

Submission

**In response to the application by the
Australasian Performing Right
Association (APRA) for revocation of
authorisation AA1000433 and
substitution of new authorisation
AA1000661**

Submitted Monday 18 March 2024

About Creative Commons globally

[Creative Commons](#) (CC) is a nonprofit organisation that helps overcome legal obstacles to the sharing of knowledge and creativity to address the world's pressing challenges. It [strives for its vision and delivers on its mission](#) through [stewardship](#) of free, simple and standardised [Creative Commons licences](#) and [public domain tools](#) (CC legal tools). By extension, CC supports the [CC Global Network](#) (CCGN) to drive adoption of its tools and build a community of advocates and knowledgeable interpreters. To that end, CC also produces events like the [CC Summit](#) and provides education such as the [CC Certificate](#) program.

<https://creativecommons.org/about>

About CC in Australia

[Creative Commons Australia](#) (CC Australia) is the local Chapter of the CCGN. CC Australia promotes and encourages the use of CC licences in Australia. We coordinate Chapter meetings and working groups, organise engagement events and share global news with the Chapter and our communities. CC Australia is an informal community of practice made up of interested individuals and organisations working collaboratively to realise the potential of CC in Australia and our region.

<https://au.creativecommons.net/about>

Introduction

CC Australia welcomes the opportunity to make a submission to the Australian Competition and Consumer Commission (ACCC) in response to the Australasian Performing Right Association's (APRA) application to revoke authorisation AA1000433 and substitute it with a new authorisation (AA1000661) (application for 're-authorisation'). CC Australia has made submissions to prior applications by APRA to the ACCC.¹ This submission draws on these prior submissions.

As advocates for the [Creative Commons](#) (CC) licences and the mission behind them – to empower individuals and communities around the world by equipping them with technical, legal and policy solutions to enable sharing of knowledge and culture in the public interest² – we want to see the affordances of CC licences available to all Australian creators, including musicians. Even with the mechanisms for APRA members to regain their public performance and communication rights in order to directly licence their music, members sadly remain unable to use CC licences with legal certainty.

In 2005 CC International flagged this issue with the ACCC.³ Nearly 20 years later this has still not been appropriately addressed. While the use of CC licences by Australian musicians will likely be taken up by a small number of music creators, we strongly believe that every Australian musician should have the choice to directly licence their works, including under a CC licence, if they wish. That choice should not be arbitrarily denied to them. CC Australia would welcome greater effort by APRA to accommodate CC licensing as an option for its members.

The other concern for CC Australia is related to the governance of Australian collecting societies, including APRA. We also advocate for more transparency in how APRA collects data from licensees and how that informs the distribution of royalties. We examine each issue further in this submission.

¹ See for example Creative Commons Australia, 'Creative Commons Australian Chapter's Submission to the Australian Competition and Consumer Commission on the Australasian Performing Right Association Ltd.'s Application for Re-Authorisation', 2019, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/AA1000433%20-%20Revocation%20and%20Substitution%20of%20A91367%20-%20A91375%20-%20Australasian%20Performing%20Right%20Association%20Limited%20-%20Submission%20by%20Creative%20Commons%20Australian%20Chapter%20-%20Received-%2008.02.19%20-%20PR.pdf>; Creative Commons Australia, 'Re Australasian Performing Right Association Ltd – Application for revocation and substitution (A91187 and A91194) – Interested Parties Consultation', 2009, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/D09%2B185821.pdf>; and Creative Commons International, 'RE: re-authorisation of collective administration of music performing rights by APRA', 2005, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/D05%2B61451.pdf>.

² See Creative Commons, 'Who we are', n.d.-a, <https://creativecommons.org/mission>.

³ Creative Commons International, 2005, p 3.

APRA's input arrangements and direct licensing mechanisms

Like many other music rights management organisations (MRMOs) around the world, Australia's music collecting society APRA requires an assignment of their right to perform the work in public and the right to communicate the work to the public (including by broadcasting it).⁴ Collectively called the 'performing right' by APRA,⁵ assignment extends to all existing and future musical works of which a member is the composer, author and/or publisher. Like other MRMOs that rely on this approach, APRA argues that assignment of rights (i.e. making them the copyright owner of those rights in their entire repertoire) creates certainty in their ability to licence, administer, manage, monitor and enforce those rights. By extension, APRA argues, this approach results in more public benefits than detriments.

