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Australian Libraries Copyright Committee



AUSTRALIAN
DIGITAL ALLIANCE

Australasian Performing Rights Association (APRA) application for re-authorisation

*Joint submission by the Australian Digital Alliance and Australian
Libraries Copyright Committee to the Australian Competition &
Consumer Commission*

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www.digital.org.au
+61 (02) 6262 1273

National Library of Australia,
Canberra ACT, 2600 Australia

Executive Summary

The Australian Digital Alliance (ADA) and Australian Libraries Copyright Committee (ALCC) thank the Australian Competition & Consumer Commission (ACCC) for the opportunity to comment on the Australasian Performing Right Association Ltd (APRA) application for re-authorisation.

The ADA and ALCC believe that the ACCC's conclusions regarding public benefit and detriment arising from APRA's arrangements as a collecting society in 2010 remain valid today. While APRA offers composers and music users significant benefits in terms of assisting users with licences to play music, and ensuring appropriate returns to songwriters¹, their virtual monopoly in respect of performance-rights licences in Australia means the potential for significant public detriment must be monitored closely.

In this submission, the ADA and ALCC comment on three aspects of APRA's submission for re-authorisation:

- 1. Re-authorisation for a period of six years;**
- 2. Whether APRA's arrangements lead or could lead to prices impermissibly above competitive levels;**
- 3. That detection and enforcement costs associated with APRA's operations would be unreasonable if APRA took only non-exclusive rights.**

The ADA and ALCC submit that:

- A. Three years remains an appropriate authorisation period in light of the rapidly evolving environment surrounding digital consumption of music**
- B. By virtue of their monopoly in respect of performance-rights licensing, they are able to set licence fees without consideration as to what a competitive price may be; and in some areas, are doing so**
- C. Access to transparent distribution and revenue data would benefit licensees negotiating competitive prices with APRA**

¹ Australian Competition & Consumer Commission (ACCC) Determination on Application for revocation and substitution of authorisations lodged by Australasian Performing Right Association Ltd in respect of arrangements for the acquisition and licensing of performing rights in music, 16 April 2010

The ADA and ALCC hope to be able to provide the ACCC with further feedback on APRA's re-authorisation at the draft determination stage of this process. APRA's submission of their application at this point in time coincides with the next stage of the ALRC Copyright Inquiry, which constrains the resources of organisations like the ADA and ALCC to properly respond to it.

- **A. Three years remains an appropriate authorisation period in light of the rapidly evolving environment surrounding digital consumption of music**

In seeking authorisation from the ACCC of their conduct and arrangements for six years, APRA state:

“Experience over the last three years and the likely developments over the short to medium term indicate there is no longer a need to have short term, three year authorisations. APRA submits that in the next six years there are unlikely to be any substantial changes in the market or in technology that alter fundamentally the balance of benefit over detriment inherent in the granting of the present applications for authorisation.”²

The ADA and ALCC find APRA's confidence in the stability and predictability of the digital market and technology surprising, in light of their submission (and the submissions of a number of other content industry representatives) to the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy.

As APRA noted in their submission to the ALRC Issues Paper, the streaming market for digital music is still emerging:

“Spotify launched in Australia in May 2012. In 2011 and 2012, at least ten other music streaming services commenced operations in Australia, including overseas services Rdio and Pandora, and locally developed music

² Australasian Performing Rights Association (APRA) submission to Australian Competition & Consumer Commission (ACCC) for reauthorisation 30 April 2013 paragraph 11.

services JB Hi Fi and Samsung Music Hub. The impact of these services on the Australian digital download market is uncertain.”³

Similarly, the Australian Recording Industry Association (ARIA) made note of the continuing evolution of digital music licensing in Australia in their submission to the ALRC:

“Developments in cloud technology are transforming the way consumers manage and store their music. Many of the cloud services are early in their adoption curve. Increasingly services are offering a bundled array of offerings to their consumers that will change over time. Even as this inquiry proceeds, new services such as the Xbox (Microsoft) music service are being launched or expanding into new territories.”⁴

