Australian Libraries Copyright Committee

Australian Digital Alliance

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LTD
DRAFT DETERMINATION ON AUTHORISATION
INTERESTED PARTY CONSULTATION

Joint submission to the
Australian Competition and Consumer Commission

March 2010

t (02) 6262 1273 | e mdawes@nla.gov.au | w www.digital.org.au | a PO Box E202 Kingston ACT 2604

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EXECUTIVE SUMMARY

In our response to the Australian Competition and Consumer Commission's (**ACCC**) interested party consultation we submitted that within the bounds of the current authorisation, the Australasian Performing Right Association Ltd (**APRA**) still had significant scope to take advantage of its market power when setting licence fees and terms and conditions. We considered that this had the potential to create a significant anti-competitive detriment and recommended several conditions to safeguard the public benefit in the collective management of the public performance and communication rights.

We are pleased with the ACCC's decision to take 'further steps' to lessen the detriments caused by APRA's conduct. We have made several comments on the proposed conditions of re-authorisation that we consider will have a positive impact on APRA's members, users, the cultural sector and the community at large.

We welcome the steps taken by the ACCC to relax the exclusivity of APRA's input arrangements with proposed condition C1. We have made recommendations to strengthen and encourage use of the Opt Out, Licence Back, and Non-Commercial Licence Back provisions. The licensing of the public performance and communication rights in Australia must be liberalised as creators, users and the community seek to benefit from new and innovative online uses of music.

The proposed condition C2 is a major step towards reducing the anti-competitive detriment caused by APRA's rigid output arrangements. We have commented on enhancing the expert determination process to increase its utility to users. In addition, we have recommended that APRA be required to provide for mediation under a similar framework to expert determination. We are supportive of the ACCC's decision to reject APRA's request to amend its expert determination process.

We are satisfied that three years is an appropriate authorisation period in recognition of the ACCC's proposed condition C3 requiring APRA to report on disputes under its alternative dispute resolution process. We consider that the increased involvement of the ACCC sets an appropriate balance.

Finally, we have again raised the issues surrounding the transparency of APRA's operations. We have recommended several categories of information that APRA should make available. Transparency is crucial in creating a culture of openness and accountability in APRA. It will play an important role in aiding the other conditions that limit APRA's ability to take advantage of its market power.

Kind regards

Professor Tom Cochrane
Chairman
Australian Libraries Copyright Committee

Derek Whitehead OAM
Chairman
Australian Digital Alliance

SUMMARY OF RECOMMENDATIONS

CONDITION 1: STREAMLINED LICENCE BACK PROVISIONS

Recommendation 1

We recommend that the scope of the Licence Back granted to APRA members be expanded to permit them to licence their works worldwide, enabling the Licence Back to encompass the online communication right.

Recommendation 2

We recommend that the Non-Commercial Licence Back provision include all categories of the Performing Right, not just the right to communicate to the public online.

Recommendation 3

We recommend that the Licence Back provision and the Non-Commercial Licence Back provision be amended to remove the requirements for APRA members to give undertakings to pay reasonable costs and a release and indemnity.

Recommendation 4

We recommend that the notice and information requirements for the Licence Back provision be amended to require only the minimum amount of information necessary for APRA to function efficiently. These requirements being: one weeks notice; the title/s of the relevant work/s; a simple consent form from the APRA member and sub-licensee; and details on the date, time, and location of the use. This should apply to all categories of the Performing Right.

Recommendation 5

We recommend that the definition of non-commercial use for the Non-Commercial Licence Back provision be amended to adopt the definition used by Creative Commons Australia licences.

Recommendation 6

We recommend that the Opt Out provision be amended to allow an APRA member to identify the particular work/s in relation to which they want to reclaim a category of the Performing Right, and that the provision cover all categories of the Performing Right.

CONDITION 2: ALTERNATIVE DISPUTE RESOLUTION

Recommendation 7

We recommend that the independent expert be required to report on whether APRA offers cultural institutions and other users a genuine discount to blanket licence fees to reflect non-commercial uses of the Performing Right.

