APRIL 2019

REVIEW OF COPYRIGHT ACT 1994

New Zealand music industry submission
Response to MBIE Issues Paper

"I think copyright is an amazing thing. Somewhere back in history, someone created legislation that allowed artists to get paid. Copyright makes me feel that my work's not for nothing. It's hard enough to be a musician. If we didn't have mechanisms to protect our work it would be almost impossible."

BIC RUNGA
Artist & Songwriter

"The internet changed things so quickly and there's so much still to be revealed about its nature. It scares me that big tech companies are determining so much of the future for artists – and for the world in general. So much has been made possible for us by sharing – but far more has been made possible for them by what we share."

SALINA FISHER
Composer, Performer & Fulbright Scholar

"Protecting the value of what people compose, write and create is fundamental. If we were to lose sight of that, we would disadvantage the next generation of composers, writers and creators. And if they couldn't make all the work that's in them, what a terrible loss that would be."

DON MCGLASHAN
BLAM BLAM BLAM, FROM SCRATCH, THE FRONT LAWN, THE MUTTON BIRDS
Artist, Songwriter & Screen Composer

"I would say that protecting the integrity of copyright should be our number one priority, so that the work of music creators continues to be valued."

NEIL FINN
SPLIT ENZ, CROWDED HOUSE, FLEETWOOD MAC
Artist & Songwriter

Music matters

It inspires us

It tells our stories

It entertains and uplifts us

It supports and unites us

It is the soundtrack to our lives

The authors of this submission are united in their vision to protect and support New Zealand music, and achieve a thriving and sustainable music industry for the benefit of all New Zealanders.

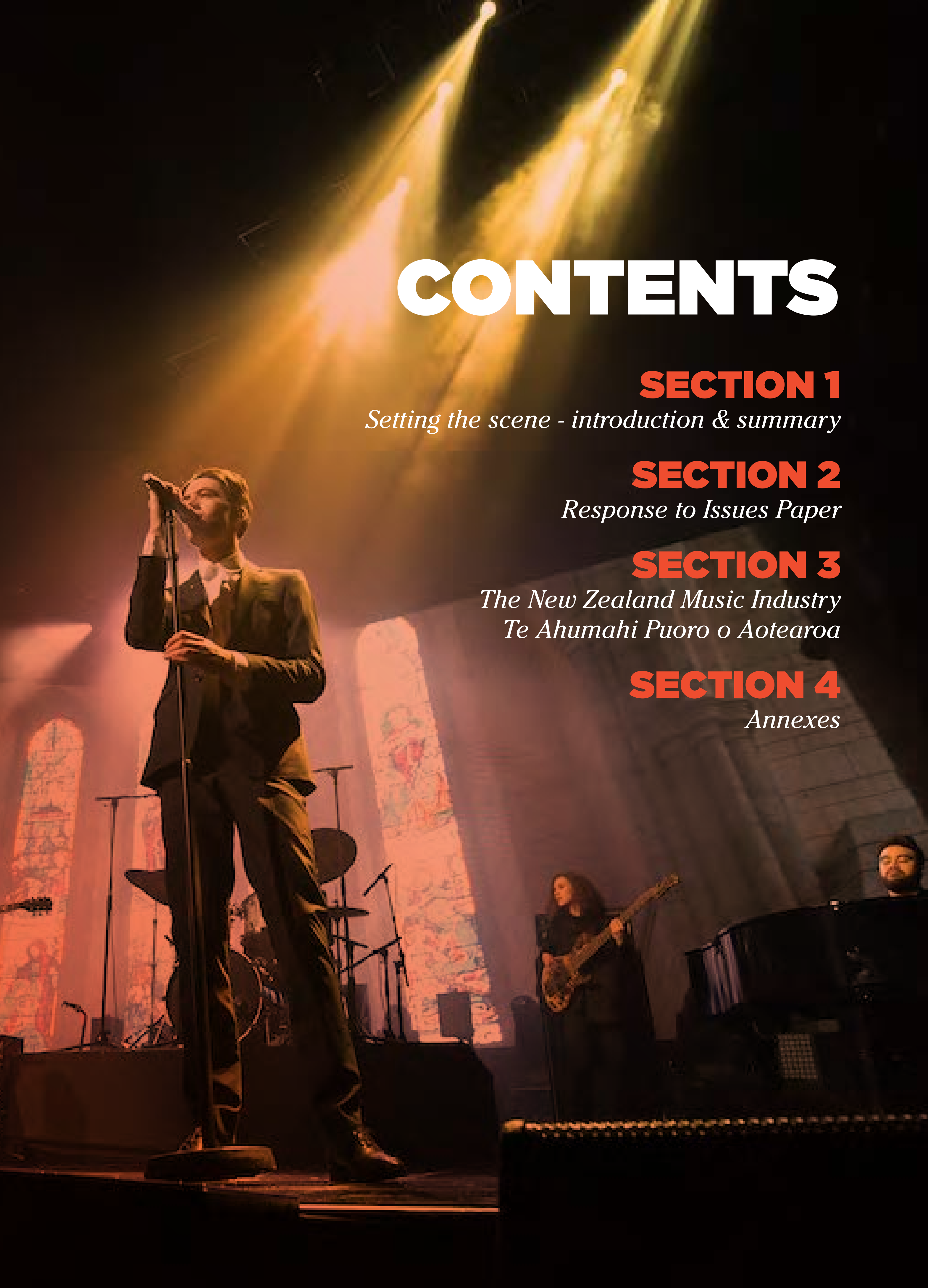
A key pillar of this is a robust framework for copyright law, and we welcome the opportunity to respond to MBIE's Issues Paper.

