



**APRA
AMCOS**

10 February 2023

Kia Ora Koutou,

Re: Draft Guidelines on the Application of Competition Law to Intellectual Property Rights

APRA AMCOS thanks the Commission for the opportunity to comment on the draft guidelines.

Currently, APRA, the Australasian Performing Right Association, has more than 111,000 New Zealand, Australian and Pacific members, comprising songwriters, composers, lyricists and music publishers, together with reciprocal agreements with over 120 overseas similar copyright management organisations. The membership is diverse, ranging from unpublished writers to major music publishers. Our licensee stakeholders range from sole traders to multinational content platforms across all industries.

APRA is assigned rights of performance and communication in millions of songs written by composers all across the world and therefore represents the majority of musical works and lyrics performed and communicated to the public in New Zealand, Australia and the Pacific.

AMCOS has around 24,000 members including music publishers, composers, and songwriters. Licensees include all major broadcasters and video on demand and music streaming services, as well as businesses such as background music suppliers. AMCOS controls rights to reproduce a vast number of musical works and lyrics in certain circumstances in New Zealand and Australia.

APRA has been operating New Zealand, licensing music users, and distributing royalties to its members, since 1926.

In 2013 APRA and Recorded Music New Zealand (the owner of a vast majority of sound recording copyrights in New Z) came together to create a world-first, single, comprehensive music licence that best serves New Zealand businesses. This licensing initiative is known as OneMusic New Zealand and has been successfully operating for almost 10 years, simplifying licensing processes and obligations for music users whilst incrementally growing revenue for rights holders at the same time. Where in the past there were two licences required now there is one, combined.

We understand the approach by the Commission in relation to intellectual property rights and we acknowledge the complementary common purpose of promoting innovation and efficiency and enhancing consumer welfare that copyright and competition frameworks share. We take a keen focus on the application of competition law to every aspect of our organisation's operation. In doing so we applaud guidelines that attempt to explain a complex area and make the following observations:

Statutory regulation of copyright management organisations

In paragraph 38.4 and 85, the draft guidelines refer to the possibility of collecting societies gaining market power due to the breadth of works they can access. We agree that collecting societies will often secure

access to a broad range of works to make it easier and more efficient for the public to access copyright lawfully at a reduced transaction cost through blanket licensing.

APRA notes that in New Zealand, copyright licensing by collecting societies is subject to specific statutory regulation through the Copyright Tribunal under Part 8 of the Copyright Act 1994.

The Copyright Tribunal has powers to hear applications and disputes relating to licensing schemes offered by copyright management organisations (ss149-155), as well licenses and prospective licences granted by licensing bodies outside of a scheme (ss156-160). The Act allows for affected persons to apply and gives the Tribunal broad powers to intervene and either confirm or vary the terms of schemes and licences as it determines “reasonable in the circumstances”.

As part of this regime, those who propose to operate licensing schemes and organisations representing affected licensees are able to refer the terms of any proposed license scheme to the Copyright Tribunal for review. In considering the terms of any proposed scheme, the Tribunal can make orders confirming or varying the proposed scheme, as it may determine to be reasonable in the circumstances (s149).

In addition, any person who believes that an organisation has unreasonably refused to grant a licence, or who believes that fees are unreasonable, can apply to the Tribunal. The Tribunal can then determine whether the applicant is entitled to a licence and on what terms. The Tribunal is expressly required by the Act to exercise its powers in order to ensure that there is no unreasonable discrimination between licensees or prospective licensees, taking into account as part of this alternative schemes and licences when considering what license terms and pricing orders are reasonable on any referral (s161).

The terms of any licensing scheme or licence that goes through this process will have been either confirmed or amended by the Copyright Tribunal, considering what is reasonable in the circumstances. Any exercise of the power to confirm or amend in respect of a collecting society’s activities may be relevant to considering its position under competition law.

The Tribunal’s powers and oversight of licensing and licensing schemes is in our view an important feature of New Zealand’s copyright and competition law. This constraint on risks of use of market power and of anti-competitive conduct deserves consideration in formulating the guidelines so far as they concern collecting societies. We would encourage the Commission to consider acknowledging the legislation and possibility of intervention by the Tribunal more directly in the guidelines.

Description of collecting societies as “gatekeeper”

As drafted paragraph 85 of the guidelines may inadvertently suggest that collecting societies always function as “gatekeepers” to underlying rights, whereas the reference seems to be aimed at the possibility of a society engaging in anti-competitive conduct (e.g. the example of exclusive dealing in the draft guidelines on page 17).

In general, collecting societies offer blanket licensing to a range of underlying works. Each work (where it is a creative copyright, such as a song) is not usually a substitute for another, and a blanket licence combines a set of rights together to reduce the transaction costs in securing lawful use of those creative copyrights. As the draft guidelines recognise (at paragraph 86), typically collecting societies offering a blanket license will not restrict licensing or access to individual works or groups of works from rights holders. Provided there are licence back arrangements available, users can bypass societies as appropriate and licence the relevant copyright by other means, whether through direct negotiation, or through other aggregated licensing schemes. We also note, as above, that

unreasonable refusals to provide access or inappropriate pricing can be addressed by the Copyright Tribunal. Paragraph 85 could be revised to be somewhat clearer about this.

Examples of mitigating factors

We acknowledge the mitigating factors relating to collecting societies in paragraphs 37 and 86 of the draft guidelines. While the draft mentions the possibility of direct negotiation between copyright owners and users as an alternative means of accessing copyright, and a way in which competitive pressure can be preserved, we would add that collecting societies face competition (and the threat of competition) from other aggregation services outside of the traditional collecting society format. APRA AMCOS actively provide our members and music users with alternatives to APRA AMCOS <https://www.apraamcos.co.nz/about/what-we-do/alternatives-to-apra-amcos>

In the music industry there are a number of independent rights management and music publishing companies that have substantial catalogues, some of which have developed online portals to provide royalty arrangements with artists, and which offer alternative licensing arrangements to users internationally, including in New Zealand. We suggest that the examples in the draft might include not only direct negotiation with owners of copyright, but also with other collecting societies and aggregated licence providers. However, as discussed earlier the fact that there may be barriers to users negotiating directly with rights holders is not necessarily determinative (as the majority of users tend to obtain better pricing through collecting societies than negotiating direct).

Next steps

We hope these are helpful and look forward to further review of the guidelines. If it would be helpful to discuss further or if you would like any clarification, I am always available to discuss.

Nāku iti noa, nā