Recommendation 8

We recommend that the independent expert be required to identify particular classes and needs of users, and report on whether APRA could amend a user's Licence Back or Non-Commercial Licence Back to provide a workable alternative to blanket licensing.

Recommendation 9

We recommend that the independent expert be required to report on the wants and needs of users, including: any new technologies and online uses; changes to the market place; whether in the ADR process it has become apparent that users would like to adopt these, and if so, whether APRA could change its practices or amend its licences to facilitate this.

Recommendation 10

We recommend that the ACCC be required to approve any proposed independent experts according to a set of independence criteria.

Recommendation 11

We recommend that APRA be required to implement a framework for the mediated resolution of licensing disputes with users and that the ACCC be required to approve proposed mediators according to a set of independence criteria.

Recommendation 12

We recommend that APRA bear the cost of hiring the mediator, but that both parties share the administrative, venue hire and other associated costs.

Recommendation 13

We recommend that the mediator be required to report on the same issues as the independent expert. In addition, the mediator should report on whether the parties adopted principled and good faith negotiation in an attempt to reach an agreement, or whether they adopted positional and competitive negotiation that was not conducive to reaching an agreement.

TRANSPARENCY

Recommendation 14

We recommend that the following categories of information be made transparent:

- Details of the remuneration and other benefits paid to executives with salaries greater than $100,000;
- Details of the remuneration and other benefits paid to staff;
- Details of the remuneration, other benefits, and expenses paid to consultants;
- The amount of royalties distributed to authors and creators;
- The amount of royalties distributed to record companies, and the amount to individual record companies if they receive over a certain threshold;
- Details or estimations of the amount of royalties distributed to record companies that are passed onto authors and creators;
- The amount of royalties that are undistributed, and whether those funds are used for any other purposes other than investment;
- The amount of money spent on litigation;
- The amount of money spent on legal costs; and
- The amount of money spent on policy and lobbying government.

SUBMISSION ON APRA DRAFT DETERMINATION

A. CONDITION 1: STREAMLINED LICENCE BACK PROVISIONS

Exclusivity and Alternative Forms of Licensing

1. The degree of exclusivity of the Australasian Performing Right Association Ltd's (**APRA**) input arrangements, compounded by the limited application of the Opt Out and licence back provisions, severely hampers the ability of APRA members to use alternative forms of licensing.

2. The exceptions to APRA's exclusivity are too inefficient to provide a workable solution to a demonstrated demand in the market for open access content and culture. APRA members want to use alternative forms of licensing such as Creative Commons and the direct licences required to upload their material to social networking services such as MySpace, YouTube and Last.fm. However, APRA requires members to assign their rights 'to perform the work in public' and 'to communicate the work to the public'.[1] These two distinct rights are collectively defined by APRA as the 'Performing Right'.[2] APRA's control over the communication right prevents members, and the community at large, from capitalising on the offerings of highly popular web 2.0 platforms.

3. We are supportive of the proposed condition requiring APRA to amend its constitution to streamline the licence back provisions and make it easier for APRA members to use alternative forms of licensing. We agree with the Australian Competition and Consumer Commission's (**ACCC**) conclusion that it is time to further relax APRA's requirements for the exclusive assignment of the Performing Right.

Categories of the Performing Right

Licence Back

4. The Licence Back provision in article 17(f) of APRA's constitution entitles members to request that APRA grant them a non-exclusive licence for a one off event. While the Licence Back applies to all performing rights, it is limited to Australia. This limitation effectively precludes the licensing back of the communication right, as making content available online requires a licence to communicate worldwide.

5. The constraint of the Licence Back to Australia reduces its utility to members who want to make their content available online. It is incompatible with emerging online business models and distribution models, which necessarily involve worldwide communication.

6. Members are prohibited from taking advantage of Creative Commons licences, direct licences used by social networking services, and innovative new revenue sharing sites. Sites such as Jamendo, Beatpick and Revver make content freely available under commercial licences that

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1 Section 31(1)(a)(iii),(iv) of the *Copyright Act 1968*. Note: 'communication' right is defined by the *Copyright Act* to include making the work available online or electronically transmitting it via a broadcast.

