

## IFPI Submission to New Zealand on Copyright Act Issues Paper 2019

April 2019

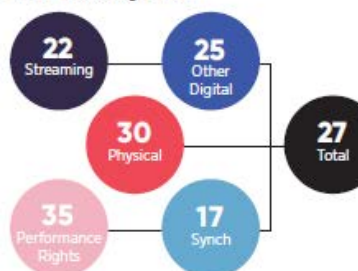
IFPI, representing the recording industry worldwide, has some 1,300 record company members in some 60 countries and affiliated industry associations in some 57 countries, including Recorded Music New Zealand. IFPI's objective is to develop fair and balanced market conditions for our members to operate in, to enable the recording industry to continue to invest in artists, create jobs, and contribute to economic growth. We are grateful for the opportunity to submit comments in response to the Issues Paper on the Review of the New Zealand Copyright Act 1994.

The New Zealand recorded music has returned to growth after over a decade in decline. Notably, New Zealanders have embraced digital music services with our latest data (published on 2 April 2018) showing that 73 percent of New Zealand recorded music revenues come from digital, compared to 58.9 percent globally.

Recorded Music Revenues by Sector 2018 (Trade Value)



World Ranking 2018



Recorded Music Revenue (US\$ Millions, Trade Value)

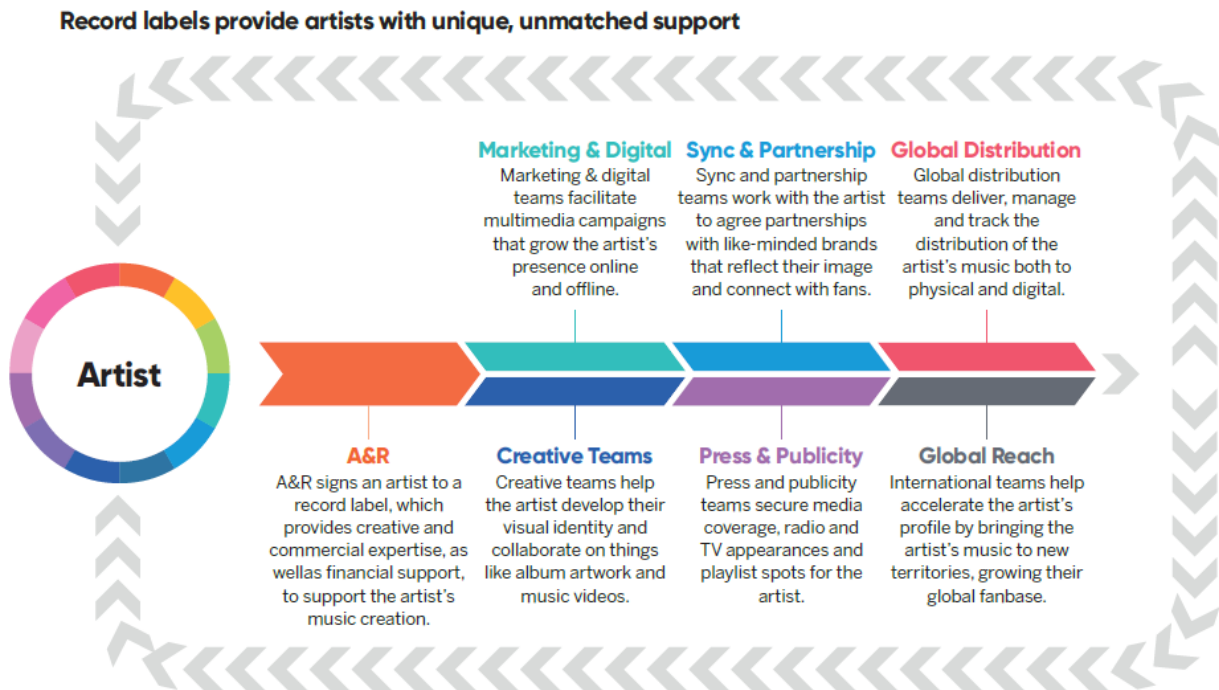
	Streaming	Other Digital	Physical	Performance Rights	Synch	Total (US \$)	Total (NZD)	Total % change
2018	51.3	3.9	7.8	10.5	1.6	75.1	108.6	7.9%
2017	42.4	5.8	10.0	10.4	1.0	69.6	100.7	13.5%
2016	30.5	7.7	12.1	10.0	1.1	61.3	88.7	16.9%
2015	17.8	10.9	13.4	9.7	0.8	52.5	75.9	12.3%
2014	8.8	13.2	14.8	9.3	0.7	46.7	67.6	0.3%

Source: IFPI Global Music Report 2019

For the New Zealand music industry to continue to grow and to further develop its export potential, a fair legal framework is needed. Fair legal frameworks enable all right holders to secure fair value from the use of their rights and, crucially, enable record companies to continue their high levels of investments in artist and repertoire. Record companies are both the spark and the engine, igniting and driving music, working to discover and develop artists around the world and connect them to fans everywhere in unprecedented ways.

A dominant feature of the return to growth in recent years has been the expanded levels of investment record companies are making in their offerings to artists, in their people and in their global presence. **Record companies are investing more than one-third of their global**

revenues, or USD 5.8 billion, in Artists & Repertoire (or A&R) and marketing each year, to break, develop and support artists.



In this submission we respond to questions in the Issues Paper which are of particular concern to the recorded music industry, not least in ensuring that New Zealand law continues to support and the creative industries and, where changes are made, they are changes that will foster further growth and increased investments in New Zealand's artists. We look forward to continued participation in this review process as it develops.

#### IFPI RESPONSES TO QUESTIONS IN THE ISSUES PAPER:

**QUESTION 15: Do you think there are any problems with (or benefits arising from) the exclusive rights or how they are expressed? What changes (if any) should be considered?**

IFPI congratulates the Government of New Zealand on its recent accession to the WIPO Internet Treaties. The exclusive rights granted under New Zealand law appear to be compatible with New Zealand's international obligations, including under those treaties. We do not consider there to be any need for changes to these exclusive rights. We also refer to our response to Question 18 below in respect of the right of communication to the public.

**QUESTION 18: What are the problems (or advantages) with the way the right of communication to the public operates? What changes, if any, might be needed?**

We note that the Issues Paper appears to present "communication works" and the right of communication to the public as being interrelated. However, they are not. Communication works are a type of protected *work* under the Act, while communication to the public is a

*right* applicable to all works. In our response to this question we address the right of communication to the public. We also make observations in respect of communication works in our response to Question 19 below.

The right of communication to the public under New Zealand law is derived from the WIPO “Internet Treaties” (the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)). The manner in which communication to the public is defined in the New Zealand Copyright Act makes clear that the right covers both linear and interactive transmissions (the definition in section 2 stating “**transmit or make available** by means of a communication technology, including by means of a telecommunications system or electronic retrieval system”).

Accordingly, the right of communication to the public in the New Zealand Act covers:

- The authors’ right of communication to the public under Article 8 of WCT, which includes the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them (the making available right); and
- Sound recordings producers’ right of communication to the public under Article 15 of WPPT (except for their right of public performance, which is separately enumerated under section 16(1)(d) of the New Zealand Copyright Act (“publicly play”)); and
- Sound recording producers’ right of making available to the public under Article 14 of WPPT.

New Zealand law therefore appears to be compatible with WCT and WPPT, which requires that contracting parties provide at a minimum the level of protection out therein.

As the issues paper correctly notes, the right of communication to the public in the WIPO Treaties is technologically neutral. While we support the intention of MBIE to ensure that all exclusive rights continue to be applicable to all new uses of works (para 198 of the Issues Paper), New Zealand law appears to already to achieve that in respect of communication to the public. We do not therefore consider there to be any need to change the definition of communication to the public.

As stated above, it is important not to confuse “communication works” with the right of communication to the public, and we urge the MBIE to take that point into account as it considers the responses it receives to the Issues Paper.

**QUESTION 19: What problems (or benefits) are there with communication works as a category of copyright work? What alternatives (if any) should be considered?**

We are not aware of the concept of a “communication work” being present in the laws of any other country. We understand from the Issues Paper that in creating this new category of work in 2008, the intention was to change the definitions of “broadcast” and “cable

programme” *“to incorporate transmission of copyright works on line and be technologically neutral to take account of future technological advances.”*

Prior to the 2008 amendments, broadcasts and cable transmissions enjoyed protection as copyright works.

The approach taken has resulted in a unique situation whereby **a transmission of any nature** is protected as a copyright work. In this respect we are concerned about a statement in this Issues Paper, which we understand to be an incorrect statement of the law. At paragraph 203 the Issues Paper states:

*“A communication work is a transmission of content. **It gives the transmitter (eg broadcaster) rights in the transmitted transient content.** Often the transmitted content is protected by copyright, like a movie. Sometimes it is not (eg a live rugby game).”* (emphasis added)

In other words, the Issues Paper appears to be suggesting that when a work such as a sound recording is transmitted, the maker of that transmission acquires copyright in that *transmission* (the communication work), and also acquires rights in the *transmitted works*. We do not understand New Zealand law to provide that the inclusion of a copyright work in a communication work would grant the “author” of the communication work rights over such third party works, and it is troubling that the Issues Paper includes such a statement. Were this statement correct it would mean, for example, that by streaming recordings licensed to it under a non-exclusive licence, a music streaming service would acquire rights over the recordings (distinct from any rights that may have been granted to it contractually) if that transmission is protected as a communication work. That cannot be right, and such an interpretation would not be compatible with the Act, nor with general principles of copyright law. Under the Act, authors or communication works are afforded copyright protection in their “transmissions” but not in the works included in the transmission. This does, however, illustrate the confusion that granting protection to communication works has caused. It may be the case that such a transmission does not qualify as a communication work because it lacks the necessary originality and fixation to subsist as a copyright work, but that question further illustrates the uncertainty caused by the creation of this category of work.

**We urge the Government to correct the above statement in the Issues Paper by clarifying that the inclusion of a copyright work in a communication work does not confer any rights in such works upon the author of the communication work.**

Leaving that point aside, the granting of copyright protection in respect of “communication works” is problematic for reasons including the following:

- While we support broadcasters being granted legal protection against signal theft, in other words, the unauthorised re-transmission of their programme-carrying signals, “communication works” and the rights granted in respect of them go far beyond this.