This submission is in four main parts:

Section 1: Introduction and Summary
Section 2: Response to Issues Paper
Section 3: The New Zealand Music Industry | *Te Ahumahi Puoro o Aotearoa*
Section 4: Annexes

The New Zealand Music Industry | Te Ahumahi Puoro o Aotearoa is an introduction to and a report on the state of the industry. It explains who we are and what we do, and how our contribution to Aotearoa New Zealand is enabled and sustained by copyright law. The document is essential background to our responses to the Issues Paper and includes information on the economic, social and cultural contribution of the music industry to New Zealanders' wellbeing, how we have embraced and adapted to the digital environment and the multiplicity of licensed ways for consumers to enjoy music.

In preparing *The New Zealand Music Industry | Te Ahumahi Puoro o Aotearoa* we have consulted within the industry – with artists, songwriters and composers, record companies and digital aggregators, music publishers, music managers and many others, for their views on the state of the industry, the opportunities and challenges, and the importance of copyright to what they do. We cannot claim to speak for all of them, but their views have helped to shape our submission.



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SETTING THE SCENE
INTRODUCTION & SUMMARY

SETTING THE SCENE – COPYRIGHT REVIEW

In a few short years, the way we listen to music has changed beyond recognition. In 2012, most of us bought our music on CDs. Today, streaming services such as Spotify and Apple Music have become the preferred way to enjoy music. New Zealand consumers can now enjoy music in more ways than ever before, in different formats and at affordable prices.

As a result of embracing the digital transformation, the music industry has enjoyed four consecutive years of recorded music revenue growth since 2014, after 14 years of decline due to online piracy and technology disruption. As an industry we are continuing to invest, innovate and celebrate the new opportunities offered by the internet and the myriad of new ways to reach our audience.

The music industry contributed over half a billion dollars to New Zealand's GDP in 2017 and supported 2,500 full time equivalent jobs for Kiwis. New Zealand artists and their music contribute to our economy and our culture in ways that are both tangible and priceless. We remain committed to investing in New Zealand music creators, just as they continue to invest in and benefit us.

As well as preserving and celebrating our sense of identity through music, we want to see our artists succeed on the world stage. With the rise of streaming services, the market for music has become truly global and the tyranny of distance is no longer a barrier to global success.

The New Zealand music industry is focusing on export now more than ever before, with good reason. Digital music is a weightless export. There is no need to ship product around the world, and enjoyment of music is a low-emission activity that does not consume scarce resources.

In the past New Zealand has been a 'net importer' of music but there is no reason why this has to remain the case in the future.

Our local industry has the drive and ambition to become a net exporter of music, and government supports this goal. We welcome the Ministry for Culture and Heritage initiative to form a working group of government agencies and industry experts to look into enhancing the international potential of the New Zealand music industry.

> *"I want our anthems to go abroad… in and of themselves as our ambassadors for New Zealand and our creativity… But what is it going to take for us to be a net exporter of music?"* – Jacinda Ardern, Going Global Music Summit 2018

We are aligned with the wider creative sector in our ambition to grow. We are proud members of WeCreate, the alliance of the creative sector, in seeking a concerted industry-led partnership with government to grow our sector's contribution to Aotearoa New Zealand's wellbeing.

There are new challenges in the digital environment

Despite the good news about digital transformation, increasing revenues and export opportunities, our creative ecosystem is facing new challenges.

The streaming economy is fragile, with each licensed stream delivering only a fraction of a cent to creators and investors. Now more than ever before, imbalance in the digital marketplace has a profound effect.

There are serious concerns about the accountability of global platforms that monetise music uploaded by their users. The legal framework of safe harbours in copyright law has created a culture of appropriation and a digital Wild West where paying for music is optional. Even when platforms are licensed to make music available, it hasn't been a fair negotiation due to the safe harbours which give user upload platforms an unfair advantage.

In addition, and despite the proliferation of legal choices for consumers, 24% of New Zealanders are still using pirate sites to obtain or listen to music. We conservatively estimate that the losses to the New Zealand music industry from piracy in 2018 were around $50 million. These forgone revenues could be directed to investment in new artists and music, but instead are being channelled to offshore pirate sites.

In the face of these challenges, work is needed to ensure that our music ecosystem remains sustainable.

Priorities for copyright review

New Zealanders all benefit from a thriving music ecosystem: culturally, socially and economically. A robust copyright framework is an essential element of that ecosystem, both to ensure sustainable growth and to allow the freedom to explore, experiment and take the creative risks that allow us to lead, express our uniqueness, and drive our artform forwards.

The Copyright Act provides a sound framework, however in light of the rapid digital transformation of the music industry and the related challenges, there are some key issues that must be addressed to ensure that it continues to foster sustainable growth into the future. This is essential, both to preserve New Zealand's national and cultural identity, and to develop our position as exporters on the world stage.

Our detailed priorities for the copyright review are set out in the summary that follows. At a principle level we would like to see a copyright framework that:

- recognises the **value of music**, for its contribution to our social and cultural wellbeing as well as to the economy and employment

- enables creators and investors to **obtain fair value** for their work through **being able to choose** who can use their music and on what terms
- provides effective tools to enable creators and investors to **safeguard music against unauthorised uses**
- is clear and **provides for legal certainty**, respects market solutions and recognises that licensing fuels innovation, not exceptions
- **harmonises New Zealand's laws** in line with those of our trading partners to maximise export success
- reflects Aotearoa New Zealand's **rich cultural diversity** and contributes to ensuring that all our voices, including those of Tangata Whenua and our diverse communities, can be valued and heard.