2 Australasian Performing Right Association Ltd, 'APRA Constitution', December 2008, (**APRA Constitution**), article 3.

give creators a return from advertising revenue paid to the site. Advertising revenue is the most mature and proven model for commercialising content on the internet. Further, these sites provide creators with a highly profitable direct stream of revenue, while increasing their global profile.

Recommendation 1

We recommend that the scope of the Licence Back granted to APRA members be expanded to permit them to licence their works worldwide, enabling the Licence Back to encompass the online communication right.

Non-Commercial Licence Back

7. The Non-Commercial Licence Back provision in article 17(h) of APRA's constitution only covers a limited right defined by APRA to be the 'right to communicate to the public online'. It excludes other rights such as broadcasting[3] and performance. This limited category of Performing Right prevents members from using Creative Commons licensing and the direct licensing used by popular non-commercial web 2.0 platforms which all require additional rights. Thus, while the Non-Commercial Licence Back covers making music available online, its effectiveness is severely limited as it does not enable members to use the most popular online distribution models.

Recommendation 2

We recommend that the Non-Commercial Licence Back provision include all categories of the Performing Right, not just the right to communicate to the public online.

Information to be Provided to APRA

Release and Indemnity and Undertakings to Pay Reasonable Costs

8. For both the Licence Back and Non-Commercial Licence Back, APRA members are forced into the absurdity of paying to regain limited licensing rights to their own works. They are required to give undertakings to pay APRA any reasonable costs incurred prior to the first use of the work or the date of the sub-licence,[4] and any reasonable costs associated with the licence.[5]

9. We consider that the undertakings are unnecessary. Faced with the requirement to give a formal undertaking to pay reasonable costs, many APRA members appear to avoid taking advantage of the licence back provisions. While use of the provisions is a complex issue, this

3 Note: broadcasting is included in the definition of the communication right in the *Copyright Act*.
4 APRA Constitution, article 17(g)(ii)(6)(a), article 17(j)(ii)(2)(a).
5 APRA Constitution, article 17(g)(ii)(6)(b), article 17(j)(ii)(2)(b).

view is supported by their negligible use over the past decade.[6] In return for requiring this onerous obligation from members, APRA seems to recover minimal costs.[7]

10. The undertakings have the impact of discouraging members from using both licence back provisions, while only providing minimal cost offsetting to APRA. The need for a release and indemnity would appear to be another burdensome formal requirement with minimal utility. On balance, clearly the greater public benefit lies in removing these obligations to encourage use of the provisions, against providing such small compensation and assurance to APRA.

Recommendation 3

We recommend that the Licence Back provision and the Non-Commercial Licence Back provision be amended to remove the requirements for APRA members to give undertakings to pay reasonable costs and a release and indemnity.

Licence Back

11. We agree with the ACCC's conclusion that APRA's notice and information requirements are 'significant and exacting', such that they discourage use of the Licence Back provision.[8] These requirements are no doubt designed to enable APRA to determine whether uses of the Performing Right are licensed, thus aiding its enforcement practices.

12. We consider that APRA's notice and information requirements are not necessary for efficient enforcement. In support, we note and agree with the ACCC's view that exclusive licensing is not necessary for APRA to efficiently enforce the rights assigned to it.[9] The same reasoning should be applied to whether APRA is entitled to ask for such onerous notice and information requirements when it licences back works. APRA is not a collecting society with a statutory licence giving it a monopoly to deal with a particular category of right. It should not be entitled to operate on the assumption that all uses of the Performing Right in Australia are licensed to it.

13. We consider the balance of the notice and information requirements should be weighed in favour of encouraging members to Licence Back. The balance currently favours APRA being able to assume that all uses are licensed to it. There is a clear and achievable public benefit in facilitating the increased use of alternative forms of licensing by relaxing the burden on APRA's members and the unnecessary exclusivity of APRA's input arrangements.

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6 ACCC, 'Draft Determination Application for revocation and substitution of authorisations lodged by Australasian Performing Right Association Ltd', 8 February 2010, (**ACCC Draft Determination**), para 4.144.

7 The ACCC noted that it understood that any fees levied by APRA have been quite low, see APRA Draft Determination, para 4.151.

