

# COMPETITION POLICY REVIEW

## APRA AMCOS

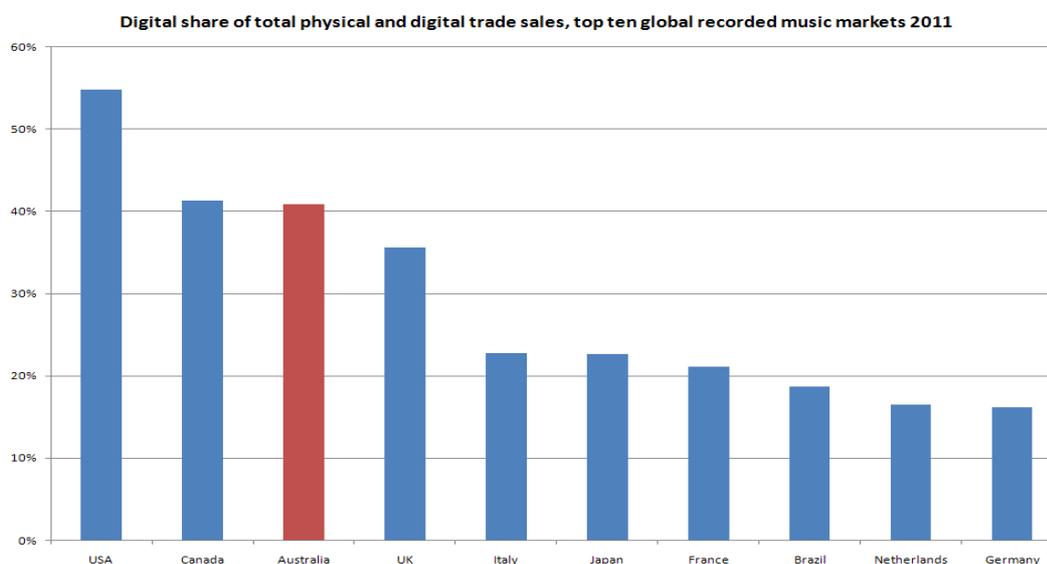
### - SUBMISSIONS -

#### Introduction

1. Australasian Performing Right Association Limited (**APRA**) administers the public performance and communication rights in basically all musical (and their associated literary) works. Australasian Mechanical Copyright Owners' Society (**AMCOS**) represents copyright owners in relation to mechanical reproductions – that is, where musical (and their associated literary) works are reproduced in sound recordings on digital media, or CDs or records – as well as photographic reproductions of sheet music. APRA AMCOS' membership is diverse, ranging from unpublished songwriters to major multi-national music publishers, and together speak on behalf of Australian songwriters and music publishers, representing more Australian copyright owners than any other organisation, with a combined total of approximately 90,000 members.
2. APRA AMCOS are grateful for this further opportunity to contribute to the review. APRA AMCOS have had the opportunity of considering, and thoroughly endorses, the latest submissions of the Australian Copyright Council. The comments below seek only to corroborate those submissions by conveying APRA AMCOS' unique experiences, where such information may assist the Panel. As copyright collecting societies, APRA AMCOS are extremely qualified to comment on certain aspects of the review, specifically those that relate to intellectual property and the digital revolution. In particular, APRA AMCOS propose to comment broadly on the music industry's experience of the digital revolution, and how intellectual property laws have not unduly stifled innovation or competition.
3. One assumption that APRA AMCOS wish to challenge from the outset is that intellectual property laws create an “Us” and “Them” dynamic, whereby Australian consumers are supposedly pitted against Australian creators in an irreconcilable conflict over each other's entitlements and obligations. In 2012, PricewaterhouseCoopers published its report on the Economic Contribution of Australia's Copyright Industries. In 2010/2011, 8% of the Australian Workforce was employed in an industry reliant on copyright, and copyright industries comprised 6.6% of GDP. The copyright industries generate economic value of more than \$90 billion, including \$7 billion in exports. This is to say that all Australians stand to benefit from healthy and prosperous copyright industries – whether they are the one in twelve Australian workers who directly makes a living in the copyright industries, or they are one of the countless others who derive knock-on benefits from the sector thriving. Moreover, all creators are themselves consumers – a musician listens to other music, and reads books, and watches television and purchases artwork. It is simplistic to proceed on the basis that creators seek to be regulated in such a manner as to be able to prevent consumers from gaining access, except on the most onerous terms. It is likewise simplistic to proceed on the basis that consumers suffer from a copyright law that provides strong protection to artists, authors and creators. It is, of course, through such protections that consumers are able to derive the high-quality products that they demand. Commercial creators, like any one of APRA AMCOS' 90,000 members, are proactive in distributing their creations to consumers on appropriate terms; that, of course, is their business. With decades of experience at the forefront of the Australian music industry, APRA AMCOS have long appreciated that ultimately consumers and

creators only truly benefit when the benefits are mutual. Noting the Panel's stated goal that all reform must be targeted to make markets work in the long-term interests of consumers, APRA AMCOS encourage any review of copyright laws to bear firmly in mind that the interests of consumers and creators are not as divergent as often perceived.

