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By online submission

AMPAL Submission to the Ministry of Business Innovation & Employment's Issues Paper: 'Review of the Copyright Act 1994'

AMPAL

The Australasian Music Publishers' Association Limited (**AMPAL**) welcomes the opportunity to make this submission in response to the Ministry of Business Innovation & Employment's Issues Paper: 'Review of the Copyright Act 1994' (the **Issues Paper**).

AMPAL is the trade association for Australian and New Zealand music publishers. Our members include large multi-national companies as well as many small businesses. AMPAL's members represent the overwhelming majority of economically significant musical works enjoyed by New Zealanders.

Music publishers invest in songwriters and composers across all genres of music. They play a critical role in nurturing and commercially exploiting the musical works of the songwriters they represent and providing returns to songwriters. AMPAL and our members also recognise the immense cultural and artistic significance of the works that music publishers represent.

AMPAL members are also members of the Australasian Performing Right Association (APRA) and the Australasian Mechanical Copyright Owners Society (AMCOS) and we endorse their joint submission (the **NZ Music submission**) with Recorded Music New Zealand, representing New Zealand recording artists and record companies, Independent Music New Zealand (IMNZ), representing New Zealand independent record labels, Music Managers Forum (MMF) representing music managers and self-managed artists and New Zealand Music Commission Te Reo Reka O Aotearoa - the Government-funded organisation that promotes music from New Zealand and supports the growth of New Zealand music businesses.

We are an affiliate of the International Confederation of Music Publishers (ICMP) and serve on its governing body. We endorse their submission also.

The Ministry has invited stakeholder views on the questions put forward in the Issues Paper. We set out our comments and responses below.

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Introductory comments

AMPAL appreciates the position of Hon Kris Faafoi, Minister of Commerce and Consumer Affairs stated at the start of the Issues Paper, that 'The vast reach of copyright – and the rapid pace of technological change today – makes it critical to ensure that our copyright regime is working the way it should: to enhance our collective social, cultural and economic well-being'.[1] However, it is crucial that any findings and recommendations made by the Ministry must give sufficient consideration to the creators that depend on the current certainty of New Zealand's robust, balanced and flexible copyright laws in order to encourage their innovation and to be rewarded for their creative efforts in advancing the cultural heritage of New Zealand. As the Issues Paper notes,[2] there is an important balance to be struck between the interests of innovators, investors and creators with the economic and social welfare of consumers and New Zealand society as a whole. It is hoped that in conducting this consultation and finding that balance, the Ministry will place appropriate weight on the value of the rich cultural contribution of New Zealand creators' works, as well as their economic contribution. The World Intellectual Property Organisation has previously noted that one of the primary purposes of copyright is: '…to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence…'.[3] This aim of copyright law must be recognised by the Ministry.

Furthermore, apart from New Zealand's obligations under the range of international treaties dealing with copyright to which it is a party, importantly, copyright is also recognised in two human rights documents:

- The Universal Declaration of Human Rights (Article 27) provides: 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.
- Article 15 of the International Covenant on Economic, Social and Cultural Rights recognises the author's right: 'To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'.

Aside from the vast contribution made to national cultural heritage and identity, the remarkable economic significance of New Zealand's creative industries was highlighted by PricewaterhouseCoopers (PWC) in 2015.[4] In its report, PWC found that New Zealand's music, book publishing, film and television and games industries 'contribute significantly to New Zealand's national gross domestic product (GDP) and employment copyright industries'.[5] The report found that the direct contribution to New Zealand's economy of these industries was over $1,742 million, and that these industries directly employed 19,234 full-time-equivalents in 2014.[6] In December 2018, PWC also released a report on the economic contribution of the music industry in New Zealand.[7] PWC estimated that in 2017, the New Zealand music industry directly contributed $292 million to national gross domestic product (GDP), and $639m in total (after accounting for multiplier effects). PWC also estimated that the industry directly contributed over 2,500 full-time equivalent (FTE) jobs, and over 5,500 FTEs in total. The music industry is a highly innovative and productive industry, comprised of many small businesses. With respect to music publishing, AMPAL's annual

