraph 3.15 is unworkable. The condition, if implemented, would either be applied:

(a) strictly in accordance with its terms, in which case it could be satisfied by a token offer of a scheme with a "reduced fee" (irrespective of any consideration of whether the scheme provides a reasonable alternative). This would be pointless;

(b) subject to the implied proviso that the alternative scheme must provide a reasonable alternative to the APRA blanket licence. This would be so uncertain as to mean that APRA would not know whether it was acting within the terms of its authorisation, and such a result should be avoided for the reasons set out 117 of the Further Reply. APRA reiterates that the proper forum for a discussion of licence schemes is the Copyright Tribunal.

3. Cinema Operators

3.1 In response to the submissions of the Cinema Operators, APRA simply notes that the submissions are again characterised by an unduly narrow focus. The submissions address only what will generate competition for APRA. The submissions fail properly to grapple with:

(a) the need to balance the promotion of competition, against the generation and protection of the public benefits associated with the APRA scheme: Further Reply, [31]ff;

(b) the prejudice to the APRA system associated with the modifications proposed by the Cinema Operators: Further Reply, [37]ff;

(c) the subtlety of the analysis and conclusions underpinning the Draft Determination: Further Reply, [63]ff

4. Creative Commons

APRA repeats paragraph 117ff of its Further Reply.

Yours sincerely

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