Taonga works need a separate regime

While copyright is an important structure that supports and protects the works being created in our country, and has done so since our first copyright law in 1842, it is also a Western framework that has been imposed on a musical tradition that existed in Aotearoa long before Pākehā arrived here. Our Tangata Whenua are the kaitiaki of music that our law was not conceived or equipped to adequately represent. We support the Waitangi Tribunal's recommendation that a new regime be established to protect taonga works and Mātauranga Māori on Māori terms. We believe that this is an incredible opportunity for Māori to lead the world in the creation of a mechanism that honours andprotects their traditional indigenous creations.

Although we have included the perspectives of some of our Māori music creators in this submission, we do not in any way presume to speak for Māori on the larger, parallel issue of protecting Taonga and Mātauranga Māori creations. We understand that any examination of this will be conducted separately with Māori alongside the Copyright Act review, on a different timeframe to this submission process. In the meantime we pledge our support to this process and will engage with it in whatever capacity Tangata Whenua invite.

We look forward to working with government and other stakeholders throughout the review.

Recorded Music New Zealand, representing recording artists and record companies

APRA AMCOS, representing songwriters, composers and music publishers

Independent Music New Zealand (IMNZ), representing independent music rights holders

Music Managers Forum (MMF) representing music managers and self-managed artists

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.

Copyright Review and the Issues Paper – Music's Key Priorities

Fair market conditions and a thriving creative ecosystem

- New Zealanders all benefit from a thriving creative ecosystem – culturally, socially and economically. In the new world of music streaming services, there is a huge opportunity for New Zealand music to grow and to reach a global audience – enhancing both our sense of national identity and our growing international reputation.

- But this opportunity can only benefit our country if we can properly capture and manage the value of our creative endeavour. We need to maintain clear exclusive rights and liability principles that underpin and support our licensing of the digital services that deliver music to New Zealanders. We also need to protect the right of creators and investors to choose who can use their music and how. The current safe harbour provisions are hampering development of the digital market by giving an unfair advantage to platforms that rely on user-uploaded content. This has resulted in an unfair value gap, as demonstrated by the graphic below.

- The safe harbours have also enabled a culture of appropriation and a digital Wild West, where paying for music is optional. It is time for platforms to be accountable. The safe harbour provisions should be reviewed to ensure that they are only available to passive intermediaries and not to platforms that actively engage with and monetise content [**Issues 59-62**].

Safeguarding creativity

- Despite the proliferation of legal choices for consumers, 24% of New Zealanders are still using pirate sites to obtain or listen to music. We conservatively estimate that the losses to the New Zealand music industry from piracy in 2018 were around $50 million. These forgone revenues could be directed to investment in new artists and music, but instead are being channelled to offshore pirate sites.
- We need effective tools to assist us in taking enforcement action – in particular a streamlined process to enable right holders to seek an order for ISPs to block access to pirate sites [**Issues 85-87**].
- We also need to improve the process of notice and take down so it means notice and *stay* down [**Issues 59-62**], and improve the prohibitions on circumventing technical measures that protect streaming services [**Issues 28-29].**
- Intermediaries such as search engines and advertisers amplify piracy and make it easier and more profitable. We need a duty on intermediaries to take reasonable steps to ensure their services are not used in connection with piracy [**Issue 62, Issue 85**].
- The current law contains unreasonable procedural hurdles for right holders seeking to enforce their rights. Changes are needed including with respect to proof of copyright ownership and the application of the law of authorisation to linked sites based overseas [**Issue 17**].

Legal certainty and an evidence-based approach to exceptions

- Licensing fuels innovation, not exceptions, and the market should be the first port of call to enable uses of music.
- We support the existing approach to fair dealing and believe a more flexible fair use approach would undermine business certainty.
- Any discussion of exceptions should involve examining the evidence that the exception is needed either for a non-profit social benefit, or as a result of market failure.
- With regard to cloud computing and format shifting, there is no need for further exceptions and market solutions should be respected [**Issue 36, Issue 52**].

- We recognise the important work of non-profit cultural institutions such as archives and stand ready to discuss the issues they experience with cataloguing and preserving music [**Issues 41-45**], and orphan works [**Issues 71-74**].

Copyright term equality

- It's time to stop penalising New Zealand artists, songwriters, composers, record companies and music publishers and harmonise the term of copyright protection to 70 years, in line with other OECD countries.

New Zealand music industry submission to Copyright Act Review

SECTION 2
RESPONSE TO ISSUES PAPER

NZ MUSIC INDUSTRY RESPONSE TO ISSUES PAPER

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PROPOSED OBJECTIVES

Issue 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?"**
Issue 2:	**"Are there other objectives that we should be aiming to achieve? For example, do you think adaptability or resilience to future technological change should be included as an objective and, if so, do you think that would be achievable without reducing certainty and clarity?**
Issue 3:	**"Should sub-objectives or different objectives for any parts of the Act be considered (eg for moral rights or performers' rights)? Please be specific in your answer.**
Issue 4:	**"What weighting (if any) should be given to each objective?**

(1) Issues Paper

1. The Issues Paper notes in [101] that the copyright regime should seek to balance the three goals of:

   (a) creation of original works

   (b) use, improvement and adaptation of works created by others

   (c) dissemination and access to knowledge and creative works.