[1] Issues Paper, page 1.
[2] Issues Paper, page 12
[3] http://www.wipo.int/copyright/en/ (last accessed 15 March 2019).
[4] https://wecreate.org.nz/wp-content/uploads/2015/09/PwC-FINAL-Summary-Creative-Sector-Report-25-September-2015-KAB.pdf (last accessed 15 March 2019).
[5] Ibid.
[6] Ibid.
[7] https://www.recordedmusic.co.nz/wp-content/uploads/2018/12/NZ-Music-Industry-Economic-Report-2017.pdf (last accessed 5 April 2019).

survey of its members in 2017 reported the value of the Australian and New Zealand music publishing sector at more than AUD$250 million a year.[8]

AMPAL also notes that some recent debates on copyright have inferred that there will always be music and that the commercial music industry is an impediment rather than a facilitator of the creation of meaningful cultural content. Nothing could be further from reality. Compelling music content requires investment, production, talent and marketing. Music publishers make a critical contribution to the creation of great New Zealand music. The business of music publishing is twofold: signing and developing songwriting talent; and licensing their works in a way that is commensurate with their value and the moral rights of the creators. Music publishers actively support the songwriters they represent to allow writers the time and resources to create. They work with other intermediaries in the business such as record companies and managers to bring the works to market. They are responsible for the collection and distribution of songwriters' income on a global basis and they create new income streams for songwriters by facilitating licences within the continually evolving digital space.

The music industry has been transformed in the digital age, and the industry has been innovative in adapting. Music copyright owners including music publishers have comprehensively demonstrated their flexibility in licensing a broad range of new digital music services. An argument frequently raised in copyright debates is that with regard to creative content, there is a problem with price and availability - however, there are now an abundance of legitimate digital services available to the New Zealand public immediately, and at a variety of price points - including ad-supported. New Zealand's *We Create* website sets out the range of these services.[9] These services are gaining traction but the market is still in a fragile space.

It is also important to note that New Zealand has repeatedly been one of the early markets for the launch of new global digital music services by licensees. Those with a viable business model have been able to receive the licences they need. Clearly, New Zealand's copyright laws have not prevented services such as iTunes, Apple Music, Spotify, and others from successfully establishing themselves in the market, nor have copyright laws acted as a disincentive to innovation. In contrast, these services have chosen not to enter territories where copyright protection is weak.

As the Ministry considers potential changes to copyright law, it is timely to recognise that what has made the ongoing transition for the music industry possible is a strong, flexible copyright framework providing certainty for creators and other copyright owners, as well as licensees. New Zealand's copyright system has adapted well to economic, commercial and technological changes in the past, and if it remains as a robust copyright framework, it will continue do so into the future. AMPAL endorses the comments made by Prime Minister Ardern: 'I want to see a country where the creativity and joy that comes from the arts is available to the many, not reserved for a privileged few. I want to see a country where the arts flourish and breathe life into, well, everyday life. I want to see a country where the arts are available to us all and help us express ourselves as unique individuals, brought together in diverse communities'.[10] A strong copyright system will support this vision, provide for sustainable careers in the copyright industries, drive innovation, and encourage new small businesses. This will in turn lead to the development of legitimate models for distribution of creative content, while also appropriately rewarding creators.

[8] https://www.ampal.com.au/news-and-events/2018/8/13/australian-and-new-zealand-music-publishing-industry-valued-at-more-than-aud250-million (last accessed 12 March 2019).
[9] https://wecreate.org.nz/home/access-content-new/ (last accessed 15 March 2019).
[10] https://www.artshub.com.au/news-article/opinions-and-analysis/public-policy/jacinda-ardern/jacinda-ardern-on-why-the-arts-need-to-be-universally-accessible-256392 (last accessed 15 March 2019).

As Jaime Gough, Managing Director of Native Tongue Music Publishing, and Director of AMPAL, puts it:

"Native Tongue represent over 100 active New Zealand songwriters and composers and our primary job is to create new revenue opportunities and ensure royalties from our writers' work are collected and accounted for here and around the world. Copyright underpins everything we do. It's our currency.

New Zealand is fundamental to our business. Native Tongue was founded here in 2003 and we have always looked for local talent to support and work with. New Zealand's music writers have a unique voice - from Shapeshifter to Don McGlashan, Dave Dobbyn, Gin Wigmore or Julia Deans. From screen composer trio, Plan 9 (Lord of the Rings, King Kong) to international phenomenon Lorde and future international stars, Drax Project and Bene - there is a unique quality to the creative output of New Zealand songwriters and artists, and the world is listening.