8 ACCC Draft Determination, para 4.151.

9 ACCC Draft Determination, paras 4.64–4.67.

Recommendation 4

We recommend that the notice and information requirements for the Licence Back provision be amended to require only the minimum amount of information necessary for APRA to function efficiently. These requirements being: one weeks notice; the title/s of the relevant work/s; a simple consent form from the APRA member and sub-licensee; and details on the date, time, and location of the use. This should apply to all categories of the Performing Right.

Additional Comments on APRA's Input Arrangements

Comments on the Limited Class of Non-Commercial Use

14. The definition of non-commercial use permitted by APRA is extremely narrow and operates to prohibit members from taking advantage of popular online distribution models. Non-commercial purposes are defined to exclude any use that involves an exchange of consideration[10] – an incredibly broad legal concept. This definition is far narrower than the Creative Commons 'noncommercial' licence which excludes uses 'primarily intended for or directed toward commercial advantage or private monetary compensation'.[11]

15. APRA's definition of non-commercial purposes also excludes not for profit sub-licensees if they receive public or institutional funding.[12] This creates the absurdity of prohibiting APRA members from licensing their works to our taxpayer funded cultural institutions. These institutions operate on a statutory mandate to increase the access of Australians to culture, but are expressly excluded from benefiting under APRA's Non-Commercial Licence Back provision.

16. To allow members to take advantage of the exposure, dissemination and distribution benefits offered by the internet, the class of non-commercial use permitted by APRA must be expanded. The most logical and globally accepted definition is that used by Creative Commons. Creative Commons is the most popular open licensing format with some 350,000,000 objects licensed worldwide,[13] it is fitting that APRA adopt its definition of non-commercial use.

Recommendation 5

We recommend that the definition of non-commercial use for the Non-Commercial Licence Back provision be amended to adopt the definition used by Creative Commons Australia licences.

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10 APRA Constitution, Article 17(i)(i).

11 Creative Commons, 'Attribution-NonCommercial 2.5 Australia', Clause 4(b) http://creativecommons.org/licenses/by-nc/2.5/au/legalcode.

12 APRA Constitution, article 17(i)(ii).

13 Larry Lessig, 'Copyright and science at the University of Amsterdam', 8 January 2010, http://www.osnews.com/story/22716/Lessig_on_Copyright_and_Science_at_the_University_of_Amsterdam.

Comments on the Scope of Opt Out

17. We consider that the Opt Out provision has limited utility because it requires members to reclaim a particular category of the Performing Right for all of their works. While the Opt Out provision does not require permission to licence distinct acts as it applies indefinitely, it applies wholesale to all works and does not permit a category of Performing Right to be opted out for a single work.

18. The scope of the Opt Out provision is unnecessarily broad such that it discourages use. If an APRA member wants to reclaim a category of right for a particular work, they are required to forgo the revenue they would otherwise receive under that category for all of their other works. There is no rationale for this onerous requirement. It would only be useful in limited circumstances where the efficiencies of collective administration are reduced, such as the 'the right to perform in public by live means'.[14] Further, there is no rationale for the Opt Out provision not to cover all categories of the Performing Right.

Recommendation 6

We recommend that the Opt Out provision be amended to allow an APRA member to identify the particular work/s in relation to which they want to reclaim a category of the Performing Right, and that the provision cover all categories of the Performing Right.

B. CONDITION 2: ALTERNATIVE DISPUTE RESOLUTION

Access to Justice

19. In our submission to the ACCC's call for comments from interested parties, we argued that APRA's users did not have adequate access to justice. We submitted that the lack of justice combined with APRA's output arrangements gave APRA significant scope to take advantage of its market power when setting licence fees and terms and conditions.

20. We welcome the ACCC's view that APRA's expert determination Alternative Dispute Resolution (**ADR**) process has limited practical utility and that APRA's ADR process has not kept pace with reforms and improvements in the area. APRA's ADR process must be strengthened to encourage its users and members to take advantage of the less restrictive input arrangements envisioned by condition C1 of the draft determination.

