AL©C

Australian Libraries Copyright Committee

ADA

Australian Digital Alliance

13 November 2009

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

By email: adjudication@accc.gov.au

Dear Mr Jones

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

I refer to your 20 October 2009 invitation to comment on the applications for authorisation made by the Australasian Performing Right Association Ltd (**APRA**).

Please see attached a joint submission from the Australian Digital Alliance (**ADA**) and the Australian Libraries Copyright Committee (**ALCC**).

The ADA is a non-profit coalition of public and private sector interests. The ADA was formed to promote balanced copyright law by providing an effective voice for the public interest perspective in debates about copyright reform.

Whilst the breadth of ADA membership spans across various sectors, all members are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.

Sir Anthony Mason, former Chief Justice of the High Court of Australia, is a patron of the ADA. ADA members include:

- Group of Eight universities
- Various metropolitan and regional universities
- National cultural institutions such as galleries and museums
- IT companies such as Google Australia
- Scientific and other research organisations
- Schools.

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Australian Digital Alliance
Australian Libraries Copyright Committee

The ADA works closely with its sister organisation, the ALCC. The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It develops policy and advocates action to support the role of libraries as information providers and preservers.

The ALCC is a cross-sectoral committee which represents the following organisations:

- All national and State libraries
- National Archives of Australia
- Australian Library and Information Association
- Council of Australian University Librarians
- National and State Libraries Australasia
- The Australian Society of Archivists
- The Council of Australasian Archives and Records Authorities
- Australian Government Libraries Information Network.

We make this submission on behalf of our members, who are licensees with several major collecting societies, including APRA, and are genuinely concerned with the conduct of those collecting societies.

However, the ADA notes that some of its members, such as the National Film and Sound Archive, enjoy a good relationship with APRA.

We submit that within the bounds of the current authorisation, APRA still has significant scope to take advantage of its market power when setting licence fees and terms and conditions. This has the potential to create a significant anti-competitive detriment that outweighs the public benefit in the collective management of performance rights.

We recommend that if the ACCC decides to grant authorisation to APRA, it should impose several conditions on the authorisation. We suggest conditions that will be of practical utility in constraining the ability of APRA to act as a monopoly, thereby reducing the anti-competitive detriment of its arrangements.

Should you have any questions regarding the submission, please contact Matt Dawes, Copyright Adviser, by telephone on (02) 6262 1273, or by email at mdawes@nla.gov.au.

We thank you for the opportunity to participate in this process.

Kind regards

Professor Tom Cochrane
Chairman
Australian Libraries Copyright Committee

Derek Whitehead OAM
Chairman
Australian Digital Alliance

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Australian Libraries Copyright Committee

ADA

Australian Digital Alliance

AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LTD APPLICATIONS FOR REVOCATION AND SUBSTITUTION INTERESTED PARTY CONSULTATION

Joint submission of the
Australian Digital Alliance
Australian Libraries Copyright Committee

November 2009

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Australian Digital Alliance
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A. PURPOSE

1. The Australian Digital Alliance (**ADA**) and Australian Libraries Copyright Committee (**ALCC**) have serious concerns regarding the conduct of the Australasian Performing Right Association Ltd (**APRA**).

2. We submit that within the bounds of the current authorisation, APRA still has significant scope to take advantage of its market power when setting licence fees and terms and conditions. This has the potential to create a significant anti-competitive detriment that outweighs the public benefit in the collective management of performance rights.

3. We recommend that if the ACCC decides to grant authorisation to APRA, it should impose several conditions on the authorisation. We suggest conditions that will be of practical utility in constraining the ability of APRA to act as a monopoly, thereby reducing the anti-competitive detriment of its arrangements.

4. We consider that this will reduce the potential risk to government of damaging feedback generated by the substantial negative community sentiment towards collecting societies. In this regard, we note the recent media interest in the unit pricing scheme proposed by the Phonographic Performance Company of Australia Ltd (**PPCA**).

B. SUMMARY OF RECOMMENDATIONS

Recommendation 1: Transparency

5. APRA is not transparent enough in its dealings with licensees. We recommend that the authorisation specify categories of information to be provided to licensees.

Recommendation 2: Access to Justice

6. Licensees and prospective licensees do not have adequate access to justice. We recommend enhancement of the existing expert determination procedure and a requirement to provide mediation.

Recommendation 3: Length of Requested Authorisation Period

7. The proposed authorisation period of six years is too long given the speed of changes in the market. We recommend an authorisation period of two years to enable the ACCC to respond to future changes.

Recommendation 4: Complaints by Licensees

8. Licensees continue to make complaints about APRA's conduct. We recommend a condition requiring that detailed information must be provided to licensees regarding any changes to licences.

Recommendation 5: Membership Agreements

9. The restrictive nature of APRA's membership agreements causes significant anti-competitive detriment. We recommend a condition that recognises the desire of members to use alternate forms of licensing.

Recommendation 6: Representation on APRA's Board

10. APRA's board membership is unbalanced which creates a profit driven mentality. We recommend broader stakeholder representation on the board from independent directors.

Recommendation 7: Non-commercial or Community Use of Music

11. Our members pay high fees for the non-commercial or community use of music. We recommend a condition requiring a licensing scheme that recognises such uses when determining a reasonable fee.

Recommendation 8: Occasional Use of Music

12. Our members pay excessive fees for the occasional use of music. We recommend a condition requiring a licensing scheme that provides for the occasional use of music.