Our copyright framework needs to be world's best and must first and foremost support creators. We want to incentivise music to be written and produced here as that music is distinctively our own and we want music businesses to see New Zealand as the best place from which to run their business."

Finally, AMPAL is disappointed that the Ministry has taken the position in the Issues Paper that: 'We do not consider it necessary to look at the general term of copyright in this review given the extensive public debate that has already occurred and the body of evidence and economic analysis we have studied on the subject. For the reasons given to the Foreign Affairs, Defence and Trade Select Committee on the Trans-Pacific Partnership Agreement Amendment Bill, we do not consider that extending the copyright term would bring net benefits to New Zealand. We would need to become aware of compelling evidence to the contrary to have us reconsider this position'.[11]

AMPAL submits that the current term of protection in New Zealand for works is no longer appropriate, due to the great investment of time and money required to bring songwriters' and composers' works to the market, and in order to better incentivise the creation of new works. It also places New Zealand out of step with its major trading partners. It is AMPAL's submission that copyright term should be extended to 70 years after death of the author for works, and in respect of sound recordings, 70 years after the date the recording is made or made available to the public. Songwriters and composers have comprehensively demonstrated that this term of protection is an appropriate term, and we refer to the submission of ICMP and the examples provided therein. Any simple analysis of the ongoing commercial consumption of the music of the many popular songwriters, composers and recording artists from the 1960s and 1970s clearly evidences that the commercial life of those works is longer than the current copyright term in New Zealand. We also note that the earlier release of a work into the public domain via a shorter copyright term does not mean that work is necessarily free for all public consumption – it merely shifts revenue away from creators to distributors who continue to commercially exploit those works without having to compensate the relevant creator. We refer to the further comments of ICMP in relation to the current international position on copyright term.

Comments on the Consultation Paper

Firstly, AMPAL submits that any 'update'[12] of copyright should not mean weakening the rights of creators and copyright owners. AMPAL disagrees that the first response to the impact of technology on the copyright regime should be to broaden the scope of existing exceptions or to introduce new

[11] Issues Paper, page 36.
[12] Issues Paper, page 5.

free exceptions. AMPAL respectfully notes that this is reflected in the framing of some questions in the Issues Paper, which then require a justification of the current copyright system.

We also note and endorse from the outset the comprehensive submission on behalf of APRA AMCOS, Recorded Music NZ and the group of New Zealand music industry organisations – referred to as the NZ Music submission.

In addition, AMPAL makes the following comments in relation to specific questions raised in the Issues Paper.

Question 1
Are the above objectives the right ones for New Zealand's copyright regime? How well do you think the copyright system is achieving these objectives?

A framework for assessing the copyright system that stresses incentives, access, effectiveness, efficiency, facilitating competitive markets and minimising transaction costs, as set out in the Issues Paper,[13] is a sound starting point. However, this analysis obviously fails to identify equally important factors such as art, culture and national identity. As Towse notes, '[t]he true cultural value of copyright cannot be fully captured by measuring the value-added in the cultural industries however accurate those measures are because there are external benefits that are not priced through the marketplace; the national culture, a creative environment and freedom of expression are examples of non-appropriable benefits'.[14] As noted above, these aspects of copyright must be given appropriate weight by the Ministry. We note that there have been a number of copyright-related inquiries in recent years internationally. The US Congress and the European Commission are currently grappling with copyright issues, for example, but there are no moves by the legislatures in these jurisdictions to weaken copyright protection. We refer to the comments of ICMP on the current status of the EU Copyright Directive.

Questions 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?

It should first be noted that New Zealand is a party to a range of treaties dealing with international standards on copyright exclusive rights, including the Berne Convention for the Protection of Literary and Artistic Works and the Trade Related Aspects of Intellectual Property Rights (TRIPS). These are largely administered by the World Intellectual Property Organisation and the World Trade Organisation. AMPAL does not support any changes to the exclusive rights provided for in the Copyright Act 1994 (**Copyright Act**), and that the exclusive rights remain appropriate in the digital environment.

Question 17
What are the problems (or advantages) with the way authorisation liability currently operates? What changes (if any) do you think should be considered?

It is AMPAL's submission that in the absence of clear authorisation liability, internet service providers (ISPs) have little incentive to cooperate with copyright owners to address copyright infringement on their services. Clear legislative authorisation liability is necessary to ensure the existence of an

[13] Issues Paper, page 23.
[14] Ruth Towse, 'Cultural Economics, Copyright and the Cultural Industries', *Society and Economy in Central and Eastern Europe*, Vol 22, No 4, 2000, pp. 107-126.

effective legal framework that encourages industry cooperation, while including service providers generally without adding additional regulatory burden or costs to service providers.

