

11 November 2009

Mr Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

By email: adjudication@acc.gov.au

Dear Mr Jones

**RE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LTD –
APPLICATIONS FOR REVOCATION AND SUBSTITUTION (A91187 TO A91194) –
INTERESTED PARTY CONSULTATION**

We are writing in response to your 20 October 2009 invitation to comment on the Australasian Performing Right Association Ltd's (APRA) application for re-authorisation. In particular, we wish to update the Australian Competition and Consumer Commission on discussions between APRA and Creative Commons Australia regarding the compatibility of APRA's licences with direct licensing mechanisms commonly used by musicians.

You will recall that during the 2006 APRA authorisation process Creative Commons Australia made a number of submissions (D05+61451 and D05+70075) to the ACCC regarding limitations imposed by the APRA licensing model on members entering into direct licences for the use of their works. In particular, the compulsory assignment of all performance and communication rights to APRA prevents members from (legally) providing their works to others via mechanisms such as the Creative Commons licences and other social networking and direct licensing services (eg YouTube, MySpace and Facebook) without APRA's permission.

In its 2006 determination the ACCC acknowledged the importance of direct licensing and encouraged APRA to explore modifications to its system to "accommodate direct dealing between music composers and users ... [as a] competitive constraint on APRA in setting the terms and conditions of its licence fees for those users where direct dealing would be an otherwise practical alternative" (Determination C2004/764, iii-iv).

Over the last three years APRA has demonstrated willingness to work with Creative Commons Australia on this issue and to explore mechanisms to enable its members to more actively manage their own copyright material. In this time APRA and Creative Commons Australia have developed a productive working relationship and have progressed towards improving the ability of APRA members to access new digital business models by directly licensing their works to consumers without having to

forfeit their APRA revenue stream. APRA's introduction in late 2008 of a 'Noncommercial Licence Back' mechanism to allow limited online licensing by its members has been a particularly significant step, and puts APRA at the forefront of international performing rights societies in engaging with digital technologies.

Nevertheless, Creative Commons Australia notes that APRA members are still extremely limited in their ability to distribute their material online and unable to use Creative Commons licences with legal certainty. We would therefore contend that, to make full use of the flexible business, production and distribution models enabled by new technologies, APRA's members would benefit from the following revisions of the collecting society's system:

- the broadening of the Noncommercial Licence Back or other modification of APRA's membership requirements to permit Creative Commons licensing and other popular direct licensing methods. The Noncommercial Licence Back's current limitation to online communications and its narrow definition of 'noncommercial' mean that it does not permit licensing for broadcast or performance (key elements of the Creative Commons licences) or via any services that incorporate advertising or direct sales. Neither do the other Licence Back or Opt Out mechanisms provided by APRA allow for such uses;¹
- clarification of APRA's policy and legal stance with regards to direct licensing and distribution of material online. Our understanding is that APRA as a matter of principle is open to its members making use of at least the noncommercial Creative Commons licences as well as most popular online direct licensing services, but a clear policy is not publicly available;
- clarification of APRA's policy and legal stance in relation to the use of revenue sharing sites such as Jamendo, Beatpick and Revver, which combine Creative Commons licensing with sales, advertising and commercial-licensing models that provide direct returns to musicians;
- consideration by APRA of its policy in relation to Creative Commons licences that allow commercial use, with an aim to enabling its members to utilise the full range of Creative Commons licences, should they so desire; and
- the streamlining of APRA's Licence Back and Opt Out processes, which currently require members to provide notice to APRA between one week and three months in advance of any direct licensing use they wish to make.

While APRA has responded well to feedback from Creative Commons Australia, we believe that more can be done to facilitate the business models of the 21st century. We hope that APRA will continue to move forward on this front and to address the issues raised above.

Yours sincerely



Professor Brian Fitzgerald
Project Lead
Creative Commons Australia



Jessica Coates
Project Manager
Creative Commons Australia

¹ For a fuller explanation of this matter see <http://creativecommons.org.au/apra>