C. APRA AND THE OVERSIGHT OF ITS CONDUCT

The Concept of Collecting Societies

13. The economic rationale behind collecting societies is the public benefit in the effective collective administration of rights. The benefit comes from cost savings in administrative, monitoring, and negotiation activities for both copyright owners and users. Collecting societies also facilitate compliance with copyright law and access to material. We recognise this as a vital role. However, we submit that the operation of collecting societies must be better regulated to ensure that the value added in cost savings is greater than the detriment caused by lower competition levels.

14. Collecting societies arose from the need for an organisation to carry out the activity of licensing materials for owners and users in a cooperative and mutually beneficial manner. Yet, there is an increasing level of concern regarding the difficulties that cultural institutions and industry peak bodies have in dealing with collecting societies such as APRA and PPCA. Both licensee groups feel that their relationship with collecting societies is unbalanced and the dynamic is hostile and driven by commercial considerations.

15. The conduct of APRA is the issue, not the concept of having a collecting society for music performance rights. We agree in principle with the model of collecting societies and the vital role that they play. However, we disagree with the corporate mentality of APRA, which departs from the concept of collecting societies as cooperatives acting for the public benefit. This mentality has resulted in the making of unreasonable proposals during licence fee

negotiations, continual monetisation of new uses, and an adversarial and combative nature with some licensees.

APRA's Conduct

16. Specific examples of APRA's conduct are discussed below, under the heading of Anti-Competitive Detriment. More generally, over the course of APRA's history, stakeholder groups have criticised the way in which APRA uses its market power and resources to demand high licence fees and impose harsh terms and conditions.

17. Six years after the formation of APRA, such was the public dissatisfaction with its conduct, that a Royal Commission was appointed to inquire into the exploitation of performance rights.[1] The Royal Commission concluded that APRA was a 'super-monopoly' and recommended what eventually became the Copyright Tribunal some 35 years later in the *Copyright Act 1968*.

18. The complaints that led to the Royal Commission remain legitimate today. Licensees continue to complain about APRA taking advantage of its market power. For example, the recent media interest in the unit pricing scheme with fee increases of over 1 000 percent proposed by the PPCA.

Oversight of APRA's Conduct

19. In the broader regulatory environment, the activities of collecting societies are subject to limited oversight from the Copyright Tribunal, the ACCC, and the Attorney-General's Department (**AGD**). The Code of Conduct for Copyright Collecting Societies (**the Code**) was implemented with the ambition of providing the required level of oversight. However, we submit that there is a need for a regime that provides for the strong and effective competition regulation of APRA's conduct.

The Copyright Tribunal

20. A key role of the Copyright Tribunal is to control the activities of collecting societies and counterbalance their market power. The Copyright Tribunal is empowered through its jurisdiction to determine the reasonableness of licence fees and terms and conditions.

21. We submit that as a forum, the Copyright Tribunal is ill equipped to effectively constrain the market power of collecting societies. The Copyright Tribunal's effectiveness in achieving practical oversight is hindered by the complexity, cost, time consuming, and legalistic nature of its proceedings. In order to mount an effective challenge in proceedings, licensees are required to obtain legal representation and expert economic witnesses.

22. The costs and delays of the Copyright Tribunal effectively bar most licensees and limit its utility as a forum. For most users, the cost of Copyright Tribunal

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1 *Report of the Royal Commission on Performing Rights*, Commonwealth Government Printer, 1933.

proceedings will exceed the cost of negotiating a licence.[2] This creates a situation where licensees have no other option than to reach agreement with the collecting society and pay higher licence fees than what the Copyright Tribunal may have determined. For example, a government committee received evidence that indicated APRA threatened licensees with 'costly and intimidatory Copyright Tribunal proceedings' unless settlement was reached.[3]

23. The alternative dispute resolution processes available through the Copyright Tribunal have not been utilised. The 2006 amendments to the *Copyright Act 1968* expanded the Copyright Tribunal's jurisdiction to include alternative dispute resolution procedures.[4] However, we consider that the procedures provide little utility because of the deterrence of initiating Copyright Tribunal proceedings in the first place.[5]

Authorisation by the ACCC

24. We submit that the 2006 authorisation of APRA by the ACCC has not effectively constrained APRA's anti-competitive conduct. However, we acknowledge the significant benefits that the authorisation process has provided, such as a non-exclusive licence back scheme and an improved alternative dispute resolution procedure.

25. We submit that authorisation, while beneficial, could be used to further constrain APRA from taking advantage of its market power and superior bargaining position in licence negotiations. We also note in this respect, the limited application of the *Trade Practices Act 1974* (**TPA**), discussed below.

The Attorney-General's Department

26. The AGD has portfolio responsibility for copyright. However, the AGD is not armed with the means to influence the conduct of collecting societies. The AGD's own guidelines on the Declaration of Collecting Societies state that it has no power over their 'day-to-day operations'.[6] The AGD only has oversight of the limited statutory licensing activities of declared collecting societies.

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2 Australian Competition and Consumer Commission, 'Determination: Application for Revocation and Substitution of Authorisations Lodged by Phonographic Performance Company of Australia Limited', 27 September 2007, p 31 (**ACCC PPCA Authorisation**).

3 Standing Committee on Legal and Constitutional Affairs, Commonwealth, 'Don't Stop the Music! A Report of the Inquiry Into Copyright, Music and Small Business', 1 June 1998, p 113. (**Don't Stop the Music report**) Note: while the inquiry is over a decade old, the nature of Copyright Tribunal proceedings have not changed, thus the evidence is still relevant as APRA continues to have the ability to threaten licensees with proceedings.

