

SUBMISSION OPPOSING APRA RE-AUTHORISATION BY ACCC.

A] INTRODUCTION:

This submission is prepared by a Consumer without the benefit of legal training. It's brief, straightforward, informal and factual. The asterisks mark statements that will be familiar to a reader with experience in the field. If needed references could be supplied for these remarks. The writer would welcome a chance to address the ACCC in person on this matter.

B] EXECUTIVE SUMMARY:

1. APRA is a monopoly.
2. The Copyright Tribunal is responsible for oversight of this APRA monopoly.*
3. The Copyright Tribunal (CT) is under equipped to govern it sufficiently.
4. Thus APRA is able to exert its monopoly power cloaked in pseudo-legalities.
5. The CT can't utilise independent information to penetrate the consultative veil
6. The consumers are insufficiently funded to penetrate the legalistic veil
7. Particular groups are victimised
8. The Public Interest may be affected.
9. The APRA monopoly has been a problem for Consumers for over 50 years.
10. APRA's recent financial power and confidence have increased its intransigence.
11. The ACCC should act now to effect significant change.
12. Solutions involving changes both broad and minimal are suggested.

C] THE MONOPOLY:

1. The Collecting Society APRA is a self-admitted monopoly. *
2. The power of a wealthy monopoly under scrutiny must be legally conscious.
3. Superior financial resources for the employment of in-house executive, clerical and legal manpower together with outside Consultant and Law firms allows the monopoly to dominate its weaker Consumers by means apparently within the statutes.
4. Applicants and especially would-be Applicants know in advance that they cannot match the amounts APRA is prepared to spend in the defence of the monopoly.
5. The CR accepts submissions, weighs the evidence to the best of its ability and decides on the "evidence".

6. As a much greater volume of material can be presented by the resourced APRA than by the under-resourced and under-qualified Applicant there is a high probability that the CT will be persuaded in the direction of the APRA unless they have the resources and the will to double check APA's well crafted assertions.
7. A case produced by those in the pay of the proponent cannot be accepted as fact. e.g. In-house drug company research only gains medical community credence when independently validated. A controversial proposition put forward by a Collecting Society should be independently validated before acceptance.
8. However, the Copyright Tribunal is not obliged by statute to inform itself independently, is not resourced sufficiently to encourage it to pursue that approach. It does not do so either at all or if at all not in a detailed manner.
9. The Tribunal has thus taken the position, often stated in its reasons for decisions* that it depends on Applicants to present the necessary information to counter APRA's claims. Thus the imbalance of power cannot be properly understood, supervised or controlled by the CRT. The CRT cannot provide the balancing role for which it was created. This is thoroughly unacceptable.
10. The Copyright Tribunal was created in large part* to prevent the abuse of APRA's monopoly power. Although obliged to do so it lacks the resources to properly fulfil that obligation. [In the PPCA case of 2006/7 the CR comment several times* that the "Applicant" did not offer a counter to the PPCA evidence and therefore they would accept the PPCA submission.]
11. The Tribunal is probably unaware of the degree to which it fails Consumers.

D] AN EXAMPLE:

1. One particular group which is being persecuted by the monopolisation of music rights are those licensed premises offering Disc Jockeys and/or dancing to modern music.
2. Without any directly CT approved scheme APRA have imposed a levy in the order of 10-20 times the international rate on Australian Licensed Premises offering the above dancing facilities.
3. For this APRA rely on a case taken to the CRT by their sister Collecting Society the PPCA in 2006/7.
4. In this case the PPCA absolutely overwhelmed a hopeful but naïve opposition by parading an expensive string of social scientists whose

opinions and researches were commissioned and designed to support APRA's position.

5. The Consumers representatives were simply out of their league and unable to muster the necessary expertise, funds or energy to properly challenge the views and calculations of APRA's experts. However an examination of those experts clearly demonstrates the bias before and after their opinions were given to the CRT. The main architect of these submissions now chairs a Collecting Society
6. Opinion from one or more biased experts is of no consequence and the CT erred in not informing itself as to the probity of the surveys upon which the PPCA case was based in 2006/7.
7. However the CRT commented it had no other course than to consider what was presented and in the absence of the weaker parties presenting similarly expensive Consultants opinions decided to largely accept what the PPCA presented.
8. The rate set for the PPCA in that case was high and it was admittedly suggested (informally) that APRA might be entitled to benefit similarly. However the position of APRA has not been explored or tested by the Tribunal. The potential Applicants simply can't afford to properly engage the process.
9. However it's well known that a musical piece performed by untalented artists is not popular, not often played or likely to be utilised for dancing. APRA has no interest in the rights of the performance but only in the underlying composition. The reality is that this right may be worth far less than that of the performance.
10. The argument that you can't have a performance without the composition is not an argument for parity of rights payments. It's not possible to have a fire without fuel but an unlit bonfire achieves only a passing glance whereas once burning the raging fire will occasion all to stare at it with fascination. The composition is the fuel, the fire equates to the performance.... Their relative entertainment value is not at parity.
11. Similarly the role of the person presenting the music has not been properly weighted. APRA charge a large premium if a DJ presents music but whilst this premium acknowledges the talent input by that DJ they don't employ, pay for that or have rights to the creativity of that DJ. This premium is a non-sequiter.
12. Similarly a large premium is charged if music is used for dancing. If this premium was confined to those dancing it could be reasoned but as it's applied to anyone entering a venue where dancing occurs whether they dance or not it is again an illogical penalty.

