

1 March 2010

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 and A91211) – DRAFT DETERMINATION**

We are writing in response to your 8 February 2010 invitation to comment on the Australian Competition and Consumer Commission's (ACCC) draft determination in respect of the application for re-authorisation lodged by Australasian Performing Right Association Ltd (APRA).

Creative Commons Australia (ccAustralia) supports all three of the ACCC's recommendations in their Draft Determination. In particular ccAustralia agrees that:

- the limited nature and bureaucratic requirements of APRA's existing opt-out and licence-back mechanisms present a significant barrier to direct licensing of music by APRA members;
- discounts on APRA's existing blanket licences would provide an incentive for music users to enter into alternative licensing agreements and empower musicians to explore more varied and competitive pricing and distribution models. In particular, we believe that it is important that such discounts recognise the direct licensing of material under Creative Commons licences, where it occurs in sufficient quantity.

ccAustralia also endorses the ACCC's commentary on the desirability of non-exclusive input agreements for APRA and other collecting societies in the future. We agree with the ACCC that it should be possible for APRA to design appropriate legal mechanisms to enable continued effective and efficient enforcement of their licences without requiring musicians to wholly relinquish their rights to the collecting society. Furthermore, we believe that any resulting increase in costs should be weighed against the competition benefits to musicians and music users.

Exchanging APRA's existing full rights assignment for a non-exclusive licensing model would:

- remove the need to develop separate mechanisms for overcoming the legal incompatibility between the APRA's existing input arrangements and Creative Commons licensing;
- proactively respond to the reality that many APRA members are already making their works available to users directly online in technical breach of their APRA membership agreement (see further below); and
- lower restraints on musicians and music users fully participating in and benefiting from the opportunities afforded by new business models that utilise direct licensing.

However, ccAustralia recognises that such a significant change to the APRA system would require time to be considered and implemented. Therefore, as a short-term solution, ccAustralia recommends:

- increased scrutiny of the degree to which APRA's current input arrangements create potential legal barriers to their members' utilisation of online licensing and distribution services;
- at a minimum, modification of APRA's Noncommercial Licence Back mechanism to allow the use of the Creative Commons noncommercial licences, which are not available to APRA members under the current system;
- by preference, further amendments to APRA's input arrangements or reassignment mechanisms to allow online distribution of music in commercial circumstances, particularly through popular social media platforms (such as MySpace and YouTube) and revenue sharing services (such as Beatpick and Jamendo);
- ideally, the introduction of further amendments to give APRA members the choice of using the full range of Creative Commons licences, including those that allow commercial use; and
- improved information for APRA members and licensors on the legal implications of APRA's input and output arrangements and the collecting society's policies with respect to common online activities.

More detailed discussion of these recommendations is provided in the attachment.


Over the last three years APRA has developed a productive relationship with ccAustralia and has exhibited a willingness to respond to feedback on its current input and output arrangements. Nevertheless, we believe that the above amendments are still necessary to ensure that Australian musicians and music users alike have access to a full range of competitive licensing options and the business models of the 21st century.

Please feel free to contact Jessica Coates on 07 3138 8301 or at [jessica@creativecommons.org.au](mailto:jessica@creativecommons.org.au) to discuss these matters further.

Yours sincerely



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Creative Commons Australia



Jessica Coates  
Project Manager  
Creative Commons Australia

## Comments on Particular Issues

### Effect of rights assignment on online activities

ccAustralia would like to draw the ACCC's attention to the anti-competitive effects of APRA's input arrangements on its members' ability to participate in emerging online business and distribution models. The ACCC's draft determination provides a comprehensive commentary on the effect of APRA's current input arrangements on direct licensing with respect to public performances (eg in pubs or cinemas), but provides less attention to their effect on the online activities of APRA members.