4 *Copyright Act 1968*, Part IV, Div 4A.

5 See ACCC PPCA Authorisation, above n 2, 33.

6 Attorney-General's Department, 'Declaration Of Collecting Societies', April 2001, <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Guidelines.doc/$file/Guidelines.doc>.

The Code of Conduct

27. The Code is not an effective mechanism for regulating the activities of APRA. The Code's immaterial requirements are incapable of ensuring licensees are treated fairly and equitably. Some of our members who are licensees with APRA have significant dissatisfaction with the conduct of APRA and with the Code.

28. The Code's ineffectual review and amendment processes have compounded its inadequacies. In the two reviews of the Code to date, the Code Reviewer has not engaged in a systematic analysis of the governance and accountability of collecting societies' operations.[7] Additionally, in the annual reviews of collecting societies' compliance with the Code, the Code Reviewer has given only passing consideration to serious issues raised in complaints.

29. The Code was designed in part as a dispute resolution mechanism and in part as a tool for reporting on disputes and complaints. The mechanics of the Code are incapable of achieving meaningful results. In fact, it has been noted that there has not 'been any discernible change in relations [between collecting societies and libraries] since the Code was implemented.'[8]

30. The Code is an ineffective constraint on the market power of APRA. In 2006, the ACCC found that the Code does not:[9]

> serve to reduce [APRA's] capacity to impose licence terms and conditions on users which reflect its position as a monopoly provider of performance rights licences in Australia.

31. In the 2007 authorisation of PPCA, the ACCC noted that the prospect of the Code Reviewer making a negative report might serve to somewhat constrain PPCA's conduct.[10] However, we submit that in practice, there is a low probability of the Code Reviewer making a negative report. This is supported by the content of the reports to date, and the following analysis of the review process.

32. There is insufficient stakeholder engagement by the Code Reviewer. The ineffectiveness of reviews and the lack of utility in making contributions discourage participation. Only one organisation other than us made a submission to the 2008 review of the Code, yet, a large number of organisations frequently express dissatisfaction with the Code and the conduct of collecting

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7 See the Hon JCS Burchett, 'Report of the Code Reviewer Upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia', April 2008; the Hon JCS Burchett, 'Report of the Code Reviewer Upon a Review of the Operation of the Code of Conduct of the Copyright Collecting Societies of Australia', April 2005.

8 Eve Woodberry, Council of Australian University Librarians, 'Australia: Code of Conduct for Copyright Collecting Societies', (Speech delivered at the International Federation of Library Associations Forum, Durban, South Africa, 23 August 2007), <http://ifla.queenslibrary.org/IV/ifla73/papers/153-Woodberry-en.pdf>.

9 Australian Competition and Consumer Commission, 'Determination: Application for Revocation and Substitution of Authorisations Lodged by Australasian Performing Right Association Limited', 8 March 2006, p 58 (**ACCC APRA Authorisation**).

10 ACCC PPCA Authorisation, above n 2, p 34.

societies. The lack of submissions does not indicate satisfaction with the Code, but rather a systematic lack of faith in the value of contributing to the review process. This position has been indicated by several of our members.

33. Our submission to the Code Reviewer cited issues with the Code on four grounds: transparency, dispute resolution, amendment of the Code, and the impartiality of the Code Reviewer.[11] The response from the Code Reviewer, and their consideration of the issues raised was unsatisfactory. The concerns were simply dismissed and not properly addressed.

34. The results of self regulation suggest that it is an inappropriate model. A key issue with self regulation is that an ineffective and weak code may be represented to the public as an effective means of regulation.[12] We submit that the Code is used as a means to deflect public criticism, without requiring any changes to the underlying conduct.

Conclusion

35. We submit that the current regulatory framework is not equipped to constrain APRA from engaging in monopoly conduct. We recommend strong and effective competition regulation to provide satisfactory oversight.

D. COMPETITION LAW AND COLLECTING SOCIETIES

Complementary Intersection of Competition and Copyright Law

36. Competition law and copyright law intersect in a complementary fashion. The concept of a 'monopoly' is different in both legal regimes. We submit that copyright monopolies should be subject to the strict application of competition law to prevent them from taking advantage of their market power. Failure to prevent this would lead to outcomes contrary to the objectives of both legal regimes.

37. The objective of copyright law is to reward creation and encourage continued innovation.[13] Copyright law aims to rectify the market failure created by the ability and incentive for people to 'free-ride' on the intellectual efforts of others. However, this copyright protection also costs society by limiting access to information. Copyright owners have a financial incentive to restrict the dissemination of their works and hamper the creation of new works. This conflict necessitates a trade off, requiring a balance to be struck between the competing interests of copyright owners and copyright users. Copyright law aims to achieve this balance by limiting the scope and strength of copyright

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11 Australian Digital Alliance and Australian Libraries Copyright Committee, 'Submission to the Code Reviewer: Code of Conduct for Copyright Collecting Societies', February 2008, <http://www.digital.org.au/submission/documents/0208_CollSoc_Code.pdf>.

12 See Rhys Jenkins, 'Corporate Codes of Conduct: Self-Regulation in a Global Economy', *United Nations Research Institute for Social Development*, April 2001.

13 Intellectual Property and Competition Review Committee, 'Review of intellectual property legislation under the Competition Principles Agreement', 30 September 2000 (**the IPCRC Report**), pp 23–26; Robertson Wright SC and Julia Baird SC, 'The intersection of competition and intellectual property law and the 'new economy'' (2008) 16 *Commonwealth Competition Law Journal* 143, pp 25–32.

protection through the duration of its grant, the nature of the rights granted, exceptions, and statutory licences.