It is essential that once unauthorised content is identified, ISPs act expeditiously to not only take it down, but to make sure that it stays down. Under any extended authorisation liability, any ISP industry code of conduct should include a workable procedure for 'notice and takedown' but such procedures should be without prejudice to a general duty of care obliging service providers to conduct some degree of monitoring using filtering techniques. Procedures according to which a single notice would result in 'actual knowledge' of all similar future infringements ('notice-and-stay-down') should be the norm. Measures that allow for the notification of illegal content can only operate effectively if they are not too cumbersome and if ISPs are encouraged to react immediately and are shielded from liability for wrongful take down when they act on invalid notifications. In this regard, we note that the initial Trans-Pacific Partnership trade agreement contained a requirement for a notice and takedown system to be implemented by member countries.[15]

The ISPs and the rights holder communities should have a shared incentive to create a safe and legal online experience for consumers. The ISPs currently benefit from the traffic generated from unauthorised hosting sites – particularly when many of the services offered by ISPs are based on a 'per gigabyte' usage model. ISPs would be quick to disconnect a consumer who failed to pay their bill. Conversely the content creators are severely limited in the realistic damages that they can recover.

Litigation in this area is costly and difficult particularly for the small businesses that make up a large proportion of rights holders. Rights holders have no desire to sue individual customers - it is the various hosting sites that are profiting hugely from the unauthorised file sharing.

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?

AMPAL is not aware of any critical problems with the way the technology-neutral right of communication operates, and does not support any changes.

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?

AMPAL refers to our comments below on copyright safe harbour provisions.

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

Firstly, music publishers' core business is licensing, and it is in the interests of the songwriters and composers that music publishers represent to ensure that their repertoire is present worldwide, and to exploit this repertoire as widely as possible. Indeed, music publishers grant multi-territorial licenses for many different musical works as part of their daily business. However, when technological protection measures prevent access to copyright material, AMPAL submits that they are the result of individual commercial and personal considerations. We would be concerned by any

[15] https://www.tpp.mfat.govt.nz/tpp-text.php (last accessed 15 March 2019).

interference with technological protection measures, without strong evidence that current licensing practices require such intervention. We submit that music creators should have the right to control how their works are used, and their intellectual property rights are already limited by the current exceptions (subject to the New Zealand Copyright Tribunal jurisdiction). There is no compelling evidence that further compromise or relaxation of such protections is necessary.

Question 31
What are the problems (or benefits) with how any of the criticism, review, news reporting and research or study exceptions operate in practice? Under what circumstances, if any, should someone be able to use these exceptions for a commercial outcome? What changes (if any) should be considered?

Firstly, AMPAL notes the established and well-functioning copyright fair dealing exceptions which New Zealand already has in place which encroach on the exclusive rights of copyright owners. With regard to any potential new exceptions to copyright infringement, we submit that it is incumbent on those advocating for new exceptions to clearly provide details of the market failures that would necessitate the introduction of new exceptions or statutory licences, and provide the evidence to support their proposed solutions. AMPAL does not believe that there is any compelling evidence to support a conclusion that New Zealand should move from purpose-based fair dealing exceptions to an open ended 'fair use' exception such as that provided for in the United States law, for example. Rather, it is appropriate for the purposes to be prescribed by the legislature, as they currently are in New Zealand. The current copyright exemptions noted above are sufficiently clear to give users certainty about whether they are likely to infringe the rights of creators. Introducing any open-ended exceptions such as fair use would lead to greater uncertainty for copyright owners and licensees.

Secondly, it would seem that much of the push for greater exceptions to copyright comes from the proponents of 'innovation'. However innovation should not be used as an excuse for building businesses that free ride on others' intellectual property. On the contrary - rights holders including music publishers and creators need certainty in intellectual property laws in order to encourage innovation. This will in turn encourage development of new legitimate models for distribution of creative content, while also appropriately rewarding creators. It is licensing, not exceptions to copyright, that drives innovation.

Finally, AMPAL submits that any proposed exceptions must be subjected to extensive evidenced-based impact assessment being undertaken in advance.

