‘Still No Good: APRA’s noncommerical licensing amendments and what they mean for Creative Commons users’

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Historically, APRA members have not been able to use Creative Commons licences. This is because, in Australia (and New Zealand) when a musician becomes a member of the Australasian Performing Right Association Limited (APRA) they give up control of part of their music. Like many collecting societies around the world, APRA requires a full assignment of the member’s performing rights of all past, present and future works. Assigning the rights to the collecting society allows more efficient administration and enforcement of the royalty collection process, increasing the ease and utility of the system for APRA members and users alike.

However, the assignment of rights to the collecting society also has disadvantages. In particular, it presents compatibility issues with online business and distribution models. Members who seek to license a work or works under a Creative Commons licence, or other direct licence such as those used by services such as MySpace and Last.fm, run afoul of their APRA membership agreement. In simple terms, because of the assignment, the creator no longer has the right to issue any direct licences for the performance of their works. Often, musicians are not even aware of these legal complications, and put themselves at risk by licensing their material in ways that are technically invalid.

To address this licensing shortfall in the APRA model, in late 2008 APRA introduced a “Noncommerical Licence Back” option for worldwide, noncommercial licensing of musical works online. APRA has had two similar mechanisms for regaining control of works in the APRA repertoire—“opt out” and “license back”— for some time. However, limitations in the terms of these mechanisms meant that musicians still had no (legal) ability to communicate their musical works online.

The new Noncommerical Licence Back enables a member to make their musical works available to others online for Noncommerical purposes. The musician can now host streamable and/or downloadable audio files of their musical works on their own website, or on third-party sites (where the reuse is noncommercial). This seems to open up a range of new options for musicians to utilise digital technologies to promote and capitalise on their music.

Although the introduction of a mechanism for taking advantage of the promotional and distributive benefits of the internet is, on its face, a good thing, the narrow and problematic drafting of Article 17(h), (i) and (j) casts a heavy shadow of doubt over its practical utility. The rights granted by the Noncommerical Licence Back and the provision’s very narrow definition of noncommercial purposes jointly serve to strangle the artist’s ability to make decisions about their own music.

Inconsistencies between the scope of the Creative Commons “Noncommerical” licences and the Noncommerical Licence Back means that in practical terms, a musician still cannot take advantage of the ease and

certainty of a Creative Commons “Noncommercial” licence. The scope of the Noncommercial Licence Back does not extend far enough to permit Creative Commons licensing or other distribution platforms that rely on direct licensing.

This paper will examine the limitations of the new Noncommercial Licence Back, explore what is being done to address the incompatibility of the Creative Commons and performing right society systems internationally and will proposed alternatives to the Licence Back that could accommodate Creative Commons while preserving musician’s ability to continue to access the benefits of APRA.