38. The objective of competition law is to enhance the welfare of Australians through the promotion of vibrant markets.[14] In the absence of competition there is market failure as participants have the incentive to engage in inefficient behaviour to maximise profits. Competition occurs through price competition for the lowest cost or dynamic competition for the innovation and marketing of new goods and services.

39. The overarching principles of copyright and competition law are complementary.[15] Copyright fosters innovation – which is a key factor in dynamic competition. Similarly, competition creates pressure and incentives to innovate – which is central to copyright. Both competition and copyright 'share the same overall objective of enhancing community welfare'.[16]

40. The use of the word 'monopoly' to describe market positions in competition law, and ownership in copyright law, is fundamentally different. A monopoly in competition terms is a participant that possesses a substantial degree of market power.[17] A monopoly may act in a manner unconstrained by competition from rivals or countervailing power from other market participants. Competition law concerns preventing monopolists from taking advantage of their market power.

41. A 'monopoly' in copyright terms is the proprietary right of the owner to exclude others from exploiting the property in certain ways.[18] Copyright law is concerned with protecting the rights of the owner to enable their enjoyment of the work. This is different to the concept of a monopoly in competition terms, a copyright monopoly over a single work is not necessarily indicative of market power.[19]

Market Power of APRA

42. All collecting societies possess a substantial degree of market power in the respective markets in which they licence classes of works. They are monopolies in the competition sense of the word. We submit that the current regulatory framework is not suited to effectively constraining APRA, which results in inefficient outcomes that are contrary to the objectives of both competition and copyright law.

43. APRA has a monopoly over performance rights licences for music and literary works in Australia.[20] In its 2006 authorisation determination, the ACCC concluded that:[21]

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14 The IPCRC Report, above n 13, pp 23–26; Wright SC and Baird SC, above n 13, pp 25–32.
15 Ibid.
16 National Competition Council, 'Review of Sections 51(2) and 51(3) of the Trade Practices Act 1974', (1999), p 159.
17 Wright SC and Baird SC, above n 13, p 32.
18 Ibid.
19 National Competition Council, above n 16, p 149.
20 *Australasian Performing Right Association Limited and Cerindale Pty Ltd* (1991) 13 ATPR 41-074/97, para 44, it was held that APRA:

> While the Copyright Tribunal and expert determination process, together with the potential development of alternatives to traditional blanket licenses, constrain APRA's ability to exploit its monopoly to some extent, the ACCC is not satisfied that they provide such a constraint that APRA is forced to offer performance rights licences on terms which accord, or are close to, the efficient price for public performance of its repertoire.

44. The collective management of rights eliminates competitive pressure that would otherwise exist through price competition between the different copyright owners trying to individually licence their works. This has the potential to result in an inefficient outcome with a higher price paid than had the copyright owners been competing for the licensing of their works.

45. We submit that APRA continues to enjoy a significant advantage in its bargaining position. We further submit that there are no real constraints to prevent APRA from taking advantage of its market power and obtaining higher licence fees than those of a competitive market.

Competition Regulation

Competition Law and Collecting Societies

46. Government reports have repeatedly expressed concern about the market power of collecting societies and the need for increased regulation. However, there have been no substantive outcomes other than the creation of the Code, and minor expansions of the Copyright Tribunal's jurisdiction. We consider both to be ineffective mechanisms for constraining the monopoly conduct of collecting societies.

47. The *Report of the Royal Commission on Performing Rights* analysed the licence fees and terms and conditions demanded by APRA.[22] The Royal Commission was appointed after sustained complaints about the monopoly conduct of APRA – the only collecting society at the time.[23] The report concluded that APRA was a 'super-monopoly' and recommended the establishment of a tribunal to arbitrate disputes over licence fees. This recommendation was not acted on until 1968 with the creation of the Copyright Tribunal.

48. The *Review of Australian Copyright Collecting Societies* report acknowledged that while collecting societies played a vital role, their conduct needed to be monitored.[24] The report recommended an industry ombudsman, but concluded that overall, collecting societies were acting appropriately.

> enjoys a substantial degree of power – amounting indeed to dominance – in the market for music rights. It would seem that, in practical terms, it would be impossible for a nightclub or discotheque to survive without using music of [APRA].

21 ACCC APRA Authorisation, above n 9, p 64.

22 *Report of the Royal Commission on Performing Rights*, Commonwealth Government Printer, 1933.

23 Justice Kevin Lindgren, 'The Interface Between Intellectual Property and Antitrust: Some Current Issues in Australia', (2005) 16 *Australian Intellectual Property Journal* 76, 87.

24 Shane Simpson, 'Review of Australian Copyright Collecting Societies', *A Report to the Minister for Communications and the Arts and the Minister for Justice*, July 1995.

49. The *Don't Stop the Music!* report focused on the complex bundles of rights involved with the playing of music, and made recommendations aimed at simplifying the procedure for small businesses.[25] The report recommended expanding the Copyright Tribunal's jurisdiction, including mediation, and the creation of a code of conduct – to be made mandatory if required. In the response to the report, the previous government indicated that it would consider a mandatory code of conduct in the event that the voluntary code of conduct was found to be inappropriate in practice.[26]

50. The *Review of Intellectual Property Legislation Under the Competition Principles Agreement* report made several strong recommendations with regard to the regulation of collecting societies.[27] The report considered appropriate regulation to be essential, and recommended among other measures, increased supervision by the ACCC through the authorisation process under the TPA. The previous government agreed in part, to amend the TPA to implement the recommendation – however this has yet to be acted on. The outcome of the report was the much weaker framework provided by the Code. The Code was agreed to as a compromise between interest groups, collecting societies, and government.