The Australasian Music Publishers Association (AMPAL), in their submission to the ALRC Copyright Inquiry, described a digital environment in its “nascent stages”:⁵

“These services [digital music services] are just now gaining traction but the market is still a fragile space.”⁶

The Australian Copyright Council describes the Copyright Inquiry as taking place,

“at a time when business models are in a state of transition as they adapt to new technology and different consumer expectations. At present, there remains a gap between some business modes and what consumers want (legitimately or otherwise).”⁷

³ APRA/AMCOS submission to Australian Law Reform Commission Copyright Inquiry Issues Paper (2012) http://www.alrc.gov.au/sites/default/files/subs/247. org_apra_amcos_correction.pdf

⁴ Australian Recording Industry Association (ARIA) submission to the Australian Law Reform Commission Copyright Inquiry Issues Paper at page 9 http://www.alrc.gov.au/sites/default/files/subs/241. org_aria.pdf

⁵ Australasian Music Publishers Association submission to the Australian Law Reform Commission Copyright Inquiry Issues Paper at page 1, http://www.alrc.gov.au/sites/default/files/subs/189. org_ampal.pdf

⁶ Ibid.

⁷ Australian Copyright Council submission to the Australian Law Reform Commission Copyright Inquiry Issues Paper, page 7

In *Australian Entertainment & Media Outlook 2012 – 2016*, PricewaterhouseCoopers (PwC) points to a market in a state of transition, with digital distribution of music set to increase from \$7.5 billion in 2011 to \$13.5 billion in 2016 - a 12.6 percent compound annual advance.⁸ At the same time, PwC notes physical distribution of music content is decreasing and will likely be surpassed by digital sales in the near future.⁹

In the next three to six years it is extremely likely digital music offerings will continue to evolve, both in the context of the roll out of the National Broadband Network (NBN) and increased penetration of connected devices (smartphones, smartTVs) into the Australian market. A number of technology companies have remarked to the ADA and ALCC that they would find it hard to say what will happen in the Australian market in the next two years, let alone six.

APRA too has taken note of the opportunities for content creators arising from the roll out of the NBN, commenting that the 'NBN and its ability to support new content delivery models provides an exciting new context for creative content and its creators.'¹⁰

Similarly, the copyright framework underpinning APRA's licensing arrangements is in a state of review. The Australian Law Reform Commission (ALRC) is set to deliver their final report on the appropriateness of existing copyright exceptions in the digital environment to the federal Government on 30 November 2013. At the same time, Australian content industries continue to press for Government intervention to combat the unauthorized access to and distribution of copyright works. It is not unlikely that within the next 3-5 years, the Australian copyright framework will change - with a resulting impact on the environment for performance-rights licensing.

In their current submission for reauthorisation, APRA describe a market for digital music 'at a critical point, with many unanswered questions about the directions in

⁸ Australian Entertainment & Media Outlook 2012 – 2016, PricewaterhouseCoopers p 143

⁹ Ibid.

¹⁰ APRA/AMCOS submission to the Department of Broadband, Communications and the Digital Economy Convergence Review 28 October 2010 - http://www.apra-amcos.com.au/downloads/file/ABOUT/APRA_AMCOS%20Submission_Convergence%20Review_28.10.11.pdf

which it will develop'.¹¹ APRA readily acknowledges that with respect to licensing of new digital business activities, in many cases a licence through APRA will be a user's only option (in circumstances where these users do not have the resources to negotiate licences on an individual basis).¹² The ADA and ALCC feel that APRA's monopoly with respect to performance rights licensing, in such a rapidly evolving environment, justifies a three year authorisation term.

Further taking into account the continuing evolution of digital business models for consumption of music in Australia, the opportunities offered by the National Broadband Network (NBN) and potential changes to the Australian copyright framework, the ADA and ALCC believe it is fair and necessary that ACCC review APRA's licensing arrangements in another 3 years.

Recommendation 1: That the authorisation period be retained at three years- not six years as proposed by APRA

¹¹ Above n 1 paragraph 4.1.4

¹² Above n 1 paragraph 4.1.5

B. By virtue of their monopoly in performance-rights licensing, they are able to set licence fees without consideration as to what a competitive price may be.