4. APRA AMCOS note that the Panel's comments about intellectual property are of a general nature, and that, even just within the copyright industries, there are such significant differences between the levels of competitiveness, that assumptions about competition are lacking in nuance. This is more pronounced when one considers the industries that deal with patent, trade mark and other intellectual property laws. APRA AMCOS' experiences with the music industry, and the copyright laws which uphold it, may, and of course do, differ from those of, say, the technology or pharmaceutical industries dealing with patent law, or the retail industries dealing with trade mark law. In fact, the modern music industry is hypercompetitive, and the evidence provided below demonstrates this.
5. The music industry has been profoundly affected by the digital revolution. Copyright owners have had to address the issue of endemic online piracy, while at the same time reinventing their businesses in line with new delivery mechanisms. Australian consumers of music now have unprecedented access to vast amounts and a diverse range of copyright music, in more flexible formats than have ever been available. Digital music presents enormous opportunities for copyright owners as well as consumers, and Australians' consumption of music is enthusiastic.
6. Spotify launched in Australia in May 2012. In 2011 – 2012, ten other music streaming services commenced operations in Australia, including overseas services Rdio and Pandora, and locally developed music services JB Hi Fi and Samsung Music Hub.
7. Australia is also at the global forefront of the move from physical to digital music, with the local market responding to local consumer wishes with agility. Of the top ten markets, only the US and Canada saw a larger share of total trade sales generated from digital services during 2011, with Australia's digital share just below that of Canada at around 41%. Notably, this share of digital trade sales exceeds that seen in the larger recorded music markets of the UK, Japan, Germany and France, as shown in table below.



8. Digital market growth has been consistently stronger in Australia than any other top ten music market. As shown in the table below, Australia is the only country in the top ten global recorded music markets to have delivered annual digital sales growth of at least 30% (in local currency terms).

**Minimum annual  
digital sales growth,  
2006-2011 (LCU  
terms)**

|            |      |
|------------|------|
| Australia  | 32%  |
| UK         | 20%  |
| Germany    | 19%  |
| Netherland | 18%  |
| Canada     | 14%  |
| Italy      | 1%   |
| USA        | 1%   |
| Brazil     | -1%  |
| France     | -2%  |
| Japan      | -16% |

9. Australia is seen internationally as an early adopter of digital music services, now consistently targeted by innovative international digital music players as part of early-stage international expansion plans. Australia's leading digital music market position has been developed on the back of strong competition, both from new local offerings and international expansions. Simple and efficient licensing procedures and stability of copyright laws have provided the foundation for such competition.
10. In the last few months, the Digital Content Guide – of which APRA AMCOS were founding members – has been launched. The Digital Content Guide was developed by a group of creative rights holder and creative content industry associations to help consumers find licensed content online across a range of services and platforms. The site indexes the licensed services available in Australia in order that consumers can make an informed decision about where they source content. Even the briefest consultation of the Digital Content Guide website (<http://digitalcontentguide.com.au/>) will reveal the wealth of alternatives in the local markets for content, with competition flourishing in the music sector, as well as those of movies and television, games, eBooks and sport.
11. APRA AMCOS submit that this evidence demonstrates that Australian consumers are, or are among, the most privileged consumers of copyright content in the world, being offered an extremely high level of access to digital services.

#### **Draft Recommendation 7 – Intellectual Property Review**

12. APRA AMCOS respectfully disagree with this recommendation made by the Panel, which calls for an overarching review of intellectual property to be undertaken by an independent body, such as the Productivity Commission. APRA AMCOS has been heavily invested in multiple recent enquiries into copyright law reform. Apart from contributing to this enquiry which considers, among other things, the interplay between intellectual property and competition laws, APRA AMCOS were involved in the House Standing Committee on Infrastructure and Communications' *Inquiry into IT Pricing* (2012-2013), the Australian Law Reform Commission's enquiry into *Copyright and the Digital Economy* (2012-2014) and the Federal Government's enquiry into *Online*

*Copyright Infringement* (2014-ongoing). The ALRC enquiry was the most comprehensive review of Australian copyright law since the enactment of the *Copyright Act 1968*. After significant consultation, and two rounds of submissions, the ALRC tabled its final report comprising close to 500 pages in Parliament earlier this year. The results of these expensive and time-consuming law reform reviews are yet to be seen, as the Federal Government continues to consider the most appropriate of regulating the copyright industries in a digital economy. APRA AMCOS have for many decades been, and will continue to be, involved in all policy debates about copyright in Australia, but APRA AMCOS urge against introducing further reviews in a manner that outpaces the Government's ability to consider them. There may be a need for law reform in respect of copyright, but there is surely scarce need for another enquiry into it.