51. The *Jurisdiction and Procedures of the Copyright Tribunal* report noted the issues surrounding the determination of licence fees and terms and conditions when considering the scope of the Copyright Tribunal's jurisdiction.[28] During the process of drafting the report the Committee looked closely at the conduct of collecting societies. However, the report's recommendations did not address the issue as its terms of reference did not require competition analysis. The report recommended that the Copyright Tribunal's jurisdiction be expanded to include alternative dispute resolution, which was implemented in 2006.

The Need for Increased Competition Regulation

52. The application of the TPA to conduct with regard to copyright is inhibited by section 51(3). The provision is founded on the concept that intellectual property rights must be protected from competition laws to prevent a detrimental effect on innovation and creativity. We acknowledge the significant commercial benefits that flow from the operation of the section,[29] but consider that in light of the above analysis, the failure to expose intellectual property *monopolies* to competition law will lead to outcomes contrary to the objectives of both regimes.

53. For certain conduct with regard to intellectual property, section 51(3) creates an exception from the restrictive trade provisions in Part IV of the TPA. This *may*

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25 Don't Stop the Music! report, above n 3.

26 Government Response to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, Commonwealth, 'Don't Stop the Music! A Report of the Inquiry Into Copyright, Music and Small Business', 2 November 2000.

27 Intellectual Property and Competition Review Committee, 'Review of Intellectual Property Legislation Under the Competition Principles Agreement', 30 September 2000, pp 124, 127.

28 Copyright Law Review Committee, 'Jurisdiction and Procedures of the Copyright Tribunal', December 2000.

29 National Competition Council, above n 16, 151.

exempt collecting societies from the competition regulation of conduct such as the pooling of rights. Without the uncertain application of section 51(3), such conduct would otherwise contravene the TPA's prohibitions on agreements affecting competition. Section 51(3) relevantly provides:

> A contravention of a provision of this Part [IV] other than section 46 [misuse of market power], 46A or 48 [resale price maintenance] shall not be taken to have been committed by reason of:
>
> (a) the imposing of, or giving effect to, a condition of:
>
> (i) a licence granted by the proprietor, licensee or owner of a … copyright …; or
>
> (ii) an assignment of a … copyright …;
>
> to the extent that the condition relates to:
>
> …
>
> (v) the work or other subject matter in which the copyright subsists; or

In recognition of the objectives of section 51(3), we consider that conduct with regard to copyright, such as its exploitation and dealing, should only contravene competition law where the conduct has an anti-competitive effect. An anti-competitive effect will cause reduced innovation and is contrary to the objectives of copyright law.

54. We submit that there is no sound reason for exempting APRA from the application of competition law. Mere possession of intellectual property should not grant a company with market power protection from competition laws.[30] We consider that collecting societies are a 'special case'; they are a rare instance of an intellectual property monopoly.[31] It is often hard to define what is an acceptable exploitation of an intellectual property right, and what is unacceptable anti-competitive behaviour. However, with collecting societies the boundaries are clear. Copyright might not be a 'monopoly' – but collecting societies surely are.

55. We consider that the authorisation of collecting societies should be necessary. This was recommended in the IPCRC report and the submission of the Trade Practices Commission to the Hilmer Committee.[32] We acknowledge that APRA has voluntarily submitted to the authorisation process, but recognise this is in light of the exceptional strength of APRA's monopoly when compared to other collecting societies.

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30 See *Universal Music Australia Pty Ltd v ACCC* (2003) 131 FCR 529.

31 National Competition Council, above n 16, p 149. The National Competition Council recognised that only in 'special cases will intellectual property owners' be monopolies.

32 Independent Committee of Inquiry, 'National Competition Policy', 23 August 1993.

E. ANTI-COMPETITIVE DETRIMENT

56. We submit that within the bounds of the current authorisation, APRA still has significant scope to take advantage of its market power when setting licence fees and terms and conditions. This has the potential to create a significant anti-competitive detriment that outweighs the public benefit in the collective management of performance rights.

57. We recommend that if the ACCC decides to grant authorisation to APRA, it should impose several conditions on the authorisation. We suggest conditions that will be of practical utility and will reduce the anti-competitive detriment.

Recommendation 1: Transparency

Concerns

58. APRA is not transparent enough in its dealings with licensees. The only requirement for transparency is in the Code, which provides insufficient direction on what information should be made available. Clause 2.3(b) of the Code only requires collecting societies to be 'transparent' in their dealings with licensees.

59. APRA does not make data collected on the use of copyright materials available.[33] The data could be used to reduce licence costs by identifying licensed works and substituting them with cheaper directly licensed or public domain works. Transparency of data provides market information on the use of copyright material and on the operation of collecting societies. Usage data sends signals to creators about the demand for their creations. This allows copyright to operate as a 'market' and efficiently direct future efforts towards creations with high demand.

Recommendation

60. We recommend that the authorisation outline licensee expectations with regard to transparency. The authorisation should specify categories of information to be provided, to strengthen the application of the Code.

61. We submit that relevant categories of information are as follows. First, information that is required to achieve an efficient outcome in licence fee negotiations. That is, information that can be used to negate the tendency of collecting societies to set a monopoly price. This category includes:

    - Information on the use of music;
    - Information on the value of the uses to copyright owners;
    - Information created through processing such as summarising and categorising information; and

[33] To an extent, this is a reflection of the fact that APRA's licences do not reflect usage.