A full appreciation of the extent of APRA's control over the right to distribute musical works online is important to any assessment of the competitive effects of APRA's current licensing system not only because online distribution is the area in which the market is most rapidly changing and evolving, but because it is the area in which musicians and users are presented with the broadest array of licensing and distribution options. Most importantly, it is through online distribution that musicians are most likely to seek to directly license their works.

ccAustralia would suggest that the majority of APRA's members are currently direct licensing their material via numerous online services in technical breach of their APRA membership agreement. For example, it is extremely common for musicians to engage in one or more of the following activities:

- making musical tracks available on websites published by an associated record label, distributor or music venue (whether under a Creative Commons licence or some other licence);
- making musical tracks available for streaming and/or download on commercial services such as MySpace, Facebook, YouTube or iTunes; and
- making musical tracks available for streaming and/or download on Creative Commons-based revenue-sharing platforms such as Jamendo and Beatpick (which, it is noted, are cited by the ACCC as emerging markets at para 4.193).

All of these activities, however, would appear to be in technical legal breach of the APRA membership agreement. This is because APRA members assign not only the 'public performance' rights (which govern playing of music in public venues) but also the 'communication' rights (which cover broadcast and online distribution of music) over all their works to the collecting society.<sup>1</sup> This effectively relinquishes their right to make their works available to others online without APRA's permission.

It would seem likely that the majority of APRA members are unaware that they must obtain APRA's permission to distribute their materials online. Furthermore, based on a close reading of the APRA Constitution, it would appear that there is currently no legal mechanism available to APRA members to use online distribution platforms and licensing tools in most cases without fully relinquishing their APRA membership and

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<sup>1</sup> It is these two separate rights that APRA collectively refers to as 'performing rights'; however, we note that at para 2.16 of its report when the ACCC describes the rights administered by APRA it appears to focus on the 'public performance' right and does not reference online uses.

their rights to obtain royalties through the collecting society. APRA's existing reassignment mechanisms — ie Opt Out, Licence Back and Noncommercial Licence Back — do not enable the above uses because:

- the Op Out mechanism does not extend to online communication of a work;<sup>2</sup>
- the Licence Back mechanism is geographically limited to Australia, and so does not permit distribution on the internet;<sup>3</sup> and
- the Noncommercial Licence Back mechanism designed to enable online distribution is not effective in permitting users to distribute their works online via popular mechanisms such as social media platforms or Creative Commons licensing (see further below).

Despite these legal barriers, it is important to note that, because many members lack a comprehensive understanding of the legal relationships entered into upon signing the APRA membership agreement, they do engage in these kinds of licensing activities. For this reason, ccAustralia contends that the best measure of interest in direct licensing is not the 52 times APRA members have sought to use the current opt out and licence back mechanisms, or the degree to which they are seeking to license directly to groups such as cinemas and television broadcasters, but the degree to which they are using online distribution services to make their material available to users in a commercial or non-commercial context.

## **Inadequacy of existing reassignment mechanisms**

ccAustralia supports the ACCC's proposed Condition 1 that APRA be required to streamline its current reassignment mechanisms to make it easier for members who want to negotiate licences directly with some users to get permission from APRA to do so. However, ccAustralia would also recommend that this condition be expanded, or an additional condition be created, requiring APRA to ensure that effective opt out and licence back mechanisms are available to allow APRA members to legally distribute their material online via popular commercial and noncommercial services such as social media platforms and the Creative Commons licences.

As discussed above, although APRA members can regain control of works in the APRA repertoire using the opt out and licence back mechanisms, limitations in the terms of these mechanisms mean that they do not provide a mechanism to allow the legal distribution of musical works online.

The Noncommercial Licence Back, introduced by APRA in 2008 to deal with this licensing shortfall, also fails to provide an adequate mechanism for addressing the most popular instances of direct licensing – distribution of material via social networking platforms, revenue sharing services and use of the Creative Commons licences. Under the mechanism, a member can issue to other parties a non-exclusive licence to “...communicate to the public online... any particular work or works...”,

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<sup>2</sup> APRA Constitution cl.17(b). This mechanism is also arguably inappropriate for musicians wishing to utilise diverse licensing arrangements for the distribution of their music, as it only allows the reclaiming of rights, and consequent relinquishing of royalties, over a musician's entire repertoire and cannot be applied on a song-by-song basis.