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

It is AMPAL's view that if text and data mining are to be dealt with under copyright legislation, careful consideration must be given to the acts involved, which in many instances will be neither technical or incidental. Further difficulties can arise in attempting to distinguish between commercial and non-commercial services in this situation, which are increasingly difficult to define. We would also be concerned that any fair dealing exception for technical or incidental use could establish what is, effectively, a separate safe harbour regime.

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

From the outset, AMPAL notes that the Copyright Act already includes provisions that allow the use of quotations. AMPAL submits that any new specific fair dealing exception for quotation must not undermine the highly commercial, established and well-functioning business of licensing samples, mash-ups and remixes, nor impede a copyright owner's commercial control over their intellectual property. If there were to be a new fair dealing exception for quotation, to the extent permitted by New Zealand's international obligations, in AMPAL's submission it should only apply to private or domestic non-commercial use, and should not extend to subsequent, public uses.

It would be a Berne Convention requirement of any exception that the excepted use did not conflict with the normal exploitation of the copyright material and did not unreasonably prejudice the legitimate interests of the owner of the copyright.[16] The moral rights provisions of the Copyright Act would continue to apply.

In relation to sampling, mash-ups and remixes, it must be emphasised that there are longstanding and effective commercial practices in the market for licensing. The music publishing industry is very familiar with the issue of sampling. It is a part of a music publisher's role to deal with requests to sample a songwriter's work into a new work. In deciding whether to issue such a licence the publisher will take into account how the sample is being used, the effect on the market for the original work, and most importantly the attitude of the original creator.

Again, any fair use exception is not required (nor desirable) in this case – AMPAL believes it is entirely appropriate that a songwriter or composer can choose how and where their original work is used. We see no reason why consideration should be given to a free use exception to take the heart of a song and include it in another work without the approval of the copyright owner. How could this not be an assault on the moral rights of the original creator? Any consideration of a fair dealing exception for quotation must address these concerns.

Question 41
Do you have any specific examples of where the uncertainty about the exceptions for libraries and archives has resulted in undesirable outcomes? Please be specific about the situation, why this caused a problem and who it caused a problem for.

AMPAL is not aware of any evidence that the Copyright Act is not working adequately in regard to the use of musical works by libraries or archives.

AMPAL does not agree that further exceptions relating to galleries, libraries, archives and museums should be granted.

Question 47
Does the Copyright Act provide enough flexibility to enable teachers, pupils and educational institutions to benefit from new technologies? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?

AMPAL submits that the flexibility currently provided in the Copyright Act is entirely sufficient. In relation to the consideration of any further fair dealing exception for certain educational uses,

[16] As established under Article 9 of the Berne Convention for the Protection of Literary and Artistic Works.

AMPAL draws the Ministry's attention to the fact that the print music business has been severely affected by the distribution of unauthorised copies on the Internet. There are a limited number of companies producing print editions of music for use by educational institutions. The provision of music education into schools is different to the provision of other subjects. Most music publications for education are used outside the classroom for individual or small group tuition, or by school choirs or bands.

The cost of producing high quality transcriptions in a small market is considerable. AMPAL is concerned by the potential for any further undercutting of the financial viability of these specialist publishers and the contributions they make to the New Zealand music industry through the broadening of fair dealing exceptions. AMPAL also refers to the voluntary licensing arrangements that have been struck between APRA AMCOS and educational institutions in New Zealand, which demonstrate the effective licensing market that exists, which should not be disrupted. We also endorse the NZ Music submission in its call for a comprehensive blanket licence covering all schools centrally funded by government to provide fairness and equity to all schools and creators alike.

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?

As noted above in relation to our comments on technical protection measures, music publishers' core business is licensing. However, when contractual terms prevent access to copyright material, AMPAL submits that they are the result of the parties' individual commercial and personal considerations. We would be concerned by any interference with individually negotiated contractual terms, again, without strong evidence that current licensing practices require such interference. AMPAL also notes the appropriate protections found in competition and consumer law limiting any imbalance of bargaining power. There is no compelling evidence that further compromise is necessary. This recommendation has the potential to discourage new investment in the local market, and add uncertainty and complexity to commercial licensing arrangements. AMPAL points to the views of PRS for Music, the British Copyright Council and UK Music in the United Kingdom, who have stated that 'It is quite within the means of business to negotiate around the exceptions to which they are entitled in a contractual licensing negotiation for uses they will have to pay for, without additional protection of the law…. [Contracts between businesses] are negotiated by willing parties. There is no logic in having the legislation interpose itself between the parties and restricting their freedom and flexibility to contract'.[17]

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

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?