- The broad scope of communication works, which bestow copyright protection on transmissions, has created rights which are superfluous and which in many instances not could be meaningfully asserted. Where the protected communication work is an exclusive transmission of live sports event, for example (where there is no protectable underlying copyright work), the value in a broadcaster of being able to assert its communication work is clear: it needs to be able to prevent theft of the signal. However, in many cases, a transmission will be of a third party work (such as a sound recording). In such circumstances, the transmission itself has no value. An unauthorised use of that transmission would be asserted by way of the copyright in the sound recording and/or through the service’s contractual terms of use. What then is the purpose of protecting that transmission? This is just one example of the effects of granting broad copyright protected to “transmissions”. We note also that it is wholly unclear how a transmission itself could ever satisfy the requirement of originality for a copyright work to subsist.
- These issues serve to demonstrate that the protection of broadcast signals is better achieved through specific regulation and not through seeking to apply copyright laws to subject matter to which it does not readily attach. A specific regulatory protection of broadcast signals would achieve the intended result without creating the uncertainty caused by the approach taken in New Zealand.
- Furthermore, a particularly problematic consequence of replacing the terms “broadcast” and “cable programme” with “communication work” is seen in certain of the exceptions now applicable to communication works. These exceptions previously applied to broadcasts and cable programmes (and, problematically, the works transmitted by them). By replacing the terms “broadcasts” and “cable programmes” with “communication works” in these exceptions, the exceptions were very substantially broadened, seemingly without due consideration of the effects this would have, particularly in respect of the works transmitted in communication works.

Absent a change in approach to the existing copyright protection afforded to “communication works”, we respectfully request that MBIE:

1. corrects the statement in paragraph 203 of the Issues Paper to clarify that authors of communication works are not granted any rights over works transmitted by the communication work; and
2. revises certain of the exceptions to communication works, in which respect please see our response to Question 51.

**QUESTION 22: What are the problems (or benefits) with how the Copyright Act applies to user-generated content? What changes (if any) should be considered?**

First, it is important to understand what is meant by “user-generated-content”. “User-generated content” or “UGC” is used to describe content uploaded by users of user

uploaded content (UUC) services. Very often the content uploaded is not in fact “generated” (created) by the user; it is simply an upload of a copyright work created by a third party, such as a popular sound recording or music video. Clearly all such uses of third party copyright protected works must be licensed, and our members license UUC services, including YouTube (which makes available over 95 percent of all UUC globally), to make available copies of our members’ sound recordings uploaded by the users of such services.

In some cases, users upload their own original content. In such cases, the user may decide what to do with that content.

In other cases, a user may use all or part of a third party copyright work as part of an upload of UUC. For example, a user might use one of our member’s sound recordings as the backing track to a home video. Such uses of sound recordings (unless covered by an exception) must be licensed. The licences entered into between our members and UUC services also cover the making available of UUC incorporating our members’ recordings in such ways.

The recording industry has a proven track record of licensing UUC services to make available sound recordings (in whole or part) uploaded their users; the market has responded to use of sound recordings in UUC. There is therefore no need for any changes to copyright in this area.

Although an exception for uses of third party works in UUC does not appear to be under consideration as part of the Issues Paper, it is important to note that not only is any such exception unnecessary (as explained above), but it would cause serious harm to right holders and in many respects would be incompatible with the three-step-test. We note that when the EU Commission investigated the potential for a “UGC” exception, it found that *“There is a lack of evidence that the current legal framework for copyright puts a brake on or inhibits UGC”*<sup>1</sup>.

The real issue with UUC is the fact that the large UUC services abuse the liability safe harbours provided in some territories for technical, automatic and passive Internet service providers. Some UUC platforms hide behind these safe harbours, which enable them either to refuse to negotiate licenses altogether and only take down infringing content after notice, or only offer to obtain licenses on behalf of their users at artificially low rates. The UUC platforms’ abuse of the safe harbours has created a market failure that harms both right holders and other digital music services. This market distortion is known as the Value Gap, and we address this issue in detail in our response to Question 61.

**QUESTION 28: What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?**

At present New Zealand’s TPM provisions do not cover access controls. Now that the majority of industry revenues come from digital uses of recordings, and in particular from streaming, the absence of protection of access controls is a major gap in New Zealand’s legal

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<sup>1</sup> EU Commission 2014 draft White Paper “A Copyright Policy for Creativity and Innovation in the European Union”

protection. The fact that the act of circumventing a TPM is not prohibited also leaves digital music services operating in New Zealand, and therefore the right holders who license them, vulnerable.

1. For example, access controls are an essential tool to prevent “stream ripping”, which is the process of creating or obtaining a downloadable file from content that is available to stream online. It is typically done by users to produce an MP3 from a streamed music video, creating a file that can then be kept and listened to offline or on other devices. Stream ripping has become the most common way of illegally downloading music, with research conducted by IFPI in 2018 finding that 32 percent of all internet users globally (and 47 percent of 16-24 year olds) had engaged in the practice in the previous three months.
2. Stream ripping sites compete unfairly with licensed music services, enabling users to permanently download music licensed only for ad-supported streaming and then listen to it offline without advertisements and without paying. Meanwhile, unlicensed stream ripping companies generate revenues from advertising and in some cases via the sale of software and other products.
3. Stream ripping is causing substantial harm to the music industry including through:
  - (a) reducing traffic to streaming platforms, thereby reducing advertising revenues;
  - (b) reducing sales of premium subscription streaming services, which offer offline and mobile access; and
  - (c) diverting sales of permanent downloads.
4. 90 percent of stream ripping downloads are sourced from YouTube, although ripping can also take place from other streaming services such as SoundCloud.
5. Stream-ripping services circumvent access control TPMs in order to give users access to downloadable copies of streamed content. **For the purposes of effective protection, it is essential that access control TPMs be included within the definition of TPM in New Zealand. It is also essential that the act of circumvention itself is prohibited.**
6. We also note that the definition of a TPM circumvention device is one that inter alia *“has no commercially significant purpose or use other than to circumvent a technological protection measure”*. The comparable provisions in both Australia and the UK require only that the copyright owner demonstrate that the device has *“only a limited commercially significant purpose or use”*. We also draw the MBIE’s attention to Article 6(2) of EU Directive 2001/29, from which the UK provision derives, which provides:

*“2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:*

*(a) are promoted, advertised or marketed for the purpose of circumvention of, or*

- (b) have only a limited commercially significant purpose or use other than to circumvent, or*  
*(c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures.”*

We recommend that the New Zealand definition be aligned with these standards so as to ensure an adequate protection, and to avoid abuse by those providing infringing circumvention devices while cynically purporting to be providing a device for a lawful commercial purpose.

We also note that the prohibition in s 226A(1) on specified dealings in TPM circumvention devices applies only if the person “*knows or has reason to believe that it will, or is likely to, be used to infringe copyright in a TPM work*”, which establishes an unduly specific knowledge requirement, particularly when compared for example to the equivalent UK provision in s 296ZA CDPA 1988, which is less restrictive in its wording:

- “(1) This section applies where –*  
*(a) Effective technological measures have been applied to a copyright work other than a computer program; and*  
*(b) A person (b) does anything which circumvents those measures **knowing, or with reasonable grounds to know, that he is pursuing that objective.**”*

We recommend that New Zealand amends the knowledge standard to reflect the UK approach.

In this section we have focused on some key shortcomings in the existing New Zealand TPM regime. As part of this review process, we urge the Government to update its TPM provisions to provide adequate tools for right holders to protect their works, and to comply with New Zealand’s obligations under WPPT. For reasons including those set out in the response to this question, the present law does not provide the “***adequate legal protection and effective legal remedies against the circumvention of effective technological measures***” required by Article 18 WPPT.

**QUESTION 35: What are the problems (or benefits) with the exception for transient reproduction of works? What changes (if any) should be considered**

Section 43A of the Copyright Acts provides an exception for “transient or incidental” reproductions of copyright works. It is intended to facilitate the efficient operation of digital technology. While similar to equivalent exceptions in other jurisdictions, section 43A is unduly broad by comparison and lacks certainty. We therefore recommend that section 43A be clarified to avoid it being abused, and to ensure its compatibility with the three-step-test.

## **Equivalent provisions in other countries**

### ***Australia***



The Australian *Copyright Act* provides separate exceptions for temporary reproductions for copyright material, made as part of the technical process of making or receiving a communication<sup>2</sup> and using a copy of a work or other subject-matter.<sup>3</sup>

### **Canada**

Section 30.71 of the Canadian *Copyright Act* 1985 provides an exception for the reproduction of copyright material where: it is an essential part of a technical process, its only purpose is to facilitate a use that is not an infringement of copyright and the reproduction exists only for the duration of the technical process.

### **Singapore**

A similar exception for temporary reproductions exists in Singapore in relation to works<sup>4</sup> and also for audio-visual items<sup>5</sup>.

### **United Kingdom**

Section 43A of the New Zealand Copyright Act is closely modelled on s.28A of the UK *Copyright, Designs and Patents Act* 1989, but is not entirely aligned with it. It provides:

*Copyright in a literary work, other than a computer program or a database, or in a dramatic, musical or artistic work, the typographical arrangement of a published edition, a sound recording or a film, is not infringed by the making of a **temporary** copy which is transient or incidental, which is an integral and essential part of a technological process and the sole purpose of which is to enable—*

*(a) a transmission of the work in a network between third parties by an intermediary; or*

*(b) a lawful use of the work;*

*and which has no independent economic significance.*

*(emphasis added).*

### **EU**

The UK exception (and other EU Member States' equivalent exceptions) is derived from Article 5 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society which provides:

*1. **Temporary** acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:*

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<sup>2</sup> s.43A, s.11A.

<sup>3</sup> s.43B, s.11B.

<sup>4</sup> s.38A.

<sup>5</sup> s.107E.

*(a) a transmission in a network between third parties by an intermediary, or  
(b) a lawful use  
of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.*

...