2. Against that background the Issues Paper sets out the proposed objectives for what copyright should "seek to achieve in the New Zealand context".

   (a) Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so;

   (b) Permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand;

   (c) Ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law;

   (d) Meet New Zealand's international obligations; and

   (e) Ensure that the copyright system is consistent with the Crown's obligations under the Treaty of Waitangi.

3. It also notes that:

> "We would also be interested in whether there are other objectives the regime should seek to achieve and why. Adaptability or resliene of the Copyright Act in the face of technoligical developments (eg through more technologically-neutral provisions) is an example of something we have heard is important to people and potentially deserves more emphasis in the objectives. Some may question whether the Copyright Act can be made more flexible without decreasing certainty for people who create and interact with copyright works,

particularly given that we get very little guidance from the courts on how to interpret copyright law (compared with other countries)"

General

4. As set out in our introduction and summary, we believe that robust and well-functioning copyright law is key to ensuring a thriving creative sector, which in turn enhances the economic, social and cultural wellbeing of all New Zealanders.

5. As to whether it is meeting is objectives, we believe that the existing copyright framework is sound and forms the bedrock of New Zealand's creative industries, enabling ongoing investment in new works and giving individual creators the incentive to sustain their careers and continue creating. However some changes are needed to ensure that it continues to support the creative ecosystem into the future, as outlined in the summary and our responses to the Issues Paper.

6. At a principle level we would like to see a copyright framework that:

- recognises the value of music, for its contribution to our social and cultural wellbeing as well as to the economy and employment;
- enables creators and investors to obtain fair value for their work through being able to choose who can use their music and on what terms;
- provides effective tools to enable creators and investors to safeguard music against unauthorised uses;
- is clear and provides for legal certainty, respects market solutions and recognises that licensing fuels innovation, not exceptions;
- harmonises New Zealand's laws in line with those of our trading partners to maximise export success;
- reflects Aotearoa New Zealand's rich cultural diversity and contributes to ensuring that all our voices, including those of Tangata Whenua and our diverse communities, can be valued and heard.

7. We note that the Issues Paper contains a number of statements suggesting that copyright is seen purely as a cost to society that should be tolerated only as far as absolutely necessary to guarantee production of more works. For example, MBIE says that copyright is a form of regulation, stops people doing things they would otherwise be able to do [para 27]. It also notes that in economic terms giving copyright to the creator "generally involves an opportunity cost for those who may otherwise enjoy unimpeded use of the work" [para 55].

8. Within the review MBIE should also consider the value of New Zealand's creative economy in the best interests of New Zealand as a whole. The emphasis of the review should be on value and opportunity for New Zealand as a whole and not on the cost and devaluation of New Zealanders' creativity.

9. This would be consistent with other initiatives within government to consider and harness the value of New Zealand's creative output. Examples include the government's work on tech disruption and the future of work, MBIE's work with the screen sector, the review by Ministry for Culture and Heritage into enhancing the international potential of New Zealand music, and the government's consideration of a plan to grow the creative economy, following from the WeCreate action plan.

(2) Comment on framing of objectives

Status of different objectives

10. We would first note that although Issue 1 is framed as a question about the objectives for the copyright regime, the objectives set out by MBIE appear to be a mixture of what *copyright* is intended to achieve and what the *review* of copyright is intended to achieve. Although related, in our view those two things are best considered separately.

11. We agree that objective (1) expresses what is generally understood as the core purpose of copyright law, to incentivise the creation and dissemination of new works - except that it adds the words "where copyright is the most efficient mechanism to do so" (which we comment further on below).

12. We believe that incentivising the creation and dissemination of new works should be the primary overriding objective in MBIE's review of copyright law. It is that core purpose that underpins the principle of reward for creative endeavour and investment which in turn benefits the public through increased copyright works.

13. In our view objectives (2) and (3), on which we comment below, are better seen as possible objectives in a *review* of copyright law than in considering what copyright itself is intended to achieve. As MBIE says in the Issues Paper, its goal is that in seeking to achieve its core objective, copyright law should also seek to balance the interests set out in (2) and (3).

14. Objective (5) is critical in this review, and we comment further on this issue in our submission. We recognise that taonga works need a separate regime and we have pledged our support to that separate consultation process in whatever capacity Tangata Whenua invite. Meeting international obligations, as per objective (4), is also a necessary and helpful part of the review, and is especially important in the increasingly global marketplace for creative content.

15. So in response to Issue 4, we believe that the creation and dissemination of new works should be treated differently from the other stated objectives as it is the core purpose of copyright law. The other objectives are not – and are not intended to be – the core objective for the legislation.

Objective (1) – incentives to create and disseminate

16. We do not find helpful the addition of the words "where copyright is the most efficient mechanism to do so" in objective (1). These words introduce complexity and uncertainty. It is unclear whether the relative efficiency of copyright as against other measures is intended to be assessed on a case-by-case basis when considering specific issues, or when considering copyright law overall. The wording implies that MBIE may be proposing to assess copyright law against other regulatory mechanisms that may be "more efficient" but we do not understand that to be within the scope of the review.

17. If the additional words in objective (1) are in fact a precursor to objective (3), we do not know why they are needed.

18. For those reasons we propose that the words "*where copyright is the most efficient mechanism to do so*" be deleted from objective (1).