The Role of the Independent Expert

21. There is a definite need for APRA to adjust its blanket licences to the circumstances and uses of its licensees. We consider that the independent expert should be required to express an opinion on factors in addition to those proposed. The majority of APRA's revenue sources are commercial organisations, as a result it does not adequately cater to uses of music by the cultural and non-commercial sectors. As raised in our earlier submission, the cultural sector has great difficulty dealing with APRA.

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14 APRA Constitution, article 17(b)(iv).

Genuine Discounts on Blanket Licences

22. We consider that this requirement should be expanded so that the independent expert also reports on whether APRA offers a genuine discount on blanket licence fees for cultural institutions and other non-commercial users. In particular, whether the discount is reflective of the proposed non-commercial use. The definition of non-commercial use should be that under Creative Commons licences.

Recommendation 7

We recommend that the independent expert be required to report on whether APRA offers cultural institutions and other users a genuine discount to blanket licence fees to reflect non-commercial uses of the Performing Right.

Amendments to Licence Back

23. We consider that this requirement should be expanded so that the independent expert identifies particular classes and needs of users, and suggests amendments accordingly.

Recommendation 8

We recommend that the independent expert be required to identify particular classes and needs of users, and report on whether APRA could amend a user's Licence Back or Non-Commercial Licence Back to provide a workable alternative to blanket licensing.

Wants and Needs of Users

24. In order to assess the impact of the re-authorisation on an evolving and dynamic market, the independent expert should be required to comment on the wants and needs of users as revealed through the determination process. For example, whether users display a trend in wanting to licence material for emerging online business models.

Recommendation 9

We recommend that the independent expert be required to report on the wants and needs of users, including: any new technologies and online uses; changes to the market place; whether in the ADR process it has become apparent that users would like to adopt these, and if so, whether APRA could change its practices or amend its licences to facilitate this.

Approval of the Independent Expert

25. We consider that confidence in the independence of the expert is crucial to encouraging users to take advantage of the process. Confidence could be assured by requiring ACCC approval of the independent expert. ACCC approval could be given on the basis of similar criteria as that used to approve 'independent managers' in undertakings given to the ACCC under section 87B of the *Trade Practices Act*.

Recommendation 10

We recommend that the ACCC be required to approve any proposed independent experts according to a set of independence criteria.

APRA to Provide For Mediation

26. We welcome the ACCC seeking comments on additional forms of ADR that might increase access to justice for users and limit the anti-competitive detriment caused by APRA's output arrangements. We consider that mediation, with an appropriate framework to ensure good faith participation, would be an effective way for APRA and users to identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement.

27. Mediation is highly flexible, accessible, and non-evidentiary. It is an ideal form of ADR for smaller and less experienced users such as those from the cultural sector. Further, mediation is an ideal first step prior to other avenues of review, such as the expert determination process or the Copyright Tribunal. The mediator should be independent and experienced in copyright licensing disputes.

Recommendation 11

We recommend that APRA be required to implement a framework for the mediated resolution of licensing disputes with users and that the ACCC be required to approve proposed mediators according to a set of independence criteria.

Funding Arrangements

28. We consider that the arrangements for financing the mediation process should replicate those decided by the Competition Tribunal for the expert determination process.

Recommendation 12

We recommend that APRA bear the cost of hiring the mediator, but that both parties share the administrative, venue hire and other associated costs.

Reporting by the Mediator

29. Good faith bargaining between APRA and users must be ensured. As raised in our earlier submission to the ACCC, the experiences of our members trying to negotiate with APRA for the non-commercial use of content has not being positive. We consider that any mediation process would require safeguards to ensure that any ensuing negotiation is conducive to a result. The National Library of Australia (**NLA**) made several attempts to licence content with APRA to make it available online.[15] APRA applied a 'take it or leave it' approach, where they

15 See paras 96 and 97 of our submission in response to the ACCC's interested party consultation on APRA.

refused to budge from their initial offering or enter into any form of good faith negotiation.[16] They refused to acknowledge the NLA's position, take account of its non-commercial use, or the public and cultural benefit in making the content available.