- Details on the licence fees and terms and conditions of major licences to categories such as public broadcasters, restaurants and cafés, and schools and universities.

62. Second, financial accountability information on the collection, calculation and distribution of royalties. We submit that such information is crucial in creating a culture of accountability in APRA. The distribution of royalties by APRA has 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.[34]

63. Finally, corporate governance information on internal procedures, and detailed breakdowns of the remuneration of staff and other expenditure such as legal costs. We submit that disclosure of expenditure information will encourage APRA to attain a higher level of accountability in exercising its power and wealth through activities such as litigation.

64. We submit that in recommending such a high level of transparency, it is relevant to take account of two factors. First, APRA collects royalties, on trust, on behalf of 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.

Recommendation 2: Access to Justice

Concerns

65. We submit that access to justice is a fundamental concern for licensees and prospective licensees as the current forums and avenues are inadequate. We acknowledge that through the authorisation process, APRA has been required to adopt alternative dispute resolution procedures that are superior to those of other collecting societies.

66. We consider that many smaller licensees are either unaware of, or dissatisfied with, current dispute resolution options, including the Copyright Tribunal[35] and APRA's expert determination procedure. In the 2006 authorisation determination the ACCC considered three alternate reasons for the fact that APRA's procedure had only been used twice.[36] First, satisfaction with APRA's licences (contradicted by concerns raised with the ACCC); second, users were unaware of the procedure; and third, the procedure had limited practicality and utility. APRA's 30 September 2009 application for authorisation states it has publicised the availability of the procedure.[37] However, the procedure has only

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

35 See Don't Stop the Music! report, above n 3, pp 110, 124, comments regarding the need for licensees to be informed of options of review; see also ACCC PPCA Authorisation, above n 2, 33, comments regarding the continuing need for licensees to be informed of options of review.

36 ACCC APRA Authorisation, above n 9, pp 57–58.

37 APRA, 'Application for Revocation and Substitution of Authorisation Numbers A90918, A90919, A90921, A90922, A90924, A90925, A90944 and A90945, and Associated Notification by Australasian Performing Right Association Limited', 30 September 2009, 10.2.3.

been used a total of three times since its inception.[38] Therefore, we consider that APRA's expert determination procedure has not been used because it is of limited practicality and utility.

67. Clause 3(a) of the Code requires collecting societies to adopt a procedure for complaints handling in accordance with Australian Standards.[39] We submit that this framework is weak and does not go far enough – the Code is merely a tool for reporting on disputes and complaints.

Recommendation

68. We submit that the authorisation should be designed as a dispute resolution mechanism to overcome the limitations of the Code. We recommend that the ACCC require APRA to implement an alternative dispute resolution procedure that complies with the relevant Australian Standards.[40]

69. We consider that alternative dispute resolution should be strengthened and enshrined in the authorisation to ensure licensees have access to a regime that provides for the fair, efficient and low-cost resolution of disputes. Strengthening dispute resolution mechanisms will address the accessibility issues of the Copyright Tribunal.

70. On 20 July 2000, when the Competition Tribunal granted authorisation, it required APRA to implement an expert determination process to help resolve disputes. We submit that this procedure should not be revised as proposed by APRA. We consider that the proposed revisions will reduce access to justice and increase anti-competitive detriment.

71. APRA proposes to limit eligibility for free expert determination to licensing disputes under $50 000. For disputes over $50 000, APRA proposes that costs must be shared. We submit that the ACCC not approve this threshold as it would have the effect of denying some organisations access to justice. Unless the total licence fee is significantly larger than $50 000, the cost benefit ratio of paying for expert determination is likely to be negative.

72. We recommend that the ACCC take steps to ensure APRA's expert determination procedure suits the needs of licensees and prospective licensees before granting authorisation. In the 2006 authorisation determination, the ACCC queried:[41]

> whether the lack of criteria or guidance as to matters independently appointed experts must have regard to in determining disputes limits the utility of the process and, if this is the case, the sort of criteria to which experts appointed to hear disputes under the alternative dispute resolution process should have regard.

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38 Ibid, 10.2.4.
39 Standards Australia Committee, 'Complaints Handling', AS 4269–1995.
40 Standards Australia Committee, 'Dispute Management Systems', AS 4608–2004.
41 ACCC APRA Authorisation, above n 9, 58.

73. We consider that the expert determination procedure must be used frequently to act as a constraint. We recommend further consultation to develop criteria or guidance to strengthen the procedure.

74. We recommend that the authorisation provide for mediation between APRA and licensees in a similar manner as it currently provides for expert determination. Mediation outside the Copyright Tribunal should be promoted, because the accessibility issues of the Copyright Tribunal mean its alternative dispute resolution jurisdiction has not been utilised.

Recommendation 3: Length of Requested Authorisation Period

Concerns

75. We submit that APRA's proposed authorisation period of six years is too long. We note that the ACCC's authorisation process is the only formal review of APRA's conduct, and that such a long period between reviews would not provide adequate oversight. We submit that over a period of six years the market will change substantially, and that this has the potential to create imbalance in the levels of public benefit and anti-competitive detriment envisaged at the time of authorisation.

Recommendation

76. We recommend that the ACCC should evaluate the appropriateness of the authorisation at regular intervals. We submit that regular review of the authorisation every two years will help to constrain monopoly behaviour. In this regard we note that the previous authorisation period was four years, and that the current authorisation period for PPCA is three years.