Objective (2) – reasonable access and exceptions

19. Objective (2) speaks of "reasonable access" where "where exceptions to exclusive rights are likely to have net benefits for New Zealand".

20. Of course we acknowledge the need for exceptions to copyright in certain special cases. As set out elsewhere in our submission, we believe that exceptions should continue to be assessed by reference to the Part 3 framework of specific exceptions and limitations, developed through a policy making process involving consideration of evidence and public policy considerations, rather than through the courts.

21. However the review should steer away from an interpretation of the goal of balance that would minimise the fundamental importance of a healthy and sustainable market for creative products that generates fair returns to the creators and the value chains that support them. The counterfactual would be that the incentives for content creation would be reduced and the creative ecosystem diminished, and that would not be in the best long-term interests of New Zealand.

22. Against that background we do not agree with the framing of objective (2). We do not believe that it is in New Zealand's best interests that copyright owners should be obliged to "give access" to their work on terms that MBIE considers reasonable.

23. As regards access for consumers, in the music industry context, there are over 40 million music tracks available for consumers to access and enjoy on streaming services and in a multitude of other ways, many of which involve no payment by the consumer.

24. When considering *use* of a work licensing should be the first port of call. As set out elsewhere in our submission, the music industry has been proactive in licensing a variety of different uses for consumers and businesses.

25. So music is available for consumers to access and enjoy, and licensing can be discussed where use of music is sought. Any issues of refusal to licence or pricing are issues for competition law not copyright law.

26. There may be certain special cases where there is a public policy reason for members of the public to use copyright works without payment. In our view these cases will generally be limited to a situation where licensing is impractical; where the user is a non-profit body acting for a social benefit (for example a non-profit archive); and other cases of market failure where a licence would not be available – for example fair dealing and parody.

27. The framing of objective (2) seems to suggest that there is no need to identify a policy reason for an exception, and that the net benefits can be weighed in every case. We do not consider think this approach is consistent with New Zealand's international obligations[1], and neither will it support the development of a creative ecosystem where creators and investors are incentivised to continue creating.

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1 The Berne Three-Step test: (Article 13 TRIPs Agreement).

28. In our view a consideration of exceptions should begin with the policy reason for the exception and evidence relating to the need for it, rather than heading directly to a balancing of net benefits.

Objective (3) – efficiency, clarity and respect for the law

29. We agree that this should be a goal in reviewing copyright law, provided that it is done with an eye on the other objectives and the balance that has been struck with respect to many of the existing provisions. The music industry values an efficient and functioning market for music, and clarity with regard to core rights and exceptions.

30. Finally, we agree that good copyright law should support a thriving creative ecosystem and fair market conditions irrespective of the technology platforms involved. However technology neutrality as a goal in itself is not always appropriate as MBIE acknowledges in the section of the Issues Paper addressing communication works.

31. Finally, in response to **Issue 3**, we believe that sub-objectives for different parts of the Copyright Act would create uncertainty.

RIGHTS (PART 4)

CATEGORISATION OF WORKS

Issue 5:	**“What are the problems (or advantages) with the way that the Copyright Act categorises works?”**

1. With one exception, we do not have any issues or problems with the way the Copyright Act categorises works. In our response to **Issue 19**, we have commented on the category of “communication works”.

ORIGINALITY

Issue 6:	**"Is it clear what 'skill, judgment and labour' means as a test as to whether a work is protected by copyright? Does this test make copyright protection apply too widely? If it does, what are the implications, and what changes should be considered?"**

1. The tests of originality are well established. For both musical works and sound recordings, we are not aware of any problems with the way the Act presently operates or the way in which the test of originality is applied. We do not regard the test as making copyright protection applying too widely.

TREATMENT OF DATA AND COMPILATIONS

Issue 7: "Are there any problems with (or benefits arising from) the treatment of data and compilations in the Copyright Act? What changes (if any) should be considered?"

1. We are not aware of any problems arising from the treatment of data and compilations in the Copyright Act.

2. As with any modern digital business, the music industry makes extensive use of data in its business and operations, and some of this data has substantial commercial value.

3. Data is used in order to track the use of music and ensure that the relevant right holders are paid. Digital music services use data to drive playlists and individualized recommendations for their users, and music companies use data to analyse trends for the purpose of marketing and sales. Data is also used by the music industry to, report to government entities, to develop market insight for its members and by Recorded Music New Zealand to compile the New Zealand music charts.

DEFAULT RULES FOR COPYRIGHT OWNERSHIP

Issue 8: **“What are problems (or benefits) with the way the default rules for copyright ownership work? What changes (if any) should we consider?”**

1. The default rules for ownership of copyright work well for Music. There are no problems and we are not seeking any changes.

REVERSION OF RIGHTS

Issue 11:	**"What are the problems creators and authors, who have previously transferred their copyright in a work to another person, experience in seeking to have the copyright in that work reassigned back to them? What changes (if any) should be considered?"**

1. The Issues Paper notes at [156] that the "purpose of copyright is to incentivise the creation and dissemination of creative works". The Paper states that MBIE has heard that "copyright can impede dissemination of older published or recorded works". Para [158] states that "Older published or recorded works are often no longer available to the public".

2. In our view this would be a matter for contract, but in any case, we are not aware of any similar issues in relation to music.