*5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder. (emphasis added).*

***Section 43A of the New Zealand Copyright Act differs from the above cited examples, lacks certainty and is unduly broad***

**The absence of a requirement that the copy must be temporary in section 43A of the New Zealand Copyright Act renders the section 43A unduly broad**

Section 43A omits the reference to “**temporary**”, which is part of equivalent exceptions elsewhere and, as far as we are aware, is unique in this regard.

This is problematic because in the absence of this requirement, section 43A would appear to cover permanent reproductions, meaning the exception covers uses beyond those needed to achieve a technological purpose.

Although a “transient” copy would by definition be temporary, section 43A applies to transient **or** incidental copying. It would seem therefore that section 43A permits **permanent** “incidental” reproductions. This goes against the international trend for exceptions of this sort, whereby the temporary nature of the reproduction is a pre-condition for the possibility of it being covered by the exception.

**We recommend that section 43A be clarified to cover only temporary reproductions.**

***The risks of not limiting section 43A to temporary copying are exacerbated by uncertainty in respect of the permitted purposes of the acts of reproduction covered by the exception***

Section 43A states that the reproduction must be for:

*“(i) making or receiving a communication that does not infringe copyright; or*

*(ii) enabling the lawful use of, or lawful dealing in, the work”.*

The ordinary meaning of a “lawful use” would mean a non-infringing use of a work, including uses that fall within an exception under the Act. What, then, is the purpose of the additional words “or lawful dealing”? These words may be understood as meaning a lawful fair dealing, but in that case such uses would be covered by the words “lawful use”, meaning the words “lawful dealing” would be superfluous.

Additional uncertainty arises because the term “dealing” is used elsewhere in the Act to refer to actions such as selling, letting for hire, importing, licensing or assigning copyright material.<sup>6</sup> It would be difficult to reconcile such a broad range of purposes with the policy aim of section 43A, which is to facilitate mere technological processes. It is therefore unclear what the reason is for the inclusion of the reference to “dealings” or how it serves the objective of the exception. Consequently, the exception is uncertain in scope and could be construed to cover reproductions going beyond those that the provision is intended to cover.

**We recommend that the words “or lawful dealing in” be removed from section 43A(b)(ii).**

***The inherent uncertainty in the drafting of section 43A may render it incompatible with the three-step-test***

The three-step-test requires that exceptions must be limited to certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder. The absence of the “temporary” requirement and the uncertainty surrounding the meaning of “lawful dealing”, risks rendering section 43A incompatible with the three-step-test. In that regard, it is notable that the EU exception is expressly subject to the three-step-test.

**We recommend that section 43A (and the other limitations and exceptions in the Act) be made expressly subject to three-step-test.**

***A note on the meaning of “transient”, “incidental” and “Integral and essential part of a technological process”.***

As the Issues Paper notes, the terms “transient” and “incidental” are not defined in the Act and there has been little discussion of the meaning of s.43A.

Some guidance is provided by the Court of Justice of the European Union (CJEU)’s decision in Case C-360/13 *Public Relations Consultants Association v Newspaper Licensing Agency and Others* (Meltwater).<sup>7</sup>

The case dealt with the issue of whether the customers of Meltwater, a news clippings service, required a licence to browse its service. The UK Supreme Court asked the CJEU to consider whether the temporary copies exception applied to on-screen and cached copies of copyrighted works generated in the course of browsing. The CJEU held that in the circumstances the exception was applicable. During the course of the its judgment, the CJEU interpreted each of the components of Article 5(1) of the Infosoc Directive:

In relation to “transient”, the court recalled its earlier ruling on the meaning of this term, which was that:

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<sup>6</sup> See for example, Part 5 ‘Dealing with rights in copyright works’.

<sup>7</sup> Available at <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CJ0360&qid=1401959911292&from=EN>>.

“an act will be held to be ‘transient’, in the light of the technological process used, if its duration is limited to what is necessary for that process to work properly.”

In relation to “incidental” the court held:

*“an act of reproduction can be regarded as ‘incidental’ if it neither exists independently of, nor has a purpose independent of, the technological process of which it forms part.”*<sup>8</sup>

In relation to “integral and essential part of a technological process” the court held:

*That condition requires that two criteria both be fulfilled, namely that, first, the acts of reproduction are carried out entirely in the context of the implementation of a technological process and, secondly, the completion of those acts of reproduction is necessary, in that the technological process could not function correctly and efficiently without those acts.*<sup>9</sup>

**While it may not be necessary to define the above terms in legislation, in addition to the recommendations we make above, guidance on the correct interpretation of these terms would be useful, in line with the guidance from the CJEU.**

Finally, we note that paragraph 289 of the Issues Paper, states:

***“There has been little discussion of the precise meaning of section 43A. Commentators have described the provision as ‘limited’ because they do not capture technologies (like internet caching) which may not be considered an integral and essential part of a technological process.”***

The assertion made by certain commentators that section 43A is limited is unfounded and not supported by an analysis of the provision (not least in respect of the intended effects of the provision), and we urge the MBIE to scrutinise such statements. Internet caching, for example, is addressed by section 92E of the Act, which provides a liability privilege (“safe harbour”) for caching activities by Internet service providers. Section 43A is not, and is not intended to be, another safe harbour. For the reasons stated above, it is already unduly broad and needs to be clarified. Broadening it is unnecessary, would create confusion, exacerbate the Value Gap (see our response to Question 61 below), and exacerbate the existing problems with this exception’s compatibility with the three-step-test.

**QUESTION 36: What are the problems (or benefits) with the way the copyright exceptions apply to cloud computing? What changes (if any) should be considered?**

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<sup>8</sup> [43].

<sup>9</sup> [28].

We are not aware of any particular problems in this regard. However, we note that paragraphs 384-386 of the Issues Paper and corresponding Question 52 concern the question of whether the format-shifting exception needs to be reviewed in light of current consumer practices. We respond to that question below.

**QUESTION 38: What problems (or benefits) are there with copying of works for non-expressive uses like datamining. What changes, if any, should be considered?**

First, we express caution about the way this question is framed. The term ‘non-expressive use’ derives from US fair use jurisprudence, where the meaning and relevance of the term is contentious. This language is not applicable to copyright law in New Zealand and may lead to confusion.

It is also important to clarify at the outset the nature of the activities understood as potentially being targeted by an exception for text and data mining. In the recorded music industry, for example, there are numerous licensed commercial uses of data relating to sound recordings which clearly should not be subject to any exception, such as uses in music recommendation services and automated playlist generation. This illustrates that “*text and data mining*” is a very broad term, which covers a vast number of uses of works and data in numerous commercial contexts. Consequently, at the outset it is important to clarify the types of uses of works that *may* warrant the introduction of a text and data mining exception. The exception in the UK and the recently agreed exception in the EU (described below) are indicative of how this issue may be addressed.

To that end, as the Issues Paper notes, data mining may already be accommodated by existing exceptions in New Zealand’s copyright law. For example, by the exception for fair dealing for research or private study. Absent clear evidence of a need for a new exception for text and data mining, we query whether there is a need introduce a specific data mining exception into New Zealand copyright law.

If, as a result of this review, MBIE is persuaded that a data mining exception is warranted in New Zealand, we would urge the New Zealand Government to carefully prescribe the parameters of such an exception. In our submission, a data mining exception should:

- apply to specified beneficiaries;
- apply for specified purposes, such as non-commercial research;
- apply only when the beneficiaries of the exception have lawful access to the data; and
- apply to the reproduction right and not subsequent uses of the data.

**An exception for text and data mining should be limited to prescribed beneficiaries.**

The European Union has recently agreed on text for a data mining exception as part of its Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (**DSM**). **Article 3** of the DSM Directive provides for an exception for ‘reproductions and extractions made by **research organisations** and **cultural heritage institutions** in order to carry out text and data mining of works or other subject-matter to which they have lawful access, for the purposes of scientific research.’

Recitals (11) and (11a) describe the meaning of **research organisations** and **cultural heritage institutions**, and emphasise that commercial undertakings should not benefit from the exception:

*(11) Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover, besides universities or other higher education institutions and their libraries, also entities such as research institutes, hospitals carrying out research. Despite different legal forms and structures, research organisations across the Member States generally have in common that they act either on a not for profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission may, for example, be reflected through public funding or through provisions in national laws or public contracts. **Conversely, organisations upon which commercial undertakings have a decisive influence allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.***

*(11a) Cultural heritage institutions should be understood as covering publicly accessible libraries and museums regardless of the type of works and other subject matter which they hold in their permanent collections, as well as archives, film or audio heritage institutions. They should include, among others, national libraries and national archives. They should also include educational establishments, public sector broadcasting organisations and research organisations, as far as their archives and publicly accessible libraries are concerned.*

This recognises, as outlined above, that in addition to text and data mining activities conducted for the “public benefit”, there are numerous commercial uses of data (and the works from which that data is derived) which should not be permitted under an exception. Allowing such commercial uses would clearly be incompatible with the three-step-test.

### **An exception for text and data mining should be limited to particular purposes**

Related to the nature of the beneficiary, the purpose must be non-commercial.

In this regard, we note that the data mining exception in the UK might provide a useful model. In 2014, the *Copyright, Designs and Patents Act* was amended to include s.29A(1). It provides an exception for:

*Making of a copy of a work by a person who has lawful access to the work does not infringe copyright in the work provided that—*

*(a) the copy is made in order that a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work **for the sole purpose of research for a non-commercial purpose, and***

*(b) the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise).*

(emphasis added)

Meanwhile, the EU proposal is limited to the beneficiaries described above and also to **scientific research**.

The EU has also agreed on a more general text and data mining exception in respect of reproductions only of works to which the beneficiary has lawful access (Article 3a DSM). However, this exception applies only “*when the work or other subject-matter is accessed lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved the rights to make reproductions and extractions for text and data mining in an appropriate manner.*” In other words, right holders can ‘contract out of’ the application of this more general exception.