Since APRA first sought authorisation, concerns have been expressed about APRA's input arrangements. Multiple interested parties and the ACCC⁶ have all raised this as a concern. Mechanisms to allow members to regain their rights so they can directly licence their works for certain purposes have been developed by APRA over the years, largely in response to the ACCC's conditions on authorisations APRA has been granted. These mechanisms are:

- **Resignation** – Where a member resigns their membership of APRA all their rights are assigned back to them, but the member must be willing to give up any royalty payments from APRA.
- **Opt Out** – Members can regain their rights for certain categories of use,⁷ including:
 - **Public performances** – performances in public, live performances, performances by showing a film that includes the music or by any other means
 - **Communication** – Communication by broadcasting, radio, free to air TV, subscription TV or by any other means.
- **Commercial Uses Licence Back** – Members can non-exclusively sub-licence identified works to a specified sub-licensee to use those works for a particular purpose within Australia.⁸

⁴ See APRA AMCOS, 'APRA Constitution', 2018, Article 17(a), <https://assets.apraamcos.com.au/images/PDFs/About/APRA-Constitution.pdf>. See also APRA, 2024, pp 7 and 8.

⁵ See APRA AMCOS, 2018, Article 3.

⁶ The ACCC's Determinations in 2010 and 2014 place an increasing emphasis on the importance of direct licensing. For example in 2010 the ACCC stated: 'There is little incentive for users to deal directly with members if APRA does not offer a genuine discount on blanket licensing to reflect direct licensing': ACCC, 'Application for revocation and substitution of authorisations A490918, A490919, A490921, A490922, A90924, A490925, A90944 & 490945 Determination', 2010, p iii, <https://www.accc.gov.au/system/files/public-registers/documents/D10%2B3541839.pdf>.

In 2014 the ACCC made it a condition of authorisation that APRA take '... steps to increase awareness of the licence back and opt out provisions: ACCC, 'Application for revocation and substitution of authorisations A91187-A91194 and A91211 Determination', 2014, p iii, <https://www.accc.gov.au/system/files/public-registers/documents/D14%2B72965.pdf>. See also pp 81 and 89.

⁷ APRA AMCOS, 'APRA alternatives', n.d.-a, <https://www.apraamcos.com.au/music-creators/membership-explained/managing-your-rights/apra-alternatives>. See also APRA, 2024, p 10.

⁸ APRA AMCOS, n.d.-a. See also APRA, 2024, p 11.

- **Non-commercial Website Licence Back** – This option grants the member a non-exclusive licence to communicate identified songs to the public online worldwide for non-commercial purposes.⁹
- **Free Personal Website Licence** – This option allows the member to make specified musical works available for free downloading or streaming from a personal website.¹⁰

As we will demonstrate, even with the establishment of opt-out and licence back mechanisms, APRA members still do not have the ability to direct licence their music, including by releasing it under the terms of a CC licence. Nearly 20 years later and this issue remains unresolved. Before we look at the incompatibility between the direct licensing mechanisms and the CC, we will provide more detail on the CC system.

About CC licences

CC licences are an easy way for creators to share their work with the public while still retaining some control over how their material is used. CC clarifies what users can (and can't) do with the licensed content by marking material available for reuse and supporting that with free standardised licence agreements. In its submission in 2005, Creative Commons International eloquently described the CC licensing system thus:

“The Creative Commons licences are based on the existing copyright system and provide a simple way for owners of copyright to retain their copyright and clearly signal to the public that they may make certain uses of their creative works, without engaging in the time and expense of individual rights clearance, in other words that only “some rights [are] reserved.” This is distinct from the traditional, default “all rights reserved” approach that has been the hallmark of established copyright practices, (including assumptions informing the original establishment of Collecting Societies and schemes) pursuant to which any person who wishes to use a copyright work, other than for reading, viewing or one of the other limited implied activities, may engage in the time and cost of separately identifying, contacting and negotiating with the rightsholder to obtain permission, if it is obtained at all. Creative Commons licensing empowers creators to provide clear and advanced signalling of the uses they are happy for others to make of their works and thereby, enables easy identification of CC-licensed works and their ready use and reuse.

