



**APRA  
AMCOS**

27 November 2018

Guy Donald  
Assistant Director  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street,  
CANBERRA ACT 2601

Dear Mr Donald

**Draft ACCC Guidelines to assist the Copyright Tribunal in the determination of copyright remuneration (draft Guidelines)**

APRA AMCOS appreciates the opportunity to comment on the draft Guidelines.

APRA is the collecting society in Australia in respect of the public performance and communication rights of songwriters and music publishers. This covers the performances of music in more than 145,000 businesses across Australia and New Zealand, including retail shops, nightclubs, restaurants and festivals, among many other settings, as well as the communication of musical works online, such as in download and streaming services like Apple iTunes and Spotify, and on commercial television and radio. AMCOS is the collecting society in Australia in respect of reproduction of music in certain formats. This covers the reproduction of songs and compositions on CD, DVD, online, for use as production music, and for radio and some television programs. Together, APRA and AMCOS control the copyright for such purposes in almost all commercially available musical works, by virtue of assignments from its local members and affiliations with similar overseas societies. Since 1997, the two organisations have been administered in tandem, and these submissions represent the united view of both.

APRA has more than 100,000 members and AMCOS has more than 15,000 members. Together, they represent an extremely diverse membership, ranging from unpublished writers to major music publishers.

Since 2000, APRA has operated under the terms of authorisations granted initially by the Australian Competition Tribunal, and subsequently by the ACCC. APRA most recently renewed its authorisations in 2014, and is authorised until 28 June 2019.

APRA has been a party to nine substantive proceedings in the Copyright Tribunal, and AMCOS three (two of those jointly with APRA). Of the 64 reported decisions of the Tribunal, APRA has been a party to 12, and AMCOS to five (two jointly with APRA). The ACCC was a party to the Tribunal proceedings in relation to APRA AMCOS' licence scheme for digital downloads.<sup>1</sup> Accordingly, APRA AMCOS is an experienced user of the Tribunal. More information can be provided about the proceedings in which APRA AMCOS has been involved if it would be helpful.

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<sup>1</sup> Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited [2009] ACopyT 2

APRA AMCOS holds the Tribunal in high esteem, and regards the mere existence of the Tribunal, as well as its applied jurisdiction, as a significant moderator of APRA's conduct in formulating licence schemes. APRA AMCOS consults widely prior to introducing any new scheme to the market, and regards an industry negotiated licence scheme as preferable to a litigated determination in the vast majority of cases. APRA refers to the submissions it has made to the ACCC in the course of each of its applications for authorisation regarding the role of the Tribunal and APRA's consultation processes. Copies of those submissions can be provided if it would be of assistance.

APRA AMCOS also has a sophisticated, purpose designed, award winning alternative dispute resolution system that operates as a low cost facility for resolving disputes between APRA AMCOS and its licensees (or potential licensees) and disputes between APRA AMCOS members. The system was established as a condition of APRA's 2014 authorisation.

APRA has, as part of its contractual arrangements with its members, facilities whereby members can withdraw their works ("opt out") from APRA's control for certain purposes (thus enabling them to enter into direct licences worldwide, or to prevent their works from being licensed), and/or obtain a "licence back" of their rights in one or more works on a non exclusive basis for the purpose of entering into direct licences in Australia. AMCOS has similar arrangements with its members. These facilities are actively utilised by APRA AMCOS members.

Many APRA AMCOS licence schemes contain express provisions for the adjustment of licence fees where the licensee has engaged in direct licensing, and in addition where appropriate APRA AMCOS will adjust licence fees if a licensee can demonstrate that it is using a repertoire than contains a material number of works that are not controlled by APRA AMCOS. Accordingly, APRA AMCOS very much operates in an environment where direct licensing takes place, and licence fees are adjusted to take account of the practice.

It is our experience that for music, direct licences are entered into for highly predictable, higher value uses of individual works or small numbers of works, where there is a high level of price and product competition between copyright owners. The markets for film and television synchronisation of music in programming and advertisements, for example, are highly competitive. It has long been considered that an additional layer of competition between works at the subsequent market level of public performance or communication to the public, is not on balance in the public interest where large numbers of works are being used.