13. While further reviews are of academic interest, they come at enormous commercial cost to industry. Putting to one side the considerable expenses generated by contemplating issues and discussion papers and final reports, and those generated by preparing helpful submissions, and by attending consultations, there are further costs engendered by the uncertainty that each review creates. It is APRA AMCOS' experience that such a lack of certainty actually stifles innovation and competition in the marketplace, because entrepreneurs are cautious of the risks inherent in an unstable regulatory environment, and because established firms can afford the advice required to participate in, and navigate through, the law reform process.
14. APRA AMCOS note that the recommendation made is of a general nature, and the Panel may have in mind other areas of intellectual property law than copyright. As mentioned above, recommendations about intellectual property laws that are of a general nature suffer from a deficiency of nuance: the copyright industries are very different from the patent or trade mark industries. But even so, the patent industries have just undergone the comprehensive *Review of the Innovation Patent System* by the Australian Council on Intellectual Property (2011-2014) with the Government presently considering its response to the Report released on 16 June 2014. So too, all intellectual property laws in Australia underwent a major reform with the enactment of the *IP Laws Amendment (Raising the Bar) Act 2012*, which came into full effect on 15 April 2013. IP Australia labels it "Australia's biggest intellectual property system overhaul in twenty years." APRA AMCOS respectfully suggest that the legislature considers the recommendations already made by the various committees in the last 24 months, and determines whether there are merits in enacting any reform of the intellectual property system – rather than putting the intellectual property industries and government to further significant expense by conducting more reviews.

#### **Draft Recommendation 8 – Intellectual Property Exception**

15. APRA AMCOS share the views articulated by the Australian Copyright Council in relation to this draft recommendation regarding the repeal of section 51(3) of the *Competition and Consumer Act*, and adds only the following. The draft recommendation appears to be motivated by the Panel's view that intellectual property rights-holders should not be treated as different from other service providers, as though there were an inbuilt statutory exceptionalism for holders of IP rights. This is simply not the case.
16. There is, in Australia, a complex system of balancing exclusive intellectual property rights against consumer interests. Any debate about the section 51(3) exception must not consider that section in isolation; it is but one small cog in a far larger machine. APRA AMCOS note that the Panel made no mention of the Copyright Tribunal, a specialist Tribunal established under the *Copyright Act* to prevent rights-holders such

as APRA AMCOS from abusing their position. A licensee or person desiring a licence has a statutory right to apply to the Tribunal for a determination of reasonable terms on which a licence should be granted. The Tribunal is specifically required to take into consideration antitrust considerations. In proceedings concerning voluntary licences and licence schemes, the Tribunal must, if requested by a party to the proceedings, consider relevant guidelines (if any) made by the ACCC. The Tribunal may also make the ACCC a party to the proceedings (if the ACCC asks to be made a party and the Tribunal is satisfied that it would be appropriate to do so). When the Tribunal has made an order in relation to a licence scheme, a person who complies with the terms is in effect deemed to have the necessary licence. Accordingly, collecting societies cannot unreasonably refuse a licence or unreasonably impose its terms.

17. The Copyright Tribunal is a genuine fetter on any possible anticompetitive urges a rights-holder might have, and the Copyright Act provides consumers with rights to access copyright material in a manner not afforded to consumers of other species of property. APRA AMCOS respectfully submit that the Panel must view the section 51(3) exception as part of the balancing act between creative and consumer interests, and that its removal would require a wholesale recalibration of the system that is already place. Its removal would tip the balance inequitably against the interests of Australia's creative community.

#### **Draft Recommendation 9 – Parallel Imports**

18. APRA AMCOS share the view articulated by the Australian Copyright Council in relation to this draft recommendation.

#### **Draft 26 – Price Discrimination**

19. APRA AMCOS share the view articulated by the Australian Copyright Council in relation to this draft recommendation.

#### **Conclusion**

20. APRA AMCOS trust that the above submission has been of some assistance to the Panel, and would be pleased to respond to any further questions if any are had.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J Carter', with a horizontal line underneath.

Jonathan Carter  
General Counsel APRA AMCOS