APRA submits that their arrangements do not lead to prices impermissibly above competitive levels¹³. In responding to the ACCC's 2010 findings in this area, APRA notes that copyright,

‘at its heart, is a statutory form of monopoly conferred on the copyright owner and can thus be seen as intended to permit the copyright owner to have market power and extract monopoly rents.’¹⁴

Copyright owners do have the exclusive right to exploit their particular work (and set monopoly rents). They also have the right to set that exclusivity aside – to waive those rights under a creative commons licence, or for public interest purposes.

APRA, however, manage exclusive licences for a range of creators who might otherwise be in competition with each other. They are not copyright owners with respect to a small percentage of musical works, competing within a broader market – APRA hold a virtual monopoly over performance-rights licensing in Australia. Further, they do not operate like individual copyright holders who may elect, in some circumstances, to waive their right to payment for certain uses of their works (either via creative commons licensing or other direct licensing).

By virtue of APRA's arrangements, there is no competitive market for performing rights licensing in Australia, and no competitive level to constrain their pricing.

APRA's ability to potentially set prices above acceptable competitive levels is most evident in the administration of blanket licences.

¹³ Above n 1 paragraph 9

¹⁴ Ibid.

Blanket licensing, and changes to APRA supplier arrangements

Blanket licences are of benefit to a number of music licensees, in significantly reducing transaction costs. For many APRA licensees, like cafes and hotels who do not know in advance what background music they'll play, the APRA background music blanket licence is their only solution to avoid infringing a creator's performance rights. As the ACCC noted in their submission to the ALRC Inquiry into Copyright and the Digital Economy, this can give rise to anti-competitive concerns:

“Users have no genuine alternative means of acquiring a licence to use copyright materials, and collecting societies are able to set prices for access to copyright material without consideration as to what the efficient price of those rights would be.”¹⁵

In many cases, smaller licensees of background music have no choice but to accept the price set by APRA - there is no alternative means, i.e. through direct dealing or through another collecting society, to negotiate a more competitive price.

Hon KE Lindgren AM, QC identified the vulnerability of small licensees in his *Review of Copyright Collecting Societies' Compliance with their Code of Conduct 2011 - 2012*:

“Sophisticated national broadcasters and telecommunications companies are to be contrasted with small business operators who have less knowledge of copyright law and perhaps limited access to specialist legal advice.”¹⁶

However, some smaller licensees are able to manage their performance of background music in commercial settings through arrangements with suppliers, who negotiate on their behalf with APRA. APRA identifies some of these suppliers in their report on distribution practices (updated July 2012), which include SMA,

¹⁵ Australian Competition and Consumer Commission, submission to the Australian Law Reform Commission Copyright Inquiry Issues Paper
http://www.alrc.gov.au/sites/default/files/subs/165.org_acc.pdf para 5.12

¹⁶ Lindgren KE, *Review of Copyright Collecting Societies' Compliance with their Code of Conduct 2011 - 2012*, March 2013,
http://www.screenrights.org/sites/default/files/uploads/CollectingSocieties_Code_Reviewers_Report_Final20Mar13.pdf p 7

*Mood Media (DMX), Coles, Big W, SBA & Marketing Melodies.*¹⁷ For smaller potential licensees, background music supply companies might act as a “buffer” between APRA and an individual bar or restaurant, who may have little knowledge of copyright law and what would constitute a reasonable tariff. The ADA and ALCC note, per APRA’s Distribution Practices Manual, that these suppliers also offer remuneration efficiency and accuracy for APRA: licence fees paid by each supplier are able to be distributed directly to the works they report to APRA.¹⁸ Suppliers are able to identify every work being played, and provide accurate ‘per play’ data to APRA – ensuring fair and accurate remuneration to APRA members.

APRA changes to background music supplier licence agreements

Taking into account suppliers’ abilities to shield smaller licensees from what might otherwise be anti-competitive, or misleading, pricing by APRA, and to provide accurate reporting data, the ADA and ALCC would value more information from APRA regarding their reasoning behind recent changes to background music supplier (BMS) agreements, which reduces the rebate to BMS licensees from 15% on APRA licence fees, to 5%.¹⁹

The ADA and ALCC are concerned that further changes to the BMS arrangements (and reduction of rebate) may ultimately force suppliers out of APRA arrangements.