Creative Commons’ core licensing suite allows a creator to decide what specific use others may make of their work: whether or not others may make commercial use of their work; whether or not others may make derivative works; and, if they may, whether those derivative works must be available to the public on the same licensing terms. All Creative Commons licences require attribution as specified by the author.

In this way, authors can structure their private rights to create public goods - creative works set “free” for certain uses, consistent with the author’s specific intent.”¹¹

This articulation still applies today.

⁹ APRA AMCOS, n.d.-a. See also APRA, 2024, p 11.

¹⁰ APRA AMCOS, n.d.-a. See also APRA, 2024, p 11.

¹¹ Creative Commons International, 2005.

SUBMISSION IN RESPONSE TO THE APPLICATION BY THE AUSTRALASIAN PERFORMING RIGHT ASSOCIATION (APRA) FOR REVOCATION OF AUTHORISATION AA1000433 AND SUBSTITUTION OF NEW AUTHORISATION AA1000661

One of the options available to licensors using CC licences is to permit or restrict commercial uses of the material. The three Noncommercial (NC) licences in the CC suite restrict uses “primarily intended for or directed towards commercial advantage or monetary compensation.”¹² While the CC licences do not allow for royalty payments to be paid under the licence, if the NC condition applies then a musician is not restricted from receiving royalties or other payments for commercial public performances or other uses of their music.

Similarly, the use of CC licences may attract other commercial opportunities for a musician. With machine-readable metadata, CC-licensed material can be more discoverable. Even where material is available under a CC licence, some potential users may wish to secure a one-off licence instead, opening other pathways to commercial return. CC licences may be applied only to specific formats of music, with other formats remaining able to be commercially exploited. Or CC-licensed music may result in commercial work for future music.

Incompatibility between direct licensing mechanisms and CC

As Creative Commons International identified in 2005,¹³ by virtue of the assignment of performing and communication rights to APRA, its members cannot legally make their music available under a CC licence, because, in order to do so, the licensor must be able to exercise the full bundle of rights in their material. We have raised this in response to multiple re-authorisations applications, yet the issue persists nearly 20 years later.

For the reasons outlined below, each of the direct licensing mechanisms currently available to members of APRA do not create a situation in which the member could release their music under a CC licence:

- **Resignation** – While this option technically gives an APRA member the ability to release their music under a CC licence, they must be willing to forego all royalty payments from APRA, resulting in an undesirable ‘either/or’ position (as the [Australian Digital Alliance](#) (ADA) and the [Australian Libraries and Archives Copyright Coalition](#) (ALACC) highlighted).¹⁴
- **Opt Out** – Limiting opting out to specific categories is incompatible with CC because a licensor releasing material under a CC licence grants the public a broad permission to use licensed material including any form of public performance or communication. To make this mechanism work, an APRA member would be forced to opt out of every category, leaving them in largely the same position as if they resigned their membership.

¹² See for example Creative Commons, ‘CC BY-NC 4.0 Legal Code Attribution-NonCommercial 4.0 International’, n.d.-b, <https://creativecommons.org/licenses/by-nc/4.0/legalcode.en>. See also Creative Commons, ‘Frequently Asked Questions’, n.d.-c, <https://creativecommons.org/faq/#does-my-use-violate-the-noncommercial-clause-of-the-licenses>.

¹³ Creative Commons International, ‘RE: re-authorisation of collective administration of music performing rights by APRA’, 2005, p 6, available on the ACCC website, <https://www.accc.gov.au/system/files/public-registers/documents/D05%2B61451.pdf>.

¹⁴ See Australian Digital Alliance and Australian Libraries and Archives Copyright Coalition, ‘Submission in response to the application by the Australasian Performing Right Association (APRA) for revocation of authorisation AA1000433 and substitution of new authorisation AA1000661’, 2024, <https://digital.org.au/accc-apra-authorisation-aa1000661-submission>.