30. Reporting obligations similar to those of the independent expert should apply to the mediator. We understand that a mediator has no advisory or determinative role. They are merely there to help facilitate the parties in reaching an agreement and may not give legal advice to either party to the dispute. However, a mediator is permitted to comment on the issues in question and they should be encouraged to do so.

Recommendation 13

We recommend that the mediator be required to report on the same issues as the independent expert. In addition, the mediator should report on whether the parties adopted principled and good faith negotiation in an attempt to reach an agreement, or whether they adopted positional and competitive negotiation that was not conducive to reaching an agreement.

C. CONDITION 3: REPORTING ON ALTERNATIVE DISPUTE RESOLUTION

31. We are pleased with the proactive role the ACCC has taken by requiring APRA to report on the outcome of disputes under its ADR process. Logically, we recommend that this reporting requirement be expanded to include mediation.

D. APRA'S REQUEST TO AMEND ALTERNATIVE DISPUTE RESOLUTION

32. Given that the existing expert determination ADR process is of limited utility to users, we welcome the ACCC's decision not to approve APRA's request for amendment, which would further weaken the process.

E. AUTHORISATION PERIOD

33. We are satisfied that the authorisation period of three years is appropriate. This is in recognition of the ACCC's proposed condition C3 requiring APRA to report on disputes under its ADR process. We consider that the increased involvement of the ACCC sets an appropriate balance.

F. TRANSPARENCY

34. We raised issues regarding the transparency of APRA's operations in our earlier submission, and consider that this remains a going concern. This view was shared by Fairfax Media Ltd.

35. Transparency is crucial in creating a culture of openness and accountability in APRA. In again recommending greater transparency, we reiterate our earlier rationale. First, APRA is a listed charity and is essentially a trust organisation that collects and distributes revenue on behalf of its members. The higher the costs incurred by APRA's operations, the less revenue available

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16 This was the experience of the National Library of Australia, however it is acknowledged generally by our members and by the ACCC, see APRA Draft Determination, para 4.157.

to its members. Greater transparency should be a fundamental aspect of this fiduciary relationship. Second, APRA is a monopoly, and thus should be required to conduct its operations in as open a manner as possible.

36. While the rules and procedures for the distribution of royalties are published, what is not published is the amount of royalties paid to particular groups of APRA members. Such as the total amount of royalties paid to independent artists or to record companies. Further, of the royalties paid to record companies, the amount that is then passed on to artists is not available.

37. The amount of royalties paid to major rights holders that is eventually passed on to creators is a point of contention for all collecting societies. It is the relationship between any given collecting society and creators, authors, or artists that justifies its existence. This relationship has been the subject attention recently with a series of articles in The Australian about the Copyright Agency Limited.[17] The same principles and dissatisfaction apply to APRA. The distribution of royalties to different groups of APRA members and the ultimate beneficiaries of those payments have been shrouded in secrecy since the 1920's. It belies APRA's intimate relationship with industry and the justification of transferring income from users to owners.[18] While APRA does not have privity of contract between record companies and artists, given the importance of the issue APRA should be required to make all the information it has available.

Recommendation 14

We recommend that the following categories of information be made transparent:

- Details of the remuneration and other benefits paid to executives with salaries greater than $100,000;
- Details of the remuneration and other benefits paid to staff;
- Details of the remuneration, other benefits, and expenses paid to consultants;
- The amount of royalties distributed to authors and creators;
- The amount of royalties distributed to record companies, and the amount to individual record companies if they receive over a certain threshold;
- Details or estimations of the amount of royalties distributed to record companies that are passed onto authors and creators;
- The amount of royalties that are undistributed, and whether those funds are used for any other purposes other than investment;

17 Luke Slattery, 'Copyright staff get more than they give to authors and artists', The Australian, 18 February 2010, page 7; Luke Slattery, 'Copyright boss defends payments' The Australian, 19 February 2010, page 2; Lyn Tranter 'CAL not good for authors' The Australian, 24 February 2010, page 27.

18 Benedict Atkinson, *The True History of Copyright: The Australian Experience, 1905-2005*, Sydney University Press, Sydney, 2007.

- The amount of money spent on litigation;
- The amount of money spent on legal costs; and
- The amount of money spent on policy and lobbying government.