The ADA and ALCC note that this reduction in rebate was the subject of one of the disputes reported by APRA to the ACCC.²⁰ While it is reasonable to expect renegotiation of licenses by APRA, the ADA/ALCC has concerns that given APRA’s market power, they are able to set tariffs for BMS licensees that make it difficult or unfeasible for them to continue to operate as a supplier on behalf of otherwise vulnerable small licensees. Any conduct by APRA that reduces the ability of suppliers to license with APRA on behalf of a pool of smaller commercial end-

¹⁷ APRA Distribution Practices, <http://www.apra-amcos.com.au/downloads/file/ABOUT/APRA-Distribution-Practices.pdf> p 37

¹⁸ Ibid.

¹⁹ Changes outlined in Attachment A, APRA’s report to the ACCC under condition C2 re disputes notified to APRA under its ADR process , 1 April 2012 to 31 March 2013 (30 April 2013), Dispute Report 4

²⁰ Ibid.

users, who may otherwise be exposed to higher individual tariffs, should be subject to closest scrutiny by APRA.

The ADA/ALCC note that with regard to the Dispute outlined by APRA to the ACCC, APRA advised the complainant that it was open for them to refer the proposed scheme to Expert Determination or the Copyright Tribunal. The ADA/ALCC do not know whether this will occur, but note there are considerable costs and resource constraints to be considered in taking either direction.

Recommendation 2: ACCC should seek further information from APRA regarding reasons behind changes to their BMS licensing arrangements

The ADA and ALCC believe there remains significant public benefit in blanket licensing, but maintain that by virtue of APRA's monopoly position in the market, they are able to set prices above what might otherwise be competitive levels. In these circumstances, APRA should be subject to close scrutiny by the ACCC to ensure that the public detriment resulting from these arrangements does not outweigh the public benefit.

The ADA and ALCC note that APRA anticipates that they will be in a position to be more flexible with their blanket licences and their pricing in future, as the costs in ascertaining proportions of APRA and non-APRA controlled works used by a licensee decrease.²¹ The ADA and ALCC look forward to hearing more examples of these reductions in cost from members and non-members affected by the present arrangements. APRA's indications argue more strongly for a three year authorization term, to enable monitoring by ACCC of these blanket licensing changes as they take effect.

C. Transparency – access to transparent distribution and revenue data would benefit licensees negotiating competitive prices with APRA

The ADA/ALCC's concerns from the 2010 re-authorisation process regarding the lack of transparency in APRA arrangements still stand.²² In 2010, the ADA/ALCC recommended that the following categories of information be made transparent:

²¹ Ibid 4.1.38

²² Recommendation 14 - Australian Digital Alliance and Australian Libraries Copyright Committee, submission to Australian Competition and Consumer Commission on APRA Draft Determination on

- 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.

The ADA and ALCC believe that making at least some of these categories of information more transparent will assist licensees negotiating with APRA (to achieve a competitive price).

The ADA and ALCC would value clarification from APRA as to the remuneration and other benefits paid to staff. The ADA/ALCC has had feedback that APRA representatives negotiating licence fees with small licensees may be working on commission, and so incentivised to attract new licensees and secure highest possible rents, even where the license may be above a reasonable rate or may not properly reflect the use of music by the licensee.

The ADA and ALCC also note that until 09/10, APRA published a detailed breakdown of their different public performance revenue. From 10/10, APRA has absorbed the specific breakdowns into broad categories, making it difficult for potential licensees and APRA members to identify how different revenue streams are growing or contracting (i.e. for digital downloads vs streaming). The ADA and ALCC maintain this information should continue to be transparent and publicly available.

Recommendation 3(as per 2010 submission) - The following categories of information be made transparent:

Authorisation March 2010

<http://digital.org.au/sites/digital.org.au/files/documents/20100302ADAALCC-ACCCdraftdeterminationforAPRA.pdf>

- **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.**