3. Music is already widely available in digital form, including older music. The introduction and rapid acceptance of streaming services for music has enabled New Zealand record companies to take their rich back catalogues of recordings to a world audience. Over the last five years these companies have embarked on an intensive programme to digitise their catalogues and make them available via legal digital platforms. This programme has to date involved re-issuing more than 750 New Zealand artist's albums, in addition to those already available on streaming services, with hundreds more planned and in progress. These reissues include historic recordings from pioneering New Zealand labels such as Zodiac, Viking and Kiwi Pacific, the huge catalogues of Philips and HMV, and the internationally influential catalogue of Flying Nun.

4. Once digitised and available on download and streaming services, use of the music can be tracked and revenues paid.

ARTIST QUOTES ON NEW ZEALAND'S SHORTER TERM OF COPYRIGHT PROTECTION

"I would personally find it upsetting, at the age of 65, to see my own music appear in a bunch of commercials that I'd spent my life turning down on principle, just because my recordings have arbitrarily fallen into the public domain."

FINN ANDREWS - The Veils

Artist & Songwriter

My working life since 1978 has been spent crafting and recording a catalogue of songs. In only nine years myself and fellow band members of Th'Dudes will lose our 'wages', our royalty income from early songs. It's like building a house over 40 years that the law can start dismantling, bit by bit. It is not the sort of downsizing I had in mind for my family's future. Yet if I was a British, Australian, Canadian or American musician I'd enjoy another two decades of copyright protection. That's not fair."

DAVE DOBBYN

Artist & Songwriter

"This year our record Nature will no longer have copyright protection in New Zealand. In real terms that means myself and the other members of Fourmyula will lose a significant portion of the income that we have been lucky enough to receive from the recording. It's incredibly hard to make a living out of being a musician in New Zealand and to know that we miss out on two decades of royalties in comparison to fellow musicians overseas is hard to take. It's time that New Zealand delivered term equality for its artists, record companies and songwriters."

WAYNE MASON - The Fourmyula

Musician

"As a young Kiwi artist, I am working very hard to build my career in the global market and on a global stage. It seems unfair then, that because NZ is a global outlier when it comes to copyright term, my contemporaries around the world will benefit from an additional twenty years of royalties on their work than what I will."

AMELIA MURRAY - Fazerdaze

Musician

"This is not about putting NZ artists ahead of the pack. It is simply about us catching up with the rest of the world and giving Kiwi musicians the same ability to make a living from our work as our international counterparts."

MARCUS POWELL - Blindspott, City of Souls

Musician

"Music has value; emotional, cultural, historical. That's why film makers, advertisers, politicians and many others are willing to pay to use it. In spite of this, most music writers and their families live their lives with the wolf, if not at the door, then no more than a few doors down. The fact that some songs and pieces of music have a longer life than their composer, and sometimes can even grow in popularity over time, helps to balance that out. If I'm lucky enough to have written something like that, then I would want my children and their children to get some benefit from it, in the same way as if I'd invented a piece of technology or a medical procedure that was still making people's lives better after I'm gone. That's why strong copyright beyond the life of the composer is crucial."

DON MCGLASHAN
Blam Blam Blam, From Scratch, The Front Lawn, The Mutton Birds

Artist, Songwriter & Screen Composer

TERM OF PROTECTION

(1) Summary

1. New Zealand is almost the last country left in the OECD that does not give at least 70 years copyright protection. New Zealand record companies and recording artists have copyright protection over their work for 50 years from the date of release, and for songwriters and composers, 50 years after their death.

2. The Issues Paper states that MBIE is not going to consider the term of copyright in the review because "given the extensive public debate that has already occurred and the body of evidence and economic analysis" it "do[es] not consider that extending copyright term would bring net benefits to New Zealand". MBIE states that it would need to "become aware of compelling evidence to the contrary" in order to reconsider its position [para 170].

3. All the previous policy and economic analysis of this issue was undertaken on the basis of outdated assumptions, the main assumption being that consumers would purchase units of music, whose price might change depending on whether or not the music was protected by copyright.

4. These assumptions are no longer valid in the new digital music ecosystem, as outlined below. In our view the changes in the market since the issue was last considered constitute the "compelling evidence to the contrary" that MBIE refers to, and it's time to take a fresh look at the issue.

5. In this section we outline the arguments for harmonising term, and address arguments others have made against it. We also refer to the views of individual artists, songwriters and composers on the issue.

6. The case for harmonising copyright term is clear:

   (a) New Zealand's shorter term is an anomaly among developed countries.

   (b) The current situation is unfair to New Zealand artists, songwriters and composers and penalises them as compared to their overseas counterparts. It also penalises New Zealand record companies who are competing with overseas companies to sign artists.

   (c) It acts as a disincentive to New Zealand artists to make recordings and base their businesses small and large, here in New Zealand.

   (d) Currently, the benefit of the shorter term is not being enjoyed by New Zealanders but by offshore distributors. Harmonising copyright term would bring revenues back to New Zealand creators and investors and could be reinvested in A&R and marketing, to the benefit of all New Zealanders.

   (e) There is a substantial body of iconic New Zealand music from the 1970s and 1980s that is soon to fall out of protection (as regards the sound recording copyright) if term is not extended.

7. In addition, the arguments against term extension do not stack up:

(a) the previous analysis of the economic impact of term extension is ten years old and reflects a past era of music purchasing;

(b) in the music streaming environment, there is no evidence that extending copyright term would impact consumer pricing (and it seems highly unlikely that it would);

(c) far from being locked up, classic New Zealand music is being digitized and made available on digital services for everyone to access; and

(d) we acknowledge the concerns of non-profit institutions seeking to comply with copyright law as they archive and catalogue music and we stand ready to discuss their concerns, and address them where we can, but we don't think these concerns should determine a policy outcome on the extension of term.