Meanwhile, as the Issues Paper notes, the Singapore Government is also considering data mining as part of its review of copyright. While the exception proposed by the Intellectual Property Office of Singapore (**IPOS**) will be for data analysis and limited to copying by parties who have lawful access to the data, in our submission it goes too far in applying to commercial activities. Extending the data mining exception to commercial activities would create an overbroad exception that would not be limited to “certain special cases” and would also be highly likely to undermine licensing arrangements and hence conflict with the three-step-test. Such a broad exception would go far beyond the public benefit that it is intended to serve, risking instead enabling commercial enterprises to free-ride off copyright protected works for a variety of purposes. This demonstrates the importance the importance of carefully prescribing the nature of the beneficiaries of such an exception as well as the permitted purposes.

### **The beneficiary of the exception must have lawful access to the works to be used for the purpose of the text and data mining**

It is an essential pre-requisite to the application of a text and data mining exception that the beneficiary must first have lawful access to the work in question. This requirement is seen in both the UK and EU exceptions.

### **Text and data mining exceptions should apply solely to the reproduction right**

In order to be compatible with the three-step-test, any exception for text and data mining should cover only acts of reproduction, such acts being the only acts that are necessary to

carry out text and data mining. To permit other uses of works would render such as exception unduly broad and widely open to abuse. Right holders would be significantly prejudiced if beneficiaries of the exception could subsequently make their works available to third parties. We refer again to the exceptions in the UK and the EU.

**QUESTION 40: What problems (or benefits) are there with the use of quotations or extracts taken from copyright works? What changes, if any, should be considered?**

There may be a legitimate case for a quotation exception for specified purposes of criticism or review, to the extent the use of a work can be objectively justified in the context. However, a quotation exception should become a pretext for free unauthorised commercial use of works such as “sampling” of sound recordings. For the recording industry revenues from licensing sampling form an important part of overall industry revenue mix. The longstanding and well-understood market for licensing the sampling of recordings illustrates that for sound recordings there are no problems in this area. Therefore, we urge caution when considering any proposals for changes in this area. Introducing a quotation exception that would cover the use of sound recordings would undermine the existing market and harm right holders for whom the licensing of sampling constitutes a “normal exploitation” (step three of the three-step-test) of sound recordings, and who therefore have a “legitimate interest” (step three of the three-step-test) in being able to control uses of samples of sound recordings. Undermining such normal exploitations and legitimate interests would therefore not be compatible with the three-step-test, and would risk serious economic harm to right holders.

**QUESTION 43: Does the Copyright Act provide enough flexibility for libraries and archives to facilitate mass digitisation projects and make copies of physical works in digital format more widely available to the public? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?**

The recording industry supports reasonable exceptions and limitations concerning libraries. However, we are concerned by the assumption in the above question that the law should provide enough “flexibility” to enable libraries to engage in “mass digitization” projects and to “make copies of physical works in digital format more widely available to the public”.

Permitting libraries to “make copies of physical works in digital format more widely available to the public” could have severe implications on the recording industry.

Access to recorded music is already ubiquitous and readily available at attractive conditions due to the recording industry’s innovative approach to the licensing of digital services. Services like Apple Music, Spotify or Deezer give instant access to a catalogue of over 40 million tracks either for no charge (ad-supported services) or for reasonably priced music subscriptions. A library service providing public access to digital sound recordings could become substitutional for, and in direct competition with, licensed digital music services. In addition, music “lent” electronically could be copied to a perfect standard and retained permanently by a user.



Therefore, there is no need for the law to permit libraries to provide access to digital sound recordings. An exception or limitation permitting libraries to do so would be incompatible with the three-step-test because it would be over-broad and would directly undermine the recordings industry's existing licensing practices.

With regard to "mass digitization" there is simply no need for libraries or any other similar organizations to be permitted to digitize sound recordings. As a result of the innovative licensing practices of record companies, New Zealand consumers already have unprecedented access to vast catalogues of recorded music. There are numerous licensed music services in New Zealand, providing access to over 40 million tracks, including services that do not charge users to access these recordings.

**QUESTION 51: What are the problems (or advantages) with the free public playing exceptions in sections 81, 87 and 87 A of the Copyright Act? What changes (if any) should be considered?**

### **Section 81 – exception for clubs, societies and other organisations to play sound recordings**

Public performances revenues are an important part of music industry revenues, comprising 15 percent of New Zealand recording industry revenues in 2018. There is no justification for requiring sound recordings producers and performers to subsidise clubs, societies and other organisations covered by section 81, any more than there is a case for such organisations enjoying rent free premises and free utilities. As much was recognised by the UK when the equivalent section of the CDPA was repealed in 2010 (section 67). We urge the New Zealand Government to do the same with section 81.

### **Section 87 and 87A - Free public playing or showing of communication work (whether or not simultaneous with reception)**

Sections 87 and 87A provide that the "free public playing of a communication work" does not infringe the copyright in the communication work itself, nor the copyright in "any sound recording or film include in the communication work". Similarly to the point raised above in relation to Section 81, there is no justification for sound recording producers and performers to subsidise businesses that use music to drive sales. Indeed, the correlation between the use of music by businesses of all kinds and an increase in revenues is well-established

A similar exception to section 87A was repealed from the UK Copyright, Designs and Patents Act 1988 (CDPA). The UK previously had an exception that was almost equivalent to the version of section 87 of the New Zealand Copyright Act prior to the 2008 amendments. In other words an exception for public showing or playing of a broadcast or cable programme and sound recordings included therein.

The equivalent section in UK law has been amended over the years, and now provides a far more limited exception as follows:

*72(1) The showing or playing in public of a broadcast F2. . . to an audience who have not paid for admission to the place where the broadcast F2. . . is to be seen or heard does not infringe any copyright in—*

*(a) the broadcast; or*

*(b) any sound recording (except so far as it is an excepted sound recording) included in it.*

Section 72(1A) defines an “**excepted sound recording**” as one:

*(a) whose author is not the author of the broadcast in which it is included; and*

*(b) which is a recording of music with or without words spoken or sung.*

In other words, sound recordings of music produced by anyone other than the broadcaster do not fall within the scope of the exception. Consequently, where a shop or other public space wishes to publicly play broadcasts that include sound recordings, they must enter into a licence to do so.

We now encourage the Government to close the obvious and wholly unjustifiable gap in the protection afforded to sound recordings by either removing sections 87 and 87A altogether or removing section 87 and amending section 87A to reflect the revised section 72 of the UK CDPA.

**QUESTION 52: What are the problems (or advantages) with the way the format shifting exception currently operates? What changes (if any) should be considered?**

Paragraphs 386 of the Issues Paper states that:

*“a number of services allow users to upload their sound recordings to the cloud, and then provide access to those recordings from any device through the internet. Users are also able to save sound recordings to the cloud. **Neither of these examples is permissible under the current format-shifting exception**” (emphasis added).*

The final sentence above suggests that MBIE has assumed that these uses of recordings are infringing. In fact, many of the services to which paragraph 386 refers are licensed, and those licences (and the terms of services between the service and the user) permit the user to make copies from the “cloud” onto a certain number of devices. Through such licensing arrangements, the recording industry has responded to the needs of consumers by ensuring that users have flexibility in the way they can engage with the recorded music that they have licensed access to.

To that end, we note that the term “cloud service” can mean different things in different contexts and should therefore be used with caution. Some example of what could be meant by “cloud services” in the present context:

- Store and stream services: Some licensed “cloud” services include functionality that enables users to stream and automatically synchronise to their different devices copies of music files purchased from the online store operating the service.
- Scan and match (e.g. Apple’s iCloud): Some licensed services are permitted to scan the subscriber’s personal digital music library automatically and to enable them to access all matched content from a certain number of devices. Matched content can either be streamed from the cloud or in some cases downloaded to each device.
- Infringing Storage/Sharing Services (so-called “cyberlockers”): These are services that purport to offer private “cloud” storage, but in reality, have a business model designed to facilitate and profit from piracy.

Each case above illustrates that:

1. The service providers carry out copyright relevant acts (copying and/or making available to the public), and the services must obtain authorisations from right holders to carry out these acts. There is already an established licensing market for these services.
2. Licences to such services enable the users of the services to make copies of stored recordings to different devices. The perceived problem in paragraph 386 of the Issues Paper is not therefore a real one.
3. Any legislative interventions in this area would not only undermine existing and well-functioning licensing practices, but would also risk legitimising infringing services, thereby causing serious harm to right holders.

Consequently, we do not believe there is an evidential basis of a problem in this area, and there is no need to change the existing format-shifting exception.

**QUESTION 58: What problems (or benefits) are there in allowing copyright owners to limit or modify a person’s ability to use the existing exceptions through contract? What changes (if any) should be considered?**

The *Copyright Act* 1984 currently only expressly prohibits contracting out of the exception relating to computer programs in s. 80D. This approach to computer programs is standard in many jurisdictions and reflects the position in the United States<sup>10</sup> and Europe.<sup>11</sup> As the Issues Paper notes, the Australian *Copyright Act* 1968 also takes a similar approach to contracting out of copyright exceptions.

The Issues Paper refers to the recommendations of the 2014 Australian Law Reform – Commission (**ALRC**) in its report *Copyright and the Digital Economy* as a possible model for reform in New Zealand. In that report, the ALRC recommended that it should not be

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<sup>10</sup>7 U.S. Code § 117.

<sup>11</sup> Articles 5 and 6 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs.

possible to contract out of the library and archive and fair dealing provisions in the Australian *Copyright Act*. We note that the Australian Government has not yet taken any action in respect of this recommendation.

IFPI does not support the ALRC recommendation as a model for New Zealand. First, fettering freedom of contract in this way would hamper innovation. Second, we are not aware of any demonstrated need for such a provision.

We address each of these below:

### **Freedom to contract supports copyright protection and fosters innovation**

Section 113 of the *Copyright Act* provides that copyright is “personal or moveable property”. The ability to contract, whether by licence or assignment, lies at the heart of a copyright owner’s ability to derive value from their copyright. It is also integral to the ability of third parties to enjoy copyright material. Put simply, the freedom to contract is an integral part of the copyright ecosystem.