<sup>3</sup> APRA Constitution cl.17(f)

where the sublicensee's use is "for Non-Commercial Purposes". Problems we identify with this new mechanism include:

- it does not allow the use of Creative Commons licences, as it extends only to online communication of the work, while the Creative Commons licences provide a broad right to 'use' the work, including to perform it in public and broadcast it (rights also controlled by APRA). Likewise, the Noncommercial Licence Back does not permit musicians to license their material under other licences that permit 'noncommercial use' of the work;
- the definition of 'noncommercial' in the mechanism is out of line with any common understanding of the term (eg it effectively excludes use by all non-profit organisations and educational institutions)<sup>4</sup> and, if a strict legal interpretation is applied, runs the risk of being so narrow as to have no practical utility;
- making works available on popular social media platforms is beyond the scope of the mechanism as these platforms are invariably commercial and include advertising and/or direct sales.

### ***Noncommercial Licence Back***

For the reasons noted about, ccAustralia recommends that, at a minimum, the Noncommercial Licence Back should be expanded to include public performance, broadcast and offline communication of a work, not just online communication, so as to allow APRA members to utilise the noncommercial Creative Commons licences — ie the Attribution-Noncommercial, Attribution-Noncommercial-No Derivative Works and Attribution-Noncommercial-ShareAlike licences.

### ***Commercial licensing***

ccAustralia also notes that, even with changes to the breadth of rights covered by the Noncommercial Licence Back, APRA members will still be unable to use the three Creative Commons licences that allow commercial use – ie Attribution, Attribution-ShareAlike and Attribution-No Derivative Works.

More importantly, they will also still be unable to distribute their works on mainstream, popular social media platforms, including MySpace, Facebook, YouTube and Last.fm, which are all ad-supported or incorporate commercial activity. While ccAustralia acknowledges that APRA is likely to in principle approve of such uses and even have licensing agreements with at least the most prominent commercial services, we are unable to locate any information on APRA's website or in their membership materials informing musicians of these licences, indicating which services hold such licences, or providing an explanation of the legal or policy position of APRA regarding their members' use of such services.

We also understand that APRA does not currently provide licences to revenue-sharing services such as Jamendo and Beatpick, which combine direct licensing

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<sup>4</sup> Creative Commons recently conducted an extensive international survey examining the definition of noncommercial in the online environment. For its conclusions see *Defining "Noncommercial" - A Study of How the U.S. Online Population Understands "Noncommercial Use"* (September 2009) Creative Commons, <http://creativecommons.org/weblog/entry/17127>

options for users and musicians with commercial payment schemes, and hence may be considered direct competitors for APRA's own services. Our understanding is that these services comply with the "50 per cent rule" endorsed by APRA and the international CISAC community.

To ensure maximum market utility and licensing flexibility for musicians and music users alike, ccAustralia therefore recommends the introduction of mechanisms through which APRA members may:

- distribute their works via commercial social networking and revenue-sharing services with legal certainty; and
- ideally, have the choice to use the full suite of Creative Commons licences, including those that allow commercial use.

### **Clarification, Education and Transparency**

As is stated above, ccAustralia believes that the majority of APRA members are currently acting in breach of their APRA membership agreements primarily because they are unaware of the legal effects of the assignment of their rights to APRA, particularly with respect to online distribution. Furthermore, APRA does not currently provide public information about its policies on the use of Creative Commons licences, social network sites, user generated content sites, or revenue-sharing services.

As noted by the ACCC at 4.135 of its Draft Determination, transparency is essential to limiting any anti-competitive detriments arising from a collecting society's input and output arrangements. ccAustralia therefore recommends that APRA be required to increase the information available in its online and hardcopy publications on:

- the restrictions placed on its members as a result of the full assignment of their rights to the collecting society;
- the legal position of members with respect to the use of social networking and user generated content services;
- the legal position of members with respect to the use of revenue-sharing services that provide direct licensing alternatives to APRA's own licences; and
- APRA's policy with respect to the use of the Creative Commons licences.