(2) Introduction – the new reality

8. MBIE's decision not to support term extension in 2016, and to omit it as an issue in the 2018 Issues Paper, is based on outdated analysis. Recorded Music New Zealand has always disputed (and still disputes) the conclusions of the Ergas report, which was produced in 2009. But whatever the position was when the Ergas report was commissioned in 2009, or when the TPP was being considered from 2012 to 2016, technology and the market for music has moved on, in fundamental ways, as outlined in *The New Zealand Music Industry* and other parts of this submission.

9. The key market developments are in the following areas:

(a) Consumer preferences: New Zealanders have enthusiastically adopted music services such as Spotify and Apple Music, preferring to enjoy music via streaming rather than purchasing CDs. Consumer research indicates that 61% of New Zealanders have used audio streaming in the past three months 48% are using it every week and 33% are using it every day.[2] When asked "if you had only one method for listening to music, what would you choose?", more than half chose on-demand streaming (32% audio streaming and 22% chose video streaming).

(b) Consumer pricing models: The consumer pricing models in streaming are based on a monthly fee in return for unlimited access to music, rather than a cost per unit (see graphic below). In the circumstances it is highly unlikely that an increase in the term of copyright protection would have an impact on consumer pricing.

(c) Structure of the business: As a result of the move to streaming, the music business has undergone a fundamental transformation from selling units embodied in a physical product to monetising the enjoyment of music via streaming services. As well as consumer pricing this impacts wholesale arrangements and the entire ecosystem of producing music. In 2018, 86% of record industry revenues were from digital sources. Leaving aside public performance and broadcast, the retail revenues derived 69% from digital downloads and 80% from streaming. This is a stark difference from 2009, when total digital was 12% of retail revenues and even 2012 when total digital was 41% of retail.[3]

[2] Horizon Music Consumer Study November 2018.
[3] See the graph in New Zealand Music Industry, Section 4.

(d) Economics of producing and selling music: The longer term impact of streaming on the music business is not yet known. What we know for now is that streaming has had a profound impact on the economics of producing music:

- First, since each "listen" on a streaming service, or unit of consumption, delivers a tiny portion of overall revenue, it takes many more streams and a longer timeframe for an artist to earn and for a music company to recoup the initial investment than in the music purchasing world of ten years ago.

- Secondly, without the mass sales of CDs that drove the business ten years ago, more than ever in the streaming world, the audience in New Zealand is not large enough to generate enough streams to deliver the revenues needed for an artist to earn and for a music company to recoup investment in producing and marketing recordings. By necessity, the market for New Zealand music is now truly global.[4]

(e) Our export position: Contrary to the assumption made in the 2012 report on TPP and MBIE's Issues Paper, being a "net importer" is not the pre-determined future of New Zealand music: For the music industry, there is no reason to base the future of New Zealand copyright law on that assumption. The conditions are right for New Zealand to become a net exporter, our local industry has the drive and ambition to do so, and our leaders agree.[5]

10. In light of all this change, it's time to leave the old thinking behind. New Zealand should stop penalising its songwriters, composers, artists and record companies and harmonise copyright with our major trading partners, to 70 years.

11. We address the arguments for extending copyright term, and those against, below.

(3) The case for harmonising copyright term

12. The case for harmonising copyright term is clear:

13. New Zealand's shorter term is an anomaly among developed countries.

(a) The current situation is unfair to New Zealand artists, songwriters and composers and penalises them as compared to their overseas counterparts. It also penalises New Zealand record companies who are competing with overseas companies to sign artists.

(b) Currently, the benefit of the shorter term is not being enjoyed by New Zealanders but by offshore distributors. Harmonising copyright term would bring revenues back to New Zealand creators and investors and could be reinvested in A&R and marketing, to the benefit of all New Zealanders.

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4 Further background is contained in The New Zealand Music Industry, Section 4 Embracing a Digital Environment.

5 "I want our anthems to go abroad … in and of themselves as our ambassadors for New Zealand and our creativity. […] But what is it going to take for us to be a net exporter of music?" – Jacinda Ardern, Going Global Music Summit 2018

(c) There are benefits and efficiencies in having the same copyright term as our major trading partners.

(d) There is a substantial body of iconic New Zealand music from the late 1960s and 1970s that is soon to fall out of protection (as regards the sound recording copyright) if term is not extended.

14. Each of these arguments is outlined further below.

New Zealand's copyright term is an anomaly among developed countries

15. Currently, New Zealand recording artists stop being entitled to payment for their recordings 50 years after they are released, and for songwriters and composers, 50 years after their death. New Zealand is one of the last countries left in the OECD that does not give 70 years or more of copyright protection. As the Annex from IFPI shows, 33 out of the 35 OECD countries now have, or are moving to, a 70 year term of protection.[6] The last remaining OECD country, Switzerland, is currently considering draft legislation to extend term.

16. Rather than sitting alongside our major trading partners and developed nations such as the UK, and the US, New Zealand sits among a list of countries with less developed economies.

17. In addition to limiting the protection of works within New Zealand, New Zealand works and recordings receive only 50 years protection in every country that applies the "rule of the shorter term". This includes the EU, UK, South Korea.[7] These countries take the view that because their creative content is not protected for at least 70 years in New Zealand, they will not give New Zealand content 70 years protection when it is used in their respective countries.

18. EU countries and the UK are major export markets for New Zealand music, meaning the shorter term has a significant impact.