Fettering the freedom to contract in the way envisaged by the ALRC would undermine the ability of rights holders to determine how they deal with their property rights. It also risks a chilling effect on the ability of rights holders to develop new and innovative business models to deliver content to consumers. The recording industry has successfully transitioned to become a truly digital industry as a result of its innovative approach to licensing. For example, when licensing iTunes in the early days of the digital transition, iTunes users were permitted to make copies of recordings licensed to them through iTunes across a defined number of devices. This ensured that users had the flexibility to access the music they had paid for, while ensuring that a necessary degree of control was retained by right holders over how the licensed recordings could be used. If right holders are not able to place certain limitations on uses of digital content they will be disincentivised to take risks with new and innovative licensing models, to the ultimate detriment of the consumer.

### **No need has been established to restrict contractual freedom**

It is worth noting that the ALRC recommendation has its origins in a [2003](#) Copyright Law Review Committee report on *Copyright and Contract*. At that time, there was concern that restrictive terms and conditions were limiting access to copyright material, particularly for the library and archive sector. This is to be contrasted with the situation in 2019, where end-user licence agreements facilitate consumer access to a wealth of content. For example, as MBIE notes in its recent report *Copyright and the Creative Sector*, there is an increased availability and accessibility of music and sound recordings.

*Consumers can access music in a variety of ways. Consumers can buy physical or digital copies of recorded music, stream recorded music, listen to live broadcasts or webcasts and attend live gigs.*

*Music is also consumed inadvertently – playing in cafés, retail outlets, gym classes and other spaces open to the public. Where music is played in these settings, the business should usually have obtained a licence from OneMusic.*

*The widespread adoption of online streaming has been a major technological development in the past decade. It has resulted in new models of delivery, such as ‘all-you-can-listen-to’ music subscription. p.24*

Indeed, IFPI’s members have licensed 15 digital music services in New Zealand alone.

In the absence of evidence about issues that exist with the Copyright Act’s current approach to contracting out of exceptions, there is no justification for an intrusion into contractual freedom.

In this regard we also note that New Zealand’s consumer laws will, in any event, apply to copyright contracts.

Writing about this issue in 2007, Australian academics Elisabeth Peden, John Carter and Kristin Stammer said:

*We see no pressing need for legislation to declare contractual restrictions invalid because the common law already provides for invalidity in cases where the public interest requires it. Moreover, even if the Act included provisions declaring certain restrictions invalid that would not by itself prevent contracting parties including such terms.<sup>12</sup>*

IFPI does not support extending the provisions relating to contracting out of copyright exceptions in New Zealand’s legislation. In the event that this review uncovers problems with contractual practices in New Zealand, then it *may* be appropriate to propose targeted solutions for those problems, subject to full consultation. We strongly urge the MBIE to consider the harmful and unintended consequences that would occur should a broader solution be adopted.

**QUESTION 60: Are there any problems (or benefit) with the absence of an explicit exception for linking to copyright material and not having a safe harbour for providers of search tools (eg search engines)? What changes (if any) should be considered?**

IFPI does not believe that the introduction of either an explicit exception for linking to copyright material or a safe harbour for providers of search is warranted.

**a. Exception for linking**

An exception for linking would be highly problematic and would mainly benefit online pirate services which rely on the provision of links to copyright infringing materials. Copyright owners struggle to effectively tackle the problem of online piracy through linking, for

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<sup>12</sup> Peden, E & Carter, J W & Stammer, K, ‘Contractual Restrictions and Rights Under Copyright Legislation’ (2007) 23 (1 & 2) *Journal of Contract Law* 32-54 at 54.

example piracy caused by P2P link sites, link aggregator sites or download sites. For example, IFPI estimates that in 2018 P2P sites were responsible for 13.6 billion illegal downloads of music files.

In the EU, the CJEU has considered extensively the issue of liability over linking. It has held that, inter alia: a) the act of linking to freely available content online made available without the authorisation of the right holder<sup>13</sup>; b) the sale of multimedia players containing add-ons with hyperlinks to streaming websites with content made available without the authorisation of the right holder<sup>14</sup>; and c) the making available and management on the internet of a sharing platform which allows users to locate the works and share them in the context of a peer-to-peer network<sup>15</sup>, all constitute unauthorised acts of communication to the public.

We submit that given the variety of types of linking and contexts in which they occur, it should instead be left for the courts to determine specific conditions where liability could be exempted, while ensuring that problematic infringing sites are held liable. For example, in *GS Media*<sup>16</sup>, the CJEU clarified that that the act of linking to freely available (i.e. not restricted by a technical measures), but unauthorised, copyright-protected material infringes the right of communication to the public, if the linker knew, or could reasonably have known, that the material was unauthorised. Further, if the linker posted the links for profit, there would be a rebuttable presumption that he or she had the requisite knowledge, on the basis that he or she can be presumed to have undertaken the “necessary checks” before posting the link.

## **b. Safe Harbour for providers of search tools**

IFPI believes there is no evidence that the introduction of a safe harbour for search engines is warranted. A broad safe harbour for search engines could risk exempting pirate sites that could fall under the definition of search tools/search engines from liability. Safe harbour protections should attach to specific types of activities, rather than specific types of entity for all activities that they may engage in.

In the EU it has been determined that the activities of search engines are, in appropriate cases, already covered by existing safe harbours (e.g. hosting activities). For example, the Court of Justice of the European Union (CJEU) held that the safe harbour for hosting providers under Article 14 of the EU E-Commerce Directive applies to an internet referencing service provider, in that case Google, where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored.<sup>17</sup> When their activities go beyond the mere neutral referral of users to third party sites, they are no longer neutral and passive intermediaries but engage directly in the distribution of content and should not benefit from safe harbours.

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<sup>13</sup> *GS Media BV v Sanoma Media Netherlands BV* (C-160/15)

<sup>14</sup> *Stichting Brein v Wullems t/a filmspeler* C-527/15

<sup>15</sup> *Brein v Ziggo BV and XS4All Internet BV* (Case C-610/15)

<sup>16</sup> *GS Media BV v Sanoma Media Netherlands BV* (C-160/15)

<sup>17</sup> *Google France v Louis Vuitton Malletier*, In Joined Cases C-236/08 to C-238/08,

Search engines play a significant role in enabling online music piracy by acting as gateways for users seeking content. Research by IFPI using audience monitoring company SimilarWeb found that in September 2017, 38 percent of visitors to stream ripping sites came to the sites from a search engine and 44 percent of visitors to illegal MP3 download sites came from search. The role of the search engine was key in these cases: users were *not* seeking a specific named site of which they were already aware. Instead, searchers typically used generic keywords such as ‘download youtube’ or ‘convert youtube mp3’ or ‘download free mp3’ and the search engine then located sites which provided that purpose.

In conjunction with the possibility to incur liability for copyright infringement, IFPI believes search engines should take steps to help stem the flow of traffic to infringing sites, including by introducing effective demotion, implementing proper delisting rules, removing autocomplete results for illegal sites, and improving visibility of licensed sites in search results. In the UK, a non-binding Code of Practice on Search and Copyright was developed in collaboration with the UK Government between search engines (in this instance, Google and Microsoft) and rights holders from the music and film/TV industries. Under the Code, the search engines undertook to support the objective of removing links to infringing content from the first page of search results returned to consumers in the UK (including natural search results, sponsored or advertisement results, or media player results). The search engines also agreed to further action and collaboration, including: a confidential exchange of information to better understand how users search for content and how infringement notices might be used more effectively; identification of ways to accelerate the demotion process; and further cooperation in relation to the issues of autocomplete and domain hopping.

**QUESTION 61: Do the safe harbour provisions in the Copyright Act affect the commercial relationship between online platforms and copyright owners? Please be specific about who is, and how they are, affected.**

### **The intended purpose of “safe harbour” privileges**

ISP “safe harbour” privileges were designed almost two decades ago to protect crucial internet infrastructure companies from secondary copyright liability law suits while, as the US put it, preserving “*strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment*”<sup>18</sup>.

As the US Congress explained in 1998, with “*constant evolution in technology, the law must adapt in order to make digital networks safe places to disseminate and exploit copyrighted materials*”<sup>19</sup>. Similarly, in Europe, the European Commission stated in 2000 that the intermediary liability regime in the E-Commerce Directive<sup>20</sup> was intended to strike “*a careful*

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<sup>18</sup> Senates Report 105-190 page 20, <http://digital-law-online.info/misc/SRep105-190.pdf>

<sup>19</sup> *Ibid.* p.2

<sup>20</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

*balance between the different interests involved in order to stimulate co-operation between different parties and so reduce the risk of illegal activity on-line*<sup>21</sup>.

In other words, intermediary liability regimes around the world, including those introduced in New Zealand in 2006 were intended to enable the internet to grow and function in a way that promotes innovation in both technological and creative industries.

However, inconsistent and sometimes expansive interpretations of safe harbour privileges have caused harmful market distortions. These overly broad safe harbours have provided on the one hand the opportunity for some online services to free-ride and engage with copyright material without entering into a market value licence or any licence at all for the use of those works, while offering a pretext for brazenly infringing services to plough their unsavoury trade, and on the other hand. We address these issues in turn.

### **The Value Gap**

The availability of professionally created copyright protected music content and engagement with it has been “rocket fuel” for the digital economy. Out of the ten most-followed Twitter accounts six belong to artists, 24 out of the 25 most popular YouTube videos that each has been viewed over a billion times are music videos, and so on. Different online services engage with music to drive traffic, achieve scale, and generate turnover, which would be positive but for the fact that some services – specifically those based on making available user-uploaded content – do so without adequately remunerating right holders for their use of music (“UUC” services). While more people are listening to recorded music than ever before, and many online services have grown into extremely valuable businesses, this growth in consumption is not fairly reflected in our members’ revenues.

A significant factor contributing to this harmful development is the inconsistent and at times incorrect application of the scope of the so-called safe harbours and associated “notice and takedown” rules. While music services that license copyrighted music directly from right holders have negotiated licence terms on the basis of exclusive rights, that has not been the case for some UUC services distributing user-uploaded copies of recorded music or a combination of that and content sourced directly from right holders.