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.

[17] PRS for Music, *Response to the Consultation on Copyright* (21 March 2012), p. 54.

Copyright safe harbour laws do affect commercial relationships between online platforms and copyright owners. We refer to ICMP's submission setting out the international experience of safe harbour protections being inappropriately used by commercial entities to the detriment of copyright owners. These entities are far beyond being neutral intermediaries, and can draw significant revenue from advertising, and then compete with legitimately licensed services. It is AMPAL's submission that services going beyond the activity of a strictly neutral intermediary should not be eligible for safe harbour protection, and therefore that the current ISP definition is too broad. AMPAL disagrees that a broader set of online service providers should be covered by the New Zealand copyright safe harbour scheme, nor was such broader coverage intended in the Copyright Act. It is also unnecessary for the current safe harbour provisions to be expanded without evidence that such an amendment is required. AMPAL is not aware of online service providers' development being inhibited in New Zealand due to the current safe harbour laws. Expanding New Zealand's safe harbour scheme will inevitably make it even more difficult and costly for New Zealand rights holders to take any infringement action against these entities.

Proportionality must be a feature of a balanced IP system. AMPAL submits that current levels of copyright infringement diminish the proportionality of the rewards for the effort exerted in composing songs, and is harming songwriters and composers and music publishers. Some of the value of music has been transferred from those who create and those intermediaries that assist in the creative process and invest in music such as music publishers, to other intermediaries who profit enormously from the creations of others, without contributing to or investing in the creative process and who are protected by safe harbour laws in other jurisdictions. Expanding the scope of New Zealand's safe harbour laws can only exacerbate this problem, and its associated impact on the value that creators' works contribute to New Zealand's rich cultural heritage, as well as their economic contribution.

If arguments are presented to expand the operation of the safe harbour scheme to make New Zealand's laws consistent with those of other jurisdictions such as the United States (and in our submission that this is unnecessary and undesirable), the other aspects of those laws relevant to rights holders such as a workable industry code of conduct for service providers, must also be examined. Comparisons with the US law must also be considered in the context of the US system of statutory damages, which is not a part of New Zealand law.

We also note that a review of US copyright safe harbour laws continues by the US Copyright Office, and that safe harbour laws are also currently being considered by EU institutions as part of broader copyright law reform under the EU Copyright Directive, and refer to ICMP's comments in their submission in this regard. It should also be noted that the Australian Parliament recently comprehensively considered the broadening of its safe harbour scheme, but only extended the protection to educational institutions, libraries, archives, key cultural institutions and organisations assisting persons with a disability, by virtue of the *Copyright Amendment (Service Providers) Act 2018*, which AMPAL supported.

The balance originally envisaged by the legislature must be maintained. The safe harbour scheme must not act as a disincentive for services to engage in legitimate music licensing. We refer to the further comments in the NZ Music submission.

Question 63
Is there a sufficient number and variety of CMOs in New Zealand? If not, which type copyright works do you think would benefit from the formation of CMOs in New Zealand?

AMPAL submits that copyright collecting agencies such as APRA AMCOS play a central role in reducing transaction costs in the copyright system, and that APRA AMCOS operate transparently, efficiently and at best practice.

Question 74
What were the problems or benefits of the system of using an overseas regime for orphan works?

AMPAL notes that significant practical and legal protections currently exist for users of copyright material where a reasonable attempt to locate the relevant rights holder has failed. Practically, it is extremely unlikely that where a rights holder cannot be located through adequate and appropriate searches, an infringement action would be brought against that user by a copyright owner. It is also common for retroactive licences to be issued by rights holders in respect of past unauthorised uses of a copyright work once discovered, so that such a licence can be entered into by a rights holder that is subsequently discovered following the use of a suspected orphan work. Furthermore, legally, the copyright user would also be entitled to the protection provided under section 67 of the Copyright Act.

In addition, the issue of orphan works is perhaps less relevant to the music industry than other copyright industries. APRA AMCOS maintains a comprehensive database of musical works that have been commercially exploited in New Zealand. Much work has also been undertaken by the international music industry to implement a structure of standards and formats to support the automated exchange of information along the digital supply chain.[18]

Nonetheless, AMPAL is supportive of sensible and balanced measures to facilitate the non-commercial use of orphan works, provided that a diligent search has taken place. Furthermore, any collective licensing scheme must not permit mass digitisation of orphan works. AMPAL also submits that any exception must not extend to intermediaries or service providers.