13. These facts are mentioned to demonstrate the persecution by the monopoly. These irrationalities SIMPLY COULD NOT EXIST IN A COMPETITIVE MARKET.
14. They demonstrate the ineffectuality of the CT and the need for a totally different approach.
15. It is respectfully submitted that the fiasco of 2006/7 demonstrated the toothlessness of the CRT once and for all. Another solution is warranted.
16. The monopoly Collecting Society is a noxious commercial institution, which doesn't hesitate to abuse power, as may any other monopoly. They should be disbanded and outlawed.

E] AGAINST THE PUBLIC INTEREST:

1. The last Determination by the ACCC saw a multitude of complaints by users of all categories. Even Fairfax commented it has no alternative but to bow to APRA's demands whether reasonable or not.
2. The last Determination accepted that Composers are non-competitive.* This goes against human nature and discriminates against talent.
3. Without the support of a compelling research this comment is self-evidently unlikely. The reason for a non-competitive composer market is APRA which is the only game in town.
4. Price discrimination across user groups is common and extreme.
5. The blanket license is a function of the monolith and used as a impost tool.
6. The Alternate Dispute Resolution option is ineffectual and little used.
7. The Copyright Tribunal is expensive and fettered in its range of remedies.
8. The APRA approach to rights is out of date, rigid, of unproven economic merit and non-progressive and therefore to the Public Detriment.
9. All the above are against the public interest

F] SENSIBLE ALTERNATIVES:

1. It is respectfully submitted that the Counterfactual did not go nearly far enough at the previous ACCC Determination. This appears to be due to the ACCC accepting a few APRA assertions which were unlikely to be true e.g. Composers are non-competitive; APRA is uniquely economically efficient.

2. This submission specifically objects to the re-authorisation of APRA in its current incarnation and invites a Counterfactual that examines this (eventual) possibility and its ultimate benefits for providers and users.
3. A realistic scenario would be three or perhaps even four 'Collecting Clubs' which are allowed a maximum of 33% (if three) or 25% (if four) of the exclusive rights to music in any particular genre. Each genre to be for sale separately as well as a blanket license from that particular collecting club.
4. Composer's could sell their rights exclusively or non-exclusively in which case a 'Club' might represent more than its 33% of total rights but not all of those rights would be exclusive. Composers would commit their rights for a maximum of 3 years at a time.
5. The APRA claim that their mammoth organisation is a more efficient machine is untestable and unlikely. It's self evident that competing businesses are more motivated toward efficiency than large uncontested institutions e.g. State run transport, utilities etc.
6. It's respectfully submitted that "Economic efficiency" is likely to improve with multiple copyright representation.
7. In any event the benefits to Composer Groups, Consumer Groups and the Public would in all probability be greater than the detriment.
8. The existence of competing "clubs" would encourage them to vie for Composer's works and thus pay more as well as compete for Consumers business, which would create a "market" price, which would not need to be questioned.

G] LESSER ALTERNATIVE MECHANISMS:

1. The Copyright Tribunal should be obliged by statute to inform itself independently by any means necessary to be able to properly address the issues under consideration and be resourced to so do. The Tribunal should be funded appropriately.
2. The Blanket License is convenient but also used as a monopolistic tool to prevent consumers knowing what alternatives exist for them. Other option should be provided (e.g. genre-based) with proportionately reduced fees.
3. APRA should be obliged by law to provide a current detailed list of all music to which it lays claim and also those works to which it does not. This would allow users an alternative strategy to a license with APRA which would then be obliged to present a balanced attractive License

4. The date of all new additions/removals to inventory must be notified to consumers. This is a difficult but not impossible task. If APRA is to remain a monopoly it must spend enough to be a responsible one.
5. If the ACCC is not convinced of APRA's anachronisms and severe anticompetitive effect and the distribution mechanism of music rights remains unchanged, the function of a singular central organisation would be fairer and more tolerable with the additions presented above.

H] CLOSING REMARKS:

The comments above attempt to explain that the Government, after several enquiries dating back to the 1930's* including a Royal Commission decided to tolerate APRA on the basis that it be counterbalanced by the Copyright Tribunal.

That position was later re-enforced by insisting on an Alternate Dispute Resolution facility, regular reporting and other fair-minded adjustments potentially in favour of consumers.

The Government also surely rely on the role of the ACCC to monitor the situation.

Sadly

THE CURRENT EXTANT MECHANISMS TO NEGATE THE MONOPOLISTIC EXPLOITATION OF MUSIC CONSUMERS ARE QUITE SIMPLY... NOT EFFECTIVE.

The ACCC is respectfully requested to use its powers and resources to insist on significant, well-thought through and effective change.

Thankyou,

Jon Sainken

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E&OE

The Leederville Hotel, Claremont Hotel, Mindarie Marina Hotel, Club Bay View.

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