The incorrect interpretation of safe harbour privileges has enabled UUC services, which are no less directly engaged in the distribution of music, to claim that they do not require a licence at all, or that they only require a limited licence covering the activities of their users in uploading the content, and not for their own engagement with it. As a result, a Value Gap has emerged between the value extracted from music by those services and the value music right holders receive from the use of their music.

This market distortion – known as the Value Gap – is illustrated by the example of YouTube, the largest UUC service globally, which claims safe harbour protection under the US Digital Millennium Copyright Act (DMCA) and equivalent laws in other jurisdictions. According to research conducted by AudienceNet in 2018, YouTube accounts for 47 percent of all time

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<sup>21</sup> European Commission Press Release IP/00/442, *Electronic commerce: Commission welcomes final adoption of legal framework Directive*, Brussels, 4 May 2000



spent listening to on-demand music online and 85 percent of YouTube users use the site for music. The same research found, when asked why they don't pay for a subscription to a music service, 22 percent of New Zealanders, and 45 percent of 18-24s, said "*anything I want to listen to is on YouTube*"<sup>22</sup>. Yet YouTube is not returning fair value to the right holders of the music it monetizes – globally, YouTube pays the recording industry less than USD 1 per user annually, whilst Spotify, which does not claim to be eligible for the safe harbour privileges, pays over USD 20. The misapplication of safe harbour provisions is not only depriving right holders of their legitimate income, but it is also creating unfair competition in the digital music services market.

Put simply, the existing legal framework does not provide right holders with tools to address the Value Gap. Right holders are left with the "choice" of accepting licensing terms which do not fairly reflect the value of their music, or not licensing a service at all and relying on ineffective "notice and takedown" procedures to try to prevent or reduce the unlicensed availability of their music on these services.

**Notice and takedown, the mechanism which was intended to protect right holders as a quid pro quo for the granting of liability limitations to service providers, is ineffective**

Using notice and takedown to prevent the availability of unlicensed music doesn't work.

IFPI acts as a notice provider on behalf of its members, which include RMNZ's members. Globally in 2017, IFPI and its National Groups referred over 11 million individual URLs containing content which infringed copyright to online services, indicating the scale of work required to operate a notice and takedown system on a global basis.

Furthermore, most service providers remove only the specific URL link notified in the takedown notice without taking any further action. This makes the process ineffective because (a) even if one URL link or one copy of an infringing file is removed, there are typically many thousands of other URL links to, or other copies of, the same infringing title which remain online; and (b) content or links once removed are often quickly re-posted and most service providers do not take any steps to prevent this.

There are numerous examples of popular content reappearing multiple times on the same site (based on IFPI data for 2017). For example:

- Pink Floyd's "Wish you were here" re-appeared almost 32,000 times on Share-online.biz after the first notice.
- Adele's album "25" reappeared more than 14,000 times on the website Torrentroom.
- Justin Bieber's "Sorry" reappeared over 6,300 on a social media site after the first notice.
- Drake's "Fake Love" reappeared almost 2,460 times on Youtube after the first notice.

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<sup>22</sup> Consumer data from 18 music markets.

These factors leave right holders to pursue a constant game of whack-a-mole, using substantial resources to locate every single URL that leads to a specific file, notify the service provider, and then repeat the process after they are re-posted. This is significant in licensing negotiations between right holders and UUC services, when both parties know if that if no agreement is reached the right holders will not be able to prevent the availability of their unlicensed content on the service. As Warner Music put it after concluding a licensing agreement with YouTube in 2017:

*“Our fight... continues to be hindered by the leverage that ‘safe harbor’ laws provide YouTube and other user-uploaded services,” ... “There’s no getting around the fact that, even if YouTube doesn’t have licenses, our music will still be available but not monetized at all. Under those circumstances, there can be no free-market ‘willing buyer, willing seller’ negotiation.”*

### **Safe harbours and accompanying notice and takedown are abused by infringing services**

In addition to the market distorting effect of overbroad interpretations of safe harbours in the licensing context, safe harbours and accompanying notice and takedown procedures are also used cynically by infringing services. Under the guise of a notice and takedown policy, infringing sites purport to be operating legally, knowing that right holders will have to incur huge expenses in suing them to establish that the safe harbours do not apply and/or engage in mass notification programs which are not effective in preventing infringement for the reasons explained above. The problem is compounded by uncertainty over the scope of safe harbours, making litigation complex, lengthy, and costly.

Meanwhile, these sites continue to operate and profit from infringement. The box below contains some examples of mass-scale infringing sites that have cynically claimed the benefit of the safe harbours.

#### **OVER BROAD SAFE HARBOURS ARE OPEN TO ABUSE BY PIRATE SITES**

**Megaupload:** Mass-scale infringing site with 60 million users, estimated to have made US \$42m for its owner Kim Dotcom

In the Kim Dotcom New Zealand District Court extradition judgment (Mr Dotcom faces prosecution in the US), the court cites extracts from online conversations between the management of the MegaUpload service. These discussions reveal how the operators of MegaUpload sought to benefit from the protection of the DMCA safe harbours in the full knowledge of the infringing content on their service from which they generated substantial profits.

Paragraph 71: *“but it’s good to stay off the radar by making the front end look like crap while all the piracy is going through direct links & embedded.”* And ORTMANN added, *“the important thing is that nobody must know that we have auditors letting this stuff through.”* VAN DER KOLK responded, *“yes that’s very true also.”* ORTMANN replied, *“if we had no auditors – full DMCA protection, but with tolerant auditors, that would go*

away.” And VAN DER KOLK replied, “yes true.”

**Grooveshark**<sup>23</sup>: Mass-scale infringing site with 35 million users

Grooveshark claimed that its service fell within the DMCA safe harbours. It was not until some way into litigation against it, after right holders had been forced to incur very substantial costs, that the discovery process revealed that the service which had been claiming the protection of the safe harbours had in fact been uploading infringing content to the service itself<sup>24</sup>:

***DMCA Notices***

In 2009, Escape received numerous Digital Millennium Copyright Act (“DMCA”) takedown notifications from copyright holders demanding that it remove infringing copies of popular copyrighted songs from Grooveshark. Ashenden Decl. ¶20; See, e.g., SUF ¶28, Ex. 63. These ‘takedown’ notices threatened to diminish the Grooveshark music library. *Id.* As a result, Escape considered various methods so that users would not be denied access to any songs because specific infringing files were removed. *Id.* As part of this process, Escape’s senior officers searched for infringing songs that had removed in response to DMCA takedown notices and re-uploaded infringing copies of those songs to Grooveshark to ensure that the music catalog remained complete. SUF ¶28.

Safe harbours are therefore distorting the licensed music market, while providing a shield to infringing services.

We urge the New Zealand Government to clarify that safe harbour privileges apply only to merely technical, automatic and passive services, not to services playing an active role in relation to the content uploaded by their users. We address the precise clarifications that are required under our response to Question 59 below. Before doing so, we highlight international developments to address the Value Gap.

## **International developments**

### ***The European Union legislates to address the Value Gap***

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<sup>23</sup> CAPITOL RECORDS, LLC V. ESCAPE MEDIA GRP., INC, UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, 12-CV-6646 (AJN) (S.D.N.Y. Mar 25, 2015)

<sup>24</sup> *Ibid.* p.11

The Value Gap was expressly recognised by the European Union in September 2016 when the European Commission proposed a Directive on Copyright in the Digital Single Market<sup>25</sup>, along with an Explanatory Memorandum including the following:

*“Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content.”*

**On 26 March 2019 the European Parliament voted in favour of the Directive. Once adopted the Directive will:**

- (1) confirm that UUC services (called Online Content Sharing Services in the Directive) are primary liable for acts of communication to the public/making available to the public; and
- (2) clarify that consequently these services are not eligible for safe harbour protection.

These legislative clarifications are also in line with the case law of the Court of Justice of the European Union, and notably the case of *L’Oréal v eBay* in which the Court held that services playing an “active role” without having taken a “neutral position” in relation to the content on their services are not eligible for the safe harbour in Article 14(1) of the E-Commerce Directive (2000/31).<sup>26</sup>

As a result of the clarification of liability of UUC services for content uploaded by their users, these services will no longer be able to avoid negotiating licences on fair commercial terms by claiming not to be liable for the content they are making available.

## **United States**

Meanwhile, in December 2015 the US Copyright Office recently launched a study into section 512 DMCA<sup>27</sup> (the US harbour). Introducing the study, the Copyright Office

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<sup>25</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593>.

<sup>26</sup> *L’Oréal SA and Others v eBay International AG and Others*, C-324/09.

<sup>27</sup> <http://copyright.gov/fedreg/2015/80fr81862.pdf>

recognises that the Internet that the safe harbour privileges were designed for has changed radically since these laws were first introduced<sup>28</sup>:

*“While Congress understood that it would be essential to address online infringement as the internet continued to grow, it may have been difficult to anticipate the online world as we now know it, where each day users upload hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement. The growth of the internet has highlighted issues concerning section 512 that appear ripe for study. Accordingly, as recommended by the Register of Copyrights, Maria A. Pallante, in testimony and requested by Ranking Member Conyers at an April 2015 House Judiciary Committee hearing, the Office is initiating a study to evaluate the impact and effectiveness of section 512 and has issued a Notice of Inquiry requesting public comment. Among other issues, the Office will consider the costs and burdens of the notice-and-takedown process on large- and small-scale copyright owners, online service providers, and the general public. The Office will also review how successfully section 512 addresses online infringement and protects against improper takedown notices.”*

**December 2015: The US Copyright Office notice and request for public comment<sup>29</sup>:**

*“In enacting section 512, Congress created a system for copyright owners and online entities to address online infringement, including limitations on liability for compliant service providers to help foster the growth of internet based services. The system reflected Congress’ recognition that the same innovative advances in technology that would expand opportunities to reproduce and disseminate content could also facilitate exponential growth in copyright infringement.”*

*“Recent research suggests that the volume of infringing material accessed via the internet more than doubled from 2010 to 2012, and that nearly one quarter of all internet bandwidth in North America, Europe, and Asia is devoted to hosting, sharing, and acquiring infringing material. **While Congress clearly understood that it would be essential to address online infringement as the internet continued to grow, it was likely difficult to anticipate the online world as we now know it—**where, each day, users post hundreds of millions of photos, videos and other items, and service providers receive over a million notices of alleged infringement.*

***As observed by the House Judiciary Committee’s Ranking Member in the course of the Committee’s ongoing multi-year review of the Copyright Act, and consistent with the testimony of the Register of Copyrights in that hearing, the operation of section 512 poses policy issues that warrant study and analysis.”***

(emphasis added)

<sup>28</sup> <http://copyright.gov/policy/section512/>

<sup>29</sup> <http://copyright.gov/fedreg/2015/80fr81862.pdf>, page 81862

## Australia

Australian safe harbour provisions are limited to “carriage service providers” (i.e. internet access providers). A Bill to broaden the safe harbours to cover other service providers including hosting providers, was withdrawn last year after strong objections to the Bill, including stakeholders highlighting that the international debate (and now legislation in Europe) is to clarify the correct application of safe harbours, not to broaden them.