77. It is our assessment that current forms of oversight, such as the Copyright Tribunal, are not effective and will not become effective in the foreseeable future. Thus we submit that an authorisation of long duration is not required to assess the effectiveness of constraints over the period.

78. The speed of technological advancement in our digital age is extraordinary. We submit that there are such rapid changes in digital technology, patterns of consumption and patterns of licensing, that the authorisation ought to be reviewed in the short-medium term, rather than the long term. A longer period will fail to take into account market changes that will have a significant impact on the balance set in the authorisation.

79. We recommend that an authorisation of short duration is preferable. We consider that this will permit the ACCC to focus on APRA's conduct. It will enable the ACCC to respond to future market changes when reassessing the balance of public benefits and anti-competitive detriments.

Recommendation 4: Complaints by Licensees

Concerns

80. Constant complaints are made about APRA's conduct regarding licence fees, terms and conditions, and the need to even enter into a licence at all. We are concerned that the continuing level of complaints is indicative of two things. First, that APRA is taking advantage of its market power, and second, that there is a lack of education about the role of copyright.

81. The *Don't Stop the Music!* report recommended APRA undertake an information campaign to educate the small business community. The then Department of Communications and the Arts issued a report following up on actions required to be taken by APRA.[42] The Department concluded that the ongoing level of complaints was indicative of the need for collecting societies to devote more resources to education about copyright.

82. The 1996-97 licensing campaign by APRA led to the Attorney-General initiating the *Don't Stop the Music!* report. Complaints were made because many small businesses did not like being forcefully told that they had to licence their use of music. It is worth noting the current level of complaints about, and media interest in, PPCA's licence fee increases and the lack of explanation or transparency regarding the increases.

Recommendation

83. We recommend that APRA should be required to provide detailed information to licensees regarding any changes to the fees or terms and conditions of its licences. We submit that this information will remove superfluous complaints and focus licensee and user lobbying on the issues of greater merit.

Recommendation 5: Membership Agreements

84. We support Creative Commons Australia's (**CCA**) submission on this ground.

Concerns

85. The primary example of impugned conduct by APRA that remains unaddressed is the anti-competitive nature of its membership agreements. APRA's input and distribution arrangements require full assignment of the member's performing rights to all past, present, and future works.[43]

86. We submit that APRA's membership agreements cause significant anti-competitive detriment. The breadth and restriction of this licensing arrangement is apparent when members try to licence works under a Creative Commons licence, or under a direct licence to a social networking medium. Such uses are

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42 Department of Communications and the Arts, *Report to Parliament on the Implementation and Operation of the APRA Complimentary Licence Scheme*, June 1998.

43 Australasian Performing Right Association Limited, 'APRA Constitution', December 2008, Article 17 <http://www.apra-amcos.com.au/downloads/file/ABOUT/APRA_Constitution.pdf>.

prevented by APRA's membership agreements, as APRA has the sole authority to determine the licensing of its members' performance rights.

87. APRA's membership agreements contain "Opt Out"[44] and "Licence Back"[45] mechanisms which allow members to regain some degree of control over their rights. However, we submit that the limitations in the terms of these mechanisms mean members are still unable to freely communicate their works with Creative Commons licences.

88. We acknowledge that APRA has worked with CCA to address this issue. In late 2008 APRA introduced a "Noncommercial Licence Back"[46] option for the noncommercial licensing of musical works online. However, we submit that the option is unworkable because of the restrictive nature of the rights it grants, and its narrow definition of noncommercial purposes. Inconsistencies between the scope of the Creative Commons "Noncommercial" licences and the Noncommerical Licence Back option, means that in practical terms Creative Commons licences cannot be used to make content available.

89. We submit that APRA has yet to create a workable model that accommodates the significant desire among members to use Creative Commons, social networking, and other direct licensing mechanisms. We further submit that this is causing significant anti-competitive detriment and substantially lessens competition.

Recommendation

90. We recommend that the authorisation include a condition that recognises the desire to use alternate forms of licensing. We submit that this will result in a substantial public benefit from increasing the free flow of information and culture. The condition is required given the substantial impact that Creative Commons, social networking, and other direct licensing mechanisms have had on the market since the 2006 authorisation.

Recommendation 6: Representation on APRA's Board

Concerns

91. We are concerned that the board membership of APRA only represents rights holders. APRA's board consists of six publisher representatives elected by publisher members and six writer representatives elected by writer members. We submit that the interests represented on APRA's board are unbalanced. This has led to the troubled dynamic with most licensee groups, and resulted in a mentality where APRA operates less like a cooperative acting for the public benefit and more like a commercial profit driven organisation.

92. We are concerned that APRA has a tiered voting system whereby voters with more money get more votes. At annual general meetings, members of APRA receive an additional vote for every $500 in earnings collected for the

44 Ibid, Article 17(b).
45 Ibid, Article 17(f).
46 Ibid, Article 17(h).

member.[47] We submit that smaller and independent musicians are not adequately represented on APRA's board. Some independent musicians have reported such poor results that they terminated their membership with APRA.

Recommendation

93. We recommend that APRA be required to amend its constitution to provide for broader stakeholder representation on its board. We consider that APRA's constitution should make provision for independent directors who are not associated with its major publisher and writer groups. Independent directors would provide a much needed element of balance on APRA's board. We consider that this would help to constrain the potential for APRA to engage in monopoly conduct.