- **Commercial Uses Licence Back** – The territorial limit on the Commercial Uses Licence Back means an APRA member using this mechanism could not release their music under a CC licence because the application of CC licensing applies worldwide.
- **Non-commercial Website Licence Back** – The definitions of noncommercial used by APRA in relation to the Non-commercial Website Licence Back and that used by CC in relation to the Noncommercial licences are incompatible. APRA’s definition is so narrow that it is hard to identify what, if any, uses would be within its scope.¹⁵ As mentioned above, the definition of noncommercial in the [CC Attribution-NonCommercial 4.0 International licence](#) is more aligned with common understanding of the term ‘noncommercial.’¹⁶
- **Free Personal Website Licence** – An APRA member would not be able to release music on their personal website under a CC licence using this mechanism because CC licences grant a broad public permission to use the licensed material. The scope of which allows for broad reuse of the licensed material, well beyond just downloading or streaming the music. Even where the APRA member restricted their choice of CC licence to a noncommercial licence, they still could not utilise CC under the Personal Website Licence because the scope of the licence back to the member provided by APRA is limited only to downloads or streaming by the public.

We are not making the claim that, but for APRA’s arrangements, CC would be widely used by more APRA members. But the CC licensing system provides free options for Australian musicians, from which they currently are locked out. Potentially even more troubling is that, where an Australian musician licenses even a single musical work to which they are a copyright owner under CC, they would technically be unable to become an APRA member in the future.

Simply stated, Australian musicians have a difficult decision to make: become a member of APRA and receive royalty payments for use of their music, or retain their rights so they can self-manage them but give up money they have a legitimate claim to. Should we accept that there is no other option?

¹⁵ For the purposes of the Licence Back (Non-commercial website):

‘Non-commercial Purposes means:

- (i) that there is no consideration or financial incentive whether directly or indirectly received by any party for the communication or any subsequent use of the Work under any sub-licence; and
- (ii) any sub- licensee is a not for profit entity whose activities are not directed towards commercial advantage and that does not receive public or institutional funding.’: APRA AMCOS, 2018, Article 17(j).

¹⁶ ‘... not primarily intended for or directed towards commercial advantage or monetary compensation.’

Transparency in Australian collecting societies

CC Australia recognises the benefits that APRA provides as a collecting society, for the ease the organisation brings to licensing music for business, education, and other purposes where remuneration is required. However, CC Australia shares the ADA and the ALACC's concern that Australian collecting societies are under-regulated and need greater oversight.¹⁷ While we recognise efforts by APRA to improve their operations and increase transparency,¹⁸ reform to the governance arrangements for collecting societies in Australia is needed. We agree with the ADA and ALACC that Australia's *Code of Conduct for Copyright Collecting Societies*:

- does not impose adequate transparency and accountability obligations on collecting societies
- grants collecting societies an inappropriate degree of discretion
- has insufficient measures for effective oversight, including sanctions aimed at deterring noncompliance and independent mechanisms for external review and amendment.

This should be addressed through legislative reform, a mandatory code of conduct with in-built enforcement mechanisms and an expanded role for the ACCC in overseeing Australian collecting societies.

Specifically, in relation to APRA, we would like to see current transparency efforts boosted through the equitable allocation of royalties based on direct data sources such as data collected using music recognition technology (MRT).¹⁹ As the ADA and the ALACC said: "A lack of transparency in this regard raises questions about whether artists are being compensated fairly for the use of work – and how underpayment could even be identified if it was occurring."²⁰

¹⁷ See ADA and ALACC, 2024.

¹⁸ For an overview of these changes, see ADA and ALACC, 2024, pp 6–9.

¹⁹ APRA, 2024, pp 11 and 12.

²⁰ See ADA and ALACC, 2024, p 12.

Conclusion

Through their technical, legal, and policy solutions, CC aims to grow and sustain a thriving commons of shared knowledge and culture that every creator can participate in and contribute to if they wish. CC Australia embraces that goal and is working locally towards that end. We want Australian creators – including musicians – to be able to assert their copyright how they choose, including under a CC licence. Sadly, the arrangements put in place by APRA make this impossible for Australian musicians that are members of the music collecting society.

Further, we remain concerned that under-regulation undermines the collective rights management system in Australia. And that the continued lack of transparency in how APRA collects data about music usage by licensees, and how this determines the distribution of royalties, undermines confidence in APRA's operations.

We hope that the ACCC will require APRA to genuinely build greater flexibility into its arrangements such that Australian musicians and legitimate users of music can take advantage of open content licences such as CC; and that conditions are put in place to increase confidence in the distribution of royalties by the organisation. CC Australia looks forward to a future in which Australian musicians are free to exploit both APRA membership and the CC licensing suite, offering options for both commercial revenue and contributing to the public commons of open licensed material.



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