In line with international developments, we urge the New Zealand Government to take action to safeguard the future of New Zealand’s creative industries by clarifying the correct application of New Zealand’s safe harbour privileges. In our response to Question 62 below we propose how these may be achieved.

**QUESTION 59: What are problems (or benefits) with the ISP definition? What changes, if any should be considered?**

**QUESTION 62: What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?**

In our responses to these questions, we first address the definition of “internet service provider”. However, as Question 62 suggests, additional changes are needed in order to ensure that the safe harbour privileges are fit for purposes and cannot be used to distort the market for licensed music (and other creative content) in the ways described above. We explain these changes below:

### Services eligible for safe harbour privileges

In line with the EU position, safe harbours should only apply to the activities of ISPs that are of a “*mere technical, automatic and passive nature*”.<sup>30</sup> ISPs that play an active role in relation to the content on their services, for instance by optimising the presentation of the content or promoting it, and whose services therefore go beyond the mere hosting of third-party information, should be expressly excluded from safe harbour protection. These active ISPs should be treated like any other digital content distributors and should not be able to benefit from liability privileges that were never intended to protect them. This is the position in the EU already under Directive 2000/31/EC (E-Commerce Directive), the jurisprudence of the Court of Justice of the European Union (CJEU)<sup>31</sup>, and has now been clarified in the Copyright in the Digital Single Market Directive, as described above.

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<sup>30</sup> See recital (42) of the EU Directive 2000/31/EC (the E-Commerce Directive).

<sup>31</sup> See supra note 3.

## Safe harbour conditions where safe harbours are applicable

Further amendments to the New Zealand Copyright Act safe harbours are also necessary, to ensure that the law is adequately delineated, fit for purpose in the digital age, and in line with international developments.

- Liability privileges should apply only if the ISP has adopted and implemented a repeat infringer policy including suspension and termination of repeat infringers' accounts.<sup>32</sup> That policy should also include an obligation on the ISP to enact measures to verify the true identity of subscribers so that they cannot evade the policy by signing up to a new account under a different name.
- The ISP must accommodate and not interfere with industry standard technical measures used by right holders to locate, identify or protect copyright works.
- Safe harbours should not be available to structurally infringing sites and services that are designed or operated with the clear intention of inducing or promoting infringements, or which facilitate or enable infringements.
- Section 92C(2)(a)(ii) requires ISPs to remove or prevent access to infringing material. It is not clear that from this section that this obligation upon the ISPs is to prevent the same copyright infringing content from reappearing after the initial "takedown" (i.e. stay down). The Copyright Act should provide for a "notice and stay down" obligation whereby the service not only terminates the notified infringement, but also terminates all other infringements on its service of the same notified content, and prevents future infringements of that content. As explained above, the process of mere notice and take down is ineffective to address large scale piracy on the internet, and to disincentivise certain UUC services from entering into licence agreements on fair terms.

A notice and stay down obligation is therefore necessary to effectively protect right holders in the digital environment. In fact, affordable technology is already available to ensure that ISPs can comply with such a stay down obligation.

In the EU, the EU Commission published a Communication on Platform's Duty of Care on 28 September 2017 which recommends that,

*"Illegal content, once detected and taken down, should not re-appear online. Efficient and effective prevention of re-appearance based on existing good practices as well as on appropriate safeguards is essential to a well-functioning system."* (page 18)

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<sup>32</sup> This requirement can be found in the legislation in other jurisdictions. For example, under s.512(i)(1) of title 17 of the US Code, limitations on liability only applies to ISP who "has adopted and reasonably implemented, and informs subscribers and account holders of the service provider's system or network of, a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers".

To that end, the EU Commission also proposed that online platforms “*should take measures which dissuade users from repeatedly uploading illegal content of the same nature and aim to effectively disrupt the dissemination of such illegal content.*” It also “*strongly encourages the further use and development of automatic technologies to prevent the re-appearance of illegal content online.*”

There is also case law in various countries that support a stay down obligation.<sup>33</sup>

**QUESTION 72: How do you or your organisation deal with orphan works (general approaches, specific policies etc.)? And can you describe the time and resources you routinely spend on identifying and contacting the copyright owners of orphan works?**

**QUESTION 73: Has a copyright owner of an orphan work ever come forward to claim copyright after it had been used without authorisation? If so, what was the outcome?**

It is rare not to be able to identify the owner of a sound recording, not least because sound recordings are accompanied by an identifier known as an ISRC. For more information please see: <https://isrc.ifpi.org/en/>

In addition, the recording industry has invested substantially in creating databases of sound recordings, particularly in the context of the music licensing companies mandated to manage certain rights in respect of sound recordings.

To the extent that MBIE is considering introducing provisions concerning orphan works, we draw its attention to EU Directive 2012/28/EU on certain permitted uses of orphan works (Orphan Works Directive), which provides a suitable model for how this issue may be addressed. In summary:

- The Orphan Works Directive requires Member States to provide a domestic exception or limitation to the rights of making available and reproduction to enable certain users (public libraries, educational establishments, museums, archives, film/audio heritage institutions and public-service broadcasters (see Art 1(1)) to use “*orphan works*” contained in their collections in the following ways:

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<sup>33</sup> Examples include: Re Rapidshare (Germany - Federal Court of Justice, 15 August 2013, No. I ZR 80/12): the Court required some ISPs including Rapidshare and Uploaded which are cyberlockers to, apart from taking down the content that was notified, search external link sites including Google, Facebook and Twitter to identify the same content on their services and prevent infringement of the same title; Re YouTube (Germany - Higher Regional Court of Hamburg, 1 July 2015, No. 5 U 87/12): The Court required YouTube to ensure that notified content is taken down and stays down, and ordered it to implement Content ID, MD5 hash and word filters; Re Dailymotion (Italy - Court of Turin, 3 June 2015, No. 11343/2015): The Court issued a preliminary injunction against Dailymotion which includes a stay down obligation in respect of future uploads of the same content; Re YouTube (Italy - Court of Turin, 7 April 2017, No. 38112/2013): The Court held that YouTube was under a “stay down” obligation, i.e. to prevent future uploads of the same videos or other videos containing the same copyright content and to ensure that all such videos (whether uploaded before or after the notice) are removed completely from YouTube’s systems; Re Vimeo (Italy – Commercial Court of Rome, 10 January 2019, no. 693/2019): The Court found Vimeo to be an active hosting provider under a duty to behave diligently and remove all infringements, and was required to immediately remove the works notified to it by the claimant RTI and ensure the works are not re-uploaded; Re Yahoo! (Italy – Supreme Court, 19 March 2019, Decision 7708/19): The Court held that a notice-and-takedown request imposes on the relevant provider a stay down obligation in relation to the re-uploads of the same infringing content.



- by making the orphan work available to the public;
  - by acts of reproduction for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.
- A work or other subject-matter is only an “*orphan work*” if the prospective user has carried out a “*diligent search*”, in good faith, to identify the right holders (including right holders of works and other subject-matter incorporated in the work or other subject-matter); and has not been able to identify and locate any of the right holders (Art 2).
  - The Orphan Works Directive sets out the requirements of a “*diligent search*” (see Art 3), which must be carried out before the work or subject-matter is used. The search must be carried out in the Member State where the recording was first published and, if the evidence suggests that information on the right holders is in (an) other Member State(s), in the other Member State(s) also. The search must include consultation of “*the appropriate sources*” (Art 3(2)). For sound recordings this will include at minimum consulting the producers’ association in the relevant country, as well as checking the ISRC database, and the database of the producers’ local CMO (see Annex to the Orphan Works Directive).
  - Member States can designate organisations responsible for carrying out the diligent search and retaining a copy of the search record. The Orphan Works Directive also establishes an EU-wide database of orphan works which is available to the public. A right holder whose work or subject-matter has incorrectly been designated as an orphan work can bring a claim to terminate the orphan status and claim compensation.

**QUESTION 78: Should CMOs be able to take legal action to enforce copyright? If so, under what circumstances?**

Yes. It is very important for CMOs to be able to enforce the rights they are mandated to manage, and to be able to do so effectively and efficiently without undue burdens upon the CMO itself or upon the rightsholders that have mandated it.

Where a CMO is a non-exclusive licensee (as in the case of Recorded Music New Zealand), and in the absence of express standing in the law for CMOs to enforce the rights they manage, it can be unduly complex for a CMO to bring proceedings. Under current New Zealand law, Recorded Music New Zealand has no standing to sue in its own right. In order to operate as intended, and efficiently manage and collect for the rights they represent, CMOs should be given a statutory right to take legal proceedings in their own name based on contractual mandates from their members.

For reference we refer to Article 4(2) of the European Directive on the enforcement of intellectual property rights (Directive 2004/48/EC):

*“Member States shall recognise as persons entitled to seek application of the measures, procedures and remedies referred to in this chapter:*

...

*(c) intellectual property collective rights-management bodies which are regularly recognised as having a right to represent holders of intellectual property rights, in so far as permitted by and in accordance with the provisions of the applicable law.”*

## **TERM**

While the Issues Paper does not seek submissions on the term of protection for copyright works under New Zealand, this is an issue of paramount importance for the recorded music industry.