APRA AMCOS and PCCA are in the final stages of implementing a joint venture licensing initiative that will trade as OneMusic Australia, whereby licensees will be able to acquire a single licence in respect of the public performance of musical works and sound recordings. This is a consumer focused development that the parties believe will make music licensing significantly more streamlined, particularly for small business music users. The OneMusic Australia licence schemes are currently the subject of a detailed stakeholder consultation process, and great care is being taken to accommodate the fact that not all licensees will require both sets of rights.

APRA AMCOS has only three specific comments in relation to the draft Guidelines:

1. While APRA AMCOS notes that benchmarking and construction of a hypothetical bargain are approaches frequently applied by the Tribunal in its decision making process, APRA AMCOS respectfully submits that it is not the role of the draft Guidelines to dismiss the other approaches also available to the Tribunal, in particular judicial estimation. Each Tribunal case is a case on its own particular facts, and the Tribunal's jurisdiction can not be fettered in any way, nor does APRA AMCOS believe that the draft Guidelines purport to do so.

2. In respect of the example given at 5.3 of the draft Guidelines, APRA AMCOS notes that the market for the personal consumption of music is quite different to the market for commercial public performance of music in fitness classes. Even if a parallel could be drawn, APRA AMCOS would argue that the appropriate multiplier is the number of attendees in the class. Further, we note that APRA AMCOS is the primary licensor of music provided for individual use whether by download or streaming, as well as for fitness classes. With respect, this particular example may be a little unhelpful in a discussion of benchmarking.
3. In 5.5 of the draft Guidelines, reference is made to the two major performing right societies operating in the United States of America, BMI and ASCAP, in the context of benchmarking. APRA AMCOS notes that the system of collective management of performing rights in the USA is complex and markedly different to that in Australia. In addition to ASCAP and BMI, at least three other societies (SESAC, GMR and AMRA) operate. Contrary to the ACCC's apparent understanding, APRA AMCOS believes that ASCAP and BMI are very close in terms of revenue, and BMI has many more members than ASCAP. More significantly, licensees almost all require licences from at least ASCAP and BMI (and often also from SESAC, GMR and AMRA) – and so most of the societies compete for members, but not for licensees. These complexities would obviously be the subject of evidence in any Tribunal proceedings where the activities of those societies were relevant, but they might render the example in the draft Guidelines a little unhelpful also.

Parties to Copyright Tribunal proceedings in which APRA AMCOS has been involved have ranged from sole trader licensees, to Apple and Telstra. The Tribunal's jurisdiction is flexible enough to deal with proceedings involving parties with varying levels of comparable market power. APRA AMCOS also notes that there is not just one market for copyright material, rather a large number of different markets, even for users of the APRA AMCOS rights. APRA AMCOS appreciates the challenge of devising a set of Guidelines for use in a Tribunal where the subject matter of the licence, the context of the use, and the nature of the stakeholder parties, varies widely.

Overall, APRA AMCOS respectfully considers that the draft Copyright Guidelines provide a useful overview of the kinds of matters that would be likely to be raised by the ACCC if it were a party to proceedings in the Tribunal, and also provide helpful guidance to potential parties to Tribunal proceedings. In that respect, the draft Guidelines may be particularly useful in proceedings in which the ACCC were not minded to seek leave to appear. In any proceedings to which APRA AMCOS was a party, we would expect to be providing evidence of the kinds of matters discussed in the draft Guidelines, as well as evidence of other matters usually considered by the Tribunal, including: market rate; comparable bargains; previous agreements or negotiations between the parties; comparison with other jurisdictions (noting as the ACCC has done the complexities of such comparisons); comparison with rates set by other licensors; capacity to pay; value of the copyright material; the general public interest and the interests of consumers; and the administrative costs of the licence.

Please do not hesitate to contact me should you require any further information or clarification.

Yours sincerely,



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APRA AMCOS