Question 76
How difficult is it for copyright owners to establish before the courts that copyright exists in a work and they are the copyright owners? What changes (if any) should be considered to help copyright owners take legal action to enforce their copyright?

Copyright infringement in New Zealand is a problem that has greatly affected the music industry. Individual songwriters and composers would attest to the difficulty in enforcing copyright in New Zealand, due to the costs, procedural requirements, and in relation to online copyright infringement, difficulty in determining the identity of an infringer. It is therefore incumbent on the New Zealand Government to ensure that online copyright infringement is addressed, and that songwriters, composers and music publishers are able to effectively enforce copyright in relation to traditional infringement of copyright. We refer to our comments below in relation to New Zealand's infringing file sharing regime, and the benefit of website-blocking provisions. We strongly endorse the NZ Music submission in this regard in its call for improved assumptions of ownership that mirror current legislation in Australia.

[18] See for example: http://www.ddex.net/ (last accessed 15 March 2019).

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

AMPAL is supportive of APRA AMCOS having the ability to take legal action to enforce copyright, on behalf of its members, and under the authority of its boards of directors. We refer to the comments of APRA AMCOS and the NZ Music submission and Recorded Music New Zealand in response to this question.

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?

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?

AMPAL submits that the costs for copyright holders to utilise the infringing file sharing regime introduced in the *Copyright (Infringing File Sharing) Amendment Act 2011* are too high. AMPAL also notes concerns around the receipt of notices. However, the regime remains an important option available to copyright owners, and should remain with a reduced cost structure in place in relation to the fees copyright owners must pay to ISPs for notices, developed in consultation with stakeholders.

We refer to the further comments in the NZ Music submission in response to this question.

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?

Copyright infringement has a corrosive influence on the creative community. AMPAL notes the website-blocking provisions introduced in Australia in the *Copyright Amendment (Online Infringement) Act 2015*. The website-blocking provisions are an important and measured step for Australia to combat the well-recognised and widespread harmful effects of online copyright infringement. Disruption of overseas online locations that distribute infringing material to New Zealand consumers has positive implications for legitimate, licensed services and for all rights holders. As noted above, the music industry has been innovative in the digital age, and a range of new digital music services are now flourishing.

AMPAL submits that there is no 'silver bullet' to eliminate online copyright infringement, but that it is incumbent on government to have a legislative framework that clearly establishes the rights of copyright owners and the protections available.

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

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

As noted above, the ISP and the rights holder communities should have a shared incentive to create a safe and legal online experience for consumers. For example, ISPs in over 27 countries have been

ordered to implement site blocking in relation to approximately 2,800 individual URLs and in most cases they have done so without seeking costs of implementing the site blocking.[19] In the overwhelming majority of cases, where the issue has been considered by a court, ISPs have been ordered to bear the compliance costs and their own legal costs, even though it was acknowledged they were not responsible for the copyright infringements. These costs have been characterised as 'a cost of doing business' for the ISPs. Courts have also noted that ISPs already have access to the technical measures necessary to comply with website blocking orders and therefore the cost of compliance is low.

However, legislation needs to be accompanied by education, and in this respect, an industry code for ISPs that includes an education and warning notice scheme would be useful. We risk additional generations believing that popular music miraculously appears out of the ether and therefore should be free. Compelling creative content comes from not only the talent, imagination and dedication of creators, but also from the investment, production and marketing of those who invest in them in recognition of the immense value of music.

Conclusion

AMPAL again thanks the Ministry for the opportunity to make this submission. We reiterate the economic and cultural importance of the work of music publishers and the songwriters and composers they represent, and again note that New Zealand's copyright system has adapted well to changes in economic, commercial and technological changes in the past, and if it remains as a robust IP framework, it will continue to do so into the future. AMPAL is hopeful that the Ministry will give full regard to the views of rights holders and creators, and the commercial realities of the market that they provide in their submissions, in finalising its recommendations. AMPAL looks forward to working further with the Ministry throughout that process.

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[19] Music Rights Australia, submission to the Australian Government Department of Communications and the Arts' Review of the Online Copyright Infringement (2018), page 8.