New Zealand protects sound recordings for 50 years from the date of making or 50 years from the date first made available or communicated to the public, whichever is later. IFPI urges the New Zealand Government to extend the term of protection of sound recordings to at least 70 years to meet the emerging international standard. With 67 countries now providing a term of protection for sound recordings of 70 years or more, New Zealand is a notable outlier, not least amongst developed countries. Countries with a term of protection of 70 years or longer include 17 out of the top 20 music markets (in terms of trade revenues)<sup>34</sup>, and some of New Zealand’s top trading partners including Singapore, the United States, Australia, and the EU.<sup>35</sup> Japan, another important trading partner of New Zealand,<sup>36</sup> has also committed to extending the term of protection to 70 years pursuant to the EU-Japan Economic Partnership Agreement.

The current gap between the term of protection in New Zealand and the majority of its trading partners puts New Zealand artists and record companies at an unfair disadvantage.

A longer term of protection would increase the economic incentives for phonogram producers to invest in new and existing talent, thus helping the New Zealand music industry to develop. Further, a longer term of protection would contribute to the preservation of local culture by ensuring that classic, older sound recordings produced in New Zealand continue to be made available by record companies to consumers. A longer term would also ensure adequate protection of performers as they would continue to receive royalty income for longer. Without the extended term, New Zealand classic recordings will be in the danger of losing copyright protection, as a result of which their producers and artists will then lose protection and income. The failure to extend the term of protection harms New Zealand’s competitiveness when neighbouring or regional countries with longer terms of protection offer more beneficial legal frameworks, putting local artists and producers at an

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<sup>34</sup> IFPI Global Music Report, April 2019. These 17 markets are US, Japan, UK, Germany, France, South Korea, Australia, Canada, Brazil, Netherlands, Italy, Spain, Sweden, Mexico, Norway, Denmark and Austria.

<sup>35</sup> According to the information at <http://www.worldstopexports.com/malaysias-top-import-partners/>, Singapore, the United States, Australia, South Korea, Netherlands and Germany represent 36.4 percent of Malaysia’s exports in 2017.

<sup>36</sup> According to the information at <http://www.worldstopexports.com/malaysias-top-import-partners/>, Japan represents 8 percent of Malaysia’s exports in 2017.

unfair disadvantage when they try to compete regionally and internationally. This would adversely affect the industry as well as the New Zealand economy and cultural development overall.

**QUESTION 82: Are peer-to-peer filing sharing technologies being used to infringe copyright? What is the scale, breadth and impact of this infringement?**

P2P piracy remains a major problem for the music industry. IFPI estimates that in 2018 more than 13.6 billion sound recordings were illegally downloaded by using P2P services. P2P piracy is particularly challenging to tackle because the operators of these sites are often unknown. The best and sometimes the sole remedy, particularly in circumstances where rights holders are unable to identify or locate the operator, to address P2P piracy are website blocking measures. Website blocking is addressed below (see Issues No. 84 and 85).

**QUESTION 83: Why do you think the infringing filing sharing regime is not being used to address copyright infringements that occur over peer-to-peer file sharing technologies?**

When the infringing file sharing regime was introduced in New Zealand in 2011, IFPI's National Group, Recorded Music NZ, used it to tackle infringements occurring on P2P file sharing networks. However, the scheme ultimately proved to be ineffective to address the sheer volume of piracy. The main reasons for the ineffectiveness were (i) the high costs per notice and (ii) the burdensome process. Essential changes would be necessary in order to make the regime workable.

As mentioned above, the best remedy to tackle piracy through P2P file sharing networks in cases where the operators are not known or are located outside New Zealand, is website blocking and a legal basis to that effect should be implemented in New Zealand.

**QUESTION 84: What are the problems (or advantages) with the infringing file sharing regime? What changes or alternatives to the infringing filing share regime (if any) should be considered?**

The problems with the infringing file sharing regime are set out above in answer to question 83 and mainly include the costs involved and the process which resulted in a very low number of notices being sent. Since the introduction of the regime, an alternative in the form of website blocking, has now been successfully tested in 33 countries around the world from the UK to Australia, Argentina to Russia. In comparison to the infringing file sharing regime, website blocking has many advantages in that it can be applied to any website or online location, requires no data pertaining to an individual to be processed and it has proved to be effective particularly when implemented at scale i.e. multiple websites are blocked at the same time by multiple ISPs.

**QUESTION 85: What are the problems (or advantages) with the existing measures copyright owners have to address online infringements? What changes (if any) should be considered?**

Online piracy remains a serious problem. IFPI estimates that in 2018, globally users illegally downloaded 13.6 billion individual tracks via BitTorrent; 3.1 billion tracks via cyberlockers; and 2.3 billion via stream ripping services. This adds up to 19.1 billion tracks downloaded via these channels alone. One of the most important measures to stop users from accessing and downloading from illegal websites is to require access providers to block access to these websites. Website blocking measures are of particular importance if the sites are located / operated from outside the jurisdiction. Therefore, a number of countries around the world have established procedures whereby right holders can request local access providers to prevent their subscribers from accessing specific websites, including foreign websites.

IFPI has annexed to its submission a separate paper on website blocking. This paper includes a worldwide overview of website blocking including a summary on key developments and cases in a significant number of countries and some high level summaries of impact studies on website blocking.

**QUESTION 86: Should ISPs be required to assist copyright owners enforce their rights? Why / why not?**

Right holders suffer from online piracy and have and continue to invest significant resources to tackle the problem. However, ISPs (as well as other intermediaries) are in a unique position to take measures to stop online infringements. For example, ISPs have the technical capacity to block access to copyright infringing online locations. As mentioned above, they have done so in many territories, either as a result of a legislative obligation or as a result of voluntary agreements (e.g. in Portugal and Denmark). In fact, ISPs should have their own interest in making sure that their services are not being used by blatantly illegal services, such as copyright infringing services. In case of a lack of voluntary agreements, ISPs should be required to assist right holders to protect their copyrights.

**QUESTION 87: Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?**

ISPs should bear the costs of implementing website blocks. This is fair and equitable since right holders suffer losses from infringement and have to bear the cost of preparing website blocking applications. ISPs in at least 33 countries have now been ordered to implement website blocks in relation to over 2,600 individual URLs, and in the majority of cases they have done so without seeking the costs of implementing these blocks.

In most cases where the issue has been considered by a court, ISPs have been ordered to bear the costs of implementation of the blocks and their own legal costs, even though it was acknowledged that they were not responsible for the copyright infringements. There are a few exceptions to this rule. In June 2018, the UK Supreme Court handed down its decision in a case involving trade mark infringing websites<sup>37</sup> finding that ISPs do not have to bear the costs of implementing website blocking injunctions issued against them. This in contrast

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<sup>37</sup> *Cartier International AG and others (Respondents) v British Telecommunications Plc and another (Appellants)* [2018] UKSC 28

with decisions involving the blocking of copyright infringing websites where to date, ISPs have been ordered to pay both implementation costs *and* legal costs in successful applications, which were resisted.<sup>38</sup> In Australia, while ordering blocks against a number of sites including The Pirate Bay, the Federal Court required right holders to pay the ISPs' costs of implementation, which had been set at AUD 50 per domain/IP address, per ISP, and it ordered right holders to pay a part of the ISPs' legal costs because the ISPs' succeeded in relation to the cost of implementation.<sup>39</sup> In another case in Ireland, right holders contributed to the legal costs of one ISP as a result of that ISP's significant assistance in negotiating the orders.

The issue of costs is rarely addressed in legislation but there have been two exceptions. First, in Finland, amendments to the website blocking provisions state that any costs in implementing a website block should be borne by the ISPs. The ISPs may claim back the cost from the primary infringing site operator, but not from right holders. Second, in Australia, website blocking legislation stipulates that “[t]he carriage service provider is not liable for any costs in relation to the proceedings unless the provider enters an appearance and takes part in the proceedings”. While the question of who bears the implementation costs was to be decided by the courts, most recent judicial pronouncements have found that the right holders must contribute to the implementation costs.

The cost to ISPs of implementing website blocks depends on the specific technical arrangements. IFPI relies on experience from litigation undertaken by right holders in other countries where blocking injunctions against ISPs have been obtained, which suggests that the costs of implementing IP and DNS blocking are modest. This has been found, for instance, by courts in the UK (*Newzbin2*<sup>40</sup>), Denmark and Portugal.

In respect of specific figures for the cost of implementation which were discussed during or outside the proceedings, ISPs in one country submitted a range of figures which varied from zero to a few hundred Euros. In Australia, implementation costs were determined in Australia to amount to AUD 50 per domain/IP address, per ISP.<sup>41</sup> In the UK *Cartier* case, the Court of Appeal assessed (based on ISPs' evidence) the cost to ISPs of implementing blocks at around GBP 5,000 for initial implementation and GBP 100 for each subsequent notification/a low four figure sum.<sup>42</sup>

The Court of Justice in the European Union in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH* (C-314/12) ruled that website blocking is consistent with fundamental rights, including the ISPs' freedom to conduct a business (Article 16 Charter of Fundamental Rights) even though the measure may have a significant cost, may impact on the organisation of the ISP's activities, or may require a complex technical solution.

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<sup>38</sup> *Twentieth Century Fox Film Corporation et al. v. British Telecommunications Plc* [2011] EWHC 2714 at para. 54 (Ch); *Cartier International AG et al. v. British Sky Broadcasting Ltd et al.* [2014] EWHC 3794; aff'd [2016] EWCA Civ 658.

<sup>39</sup> *Roadshow Films Pty Ltd. v. Telstra Corporation Ltd.*, [2016] FCA 1503.

<sup>40</sup> *Twentieth Century Fox Film Corporation et al. v. British Telecommunications Plc* [2011] EWHC 2714

<sup>41</sup> *Roadshow Films Pty Ltd. v. Telstra Corporation Ltd.*, [2016] FCA 1503.

<sup>42</sup> Court of Appeal, judgment of 6 July 2016, *Cartier International AG and Ors v. British Sky Broadcasting Ltd and Ors* ([2016] EWCA Civ 658), para. 19.

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