94. We consider that independent directors should be elected as representatives of three categories. First, a member representative for independent musicians. They have no representation, because while they constitute the majority of APRA's membership, it is by number not by revenue. Second, a member representative for creators with a background in the cultural sector. The issues facing cultural institutions and public broadcasters receive no prominence on APRA's board. Third, a licensee representative with experience in the broadcasting sector. This sector represents the majority of APRA's revenue, yet sector has no representation on APRA's board.

95. We note that the Copyright Agency Limited (**CAL**) has three independent directors and previously had a representative for the library sector. We acknowledge that CAL is a declared collecting society and is held to a higher standard. However, we submit that APRA should maintain the standards of its peers.

Recommendation 7: Non-commercial or Community Use of Music

Concerns

96. Our members have concerns regarding the fees for the non-commercial or community use of music. The perception is that fees are set at a commercial market value and applied universally, with little consideration given to non-commercial contexts or the capacity for individual organisations to negotiate.

97. Our members have experienced great difficulties trying to licence music. The National Library of Australia (**NLA**) and other cultural institutions have sought to facilitate public access to in-copyright Australian music through providing bibliographic records linked to streamed 30 second sound samples that are used merely to identify the musical work. By itself, the streamed sound sample has no commercial value, either to the library or to the user, nor competes with commercial digital download services. Nevertheless, such use in national collaborative online services promotes and exposes Australian content and thus has community interest, cultural value and the potential to increase demand for Australian creative product. The APRA licence fee to cover the free delivery of

[47] Ibid, 41(b).

these sound samples from the NLA's website is averaging $0.30 per single sound sample use, a cost to the NLA that significantly outweighs any public benefit. To date, APRA has not responded to the NLA's recent request to renegotiate the licence fee factoring in the community purpose and non-commercial context of the use.

98. We consider that the cost of performing contemporary music is extremely high, especially broadcast rights. For example, the Australian Broadcasting Corporation can pay up to $25 000 in rights fees alone for the broadcast of an opera.[48] The cost of broadcasting music can be prohibitive. We submit that APRA's failure to take into account the beneficial uses of music by cultural institutions hinders the free flow of expression and culture in society.

99. We submit that our member agencies are not trying to avoid paying licence fees. However, as APRA refuses to charge reasonable fees, cultural institutions such as the NLA avoid licensing with APRA and instead use alternative ways to licence music.

Recommendation

100. We recommend that APRA be required to adopt a licensing scheme for the non-commercial or community use of music. The scheme should set licence fees that are reasonable considering the intended use of the music.

101. Previous government reports have recognised the need for additional licensing schemes to cater for special categories of licensees. The *Don't Stop the Music!* report recommended that APRA implement a complimentary licensing scheme for small businesses of less than 20 employees where the music played would not be heard by customers or the general public.[49] The report considered the value of the indirect playing of music to users and owners, and concluded that it was unreasonable to charge a licence fee in the circumstances.

102. We submit that our recommended licensing scheme looks at the value of the playing of music to the community. We consider that making music freely available with a non-commercial or community use has immense social value, and this should be relevant when determining a reasonable licence fee.

Recommendation 8: Occasional Use of Music

Concerns

103. We are concerned that our member institutions, many of which are small Australian Government agencies, pay excessive fees for the occasional use of music. This is an example of APRA taking advantage of its market power to 'overreach' and extend the application of its licences.

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48 Note: the Australian Broadcasting Corporation is not a member of the ADA or the ALCC.

49 Don't Stop the Music! report, above n 3, recommendation 2, p 94.

104. The AGD has negotiated a Commonwealth Agreement with APRA for the public performance rights in music and lyrics.[50] The agreement is used as a model by other Australian Government departments and agencies wishing to enter into an agreement with APRA. We consider that small agencies subscribe to the agreement simply as a way to cover off risk.

105. Under the agreement, the royalties paid to APRA are calculated on the basis of a rate per employee rather than by any measure of actual use. Feedback suggests that the licence fee is inappropriate for departments and agencies that only use music occasionally. Examples of these occasional uses include playing music during social functions such as happy hours, internal choirs, and Christmas carols. We consider that the licence fees for such departments and agencies are too high because the calculation of royalties bears no relation to their actual use of music.

106. We consider that small Australian Government departments and agencies are required to pay substantial amounts of money for what are essentially minimal uses of copyright material. They are practically forced to subscribe to the agreement to mitigate risk, because they cannot guarantee that they will not use music performance rights in some fashion. We consider that agencies are further cajoled into subscribing to the over priced agreement because of the unreasonable fees demanded by APRA when they attempt to licence singular uses for events.

Recommendation

107. We recommend that APRA be required to adopt a licensing scheme that provides for the occasional use of music. The scheme should charge a fee calculated on the basis of actual use, not on the basis of an arbitrary figure such as the full time equivalence rate. We note the point mentioned above with regard to non-commercial or community use and the introduction of new licensing schemes.

Conclusion on Anti-Competitive Detriment

108. We submit that within the bounds of the current authorisation, APRA still has significant scope to take advantage of its market power when setting licence fees and terms and conditions. We consider that this creates significant anti-competitive detriment in the areas of transparency, access to justice, complaints by licensees, membership agreements, representation on APRA's board, the non-commercial or community use of music, and the incidental occasional use of music. We consider that the anti-competitive detriment outweighs the public benefit in the collective management of performance rights, and that the recommended conditions will be of practical utility in reducing the anti-competitive detriment.

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50 Agreement entered into by the Attorney-General's Department and the Australasian Performing Right Association, 11 August 2003, <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~model+agt.doc/$file/model+agt.doc>.