19. Under the Copyright Act, the term of protection attaching to a work or recording is determined by the domicile of the copyright owner. In the case of a musical work, the first owner of copyright will usually be the songwriter or composer, so term will be determined by the domicile of that individual at the time the work was created.

20. In the case of sound recordings, the owner of copyright is the entity who made the arrangements necessary for the recording. Where an individual artist has signed to a record company under a recording contract, the entity making arrangements for the recording will be the record company. This produces some anomalies. It is not uncommon for New Zealand artists to sign with overseas record companies, in particular record companies domiciled in Australia or the US. In such a case, a recording artist signing with an Australian record company would get the benefit of the longer 70 year term, while an artist choosing to sign to a New Zealand company would not.

21. In addition to creating an unnecessary anomaly, this is one of the factors that could give talented New Zealand artists an incentive to move and/or to sign overseas. The country benefits if New Zealand is

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6 Japan is required to extend to 70 years under the EU free trade agreement.

7 The 28 member countries of the EU: Article 7(2) Directive 2006/16; Korea Article 64(2) Copyright Act; India s 40(d)(iii) Copyright Act and paras 3 and 7 International Copyright Act 1999.

seen as an attractive place for creators to live and work, and the opposite is the case if they have incentives to move or to do business overseas.

22. There is also a question about New Zealand's reputation internationally and how we want to be seen as part of Brand Aotearoa. We have an established presence on the world stage for our creative talent ranging from Lorde, Gin Wigmore, and Flight of the Conchords to our growing screen production and post-production industry, and our interactive games industry that is growing at a massive rate. A shorter copyright term just doesn't fit with the image of a country that is a leader in supporting and producing creative talent.

The current situation is unfair to artists, songwriters and composers

23. Many New Zealand recording artists will face the end of copyright protection for their recordings within their lifetime. This is keenly felt by recording artists young and old as exemplified by the quotes in this section. The shorter term penalises New Zealand artists, including those that choose to live and work in New Zealand, and places them at a disadvantage in comparison to their international colleagues.

24. In addition to potentially losing valuable income streams, the shorter term leaves artists and their work open to exploitation after the term ends.

25. After an artist's active music-making career has wound down, the revenue mix tends to change. Older classic songs are often in demand for incorporating into films and television advertisements. This is called "synchronisation". Although synchronisation revenues across the industry are not substantial, these revenues can make a real difference to individual artists. For some older artists, synch income can be one of the only remaining income streams.

26. Under the current law, 50 years after release, the maker of a film, television program or advertisement would still need the permission of *musical works rights owners* (as that copyright extends 50 years after the author's death) but would *not* need the permission of the owner of the *sound recording rights*. In individual cases this might otherwise represent a significant sum for the individual artist concerned (in the tens of thousands) and a significant saving for the maker of the advertisement. This leaves artists vulnerable to exploitation, as exemplified by the quote below:

> "I would personally find it upsetting, at the age of 65, to see my own music appear in a bunch of commercials that I'd spent my life turning down on principle, just because my recordings have arbitrarily fallen into the public domain."
>
> - *Finn Andrews [The Veils] – Artist & Songwriter*

Harmonising term would bring benefits to New Zealand

27. As against the disadvantages of the shorter term for songwriters, composers, recording artists and those that invest in their careers, we understand that MBIE needs to weigh the benefits to other New Zealanders. In the Issues Paper MBIE notes its view that "we do not consider that extending copyright term would bring net benefits to New Zealand".

28. We deal with the economic evidence in a separate section below but meantime we would urge MBIE to re-examine in the digital music market what those benefits are and who they are flowing to.

29. In the Issues Paper MBIE notes that the purpose of a limited copyright term is to ensure that after a period of time under copyright, the public has the benefit of being able to use the copyright work freely, in some cases to create more derivative works for the benefit of society.

30. Theory aside, we have found little evidence that New Zealanders are benefitting from the shorter term. As noted earlier, for the moment the term of protection of individual copyright works has had no impact on consumer pricing for streaming services, and it seems unlikely that it will do so in future. So it is unclear whether consumers are benefitting from lower prices (and we believe they are not).

31. However, there is evidence that the shorter term enables exploitation of kiwi music by businesses based overseas. In **Annex 2** we have included a set of examples of New Zealand recordings whose sound recording copyright term has expired, which are being sold to New Zealanders via online platforms, by overseas distributors. On the face of it, the proceeds of sale of these recordings are going to these overseas distributors.

32. If term were extended on the other hand, New Zealanders would benefit. If the revenues from the additional 20 years were paid to artists and record companies, the additional revenues would return to the New Zealand-based creators and enable further investment in A&R and marketing, the creative powerhouse that brings new kiwi music to public.

Protecting our musical heritage - once its gone its gone

33. There is a substantial body of classic New Zealand music from the late 1960s and 1970s that will soon fall out of copyright protection if term is not extended to 70 years. Even if New Zealand later adopts a longer term (for example via a free trade negotiation) term extension would normally be implemented so as not to reinstate protection for sound recordings that have already fallen into the public domain.

34. This means that once it's gone, it's gone. This is the case already for Wayne Mason of Fourmyula who stopped being entitled to royalties from the band's recording of *Nature* at the start of 2019.

35. We appreciate that, as per the Issues Paper, copyright applies equally to all works regardless of their specific cultural value [para 59]. However, the contribution of a specific body of work to New Zealand's culture, heritage and national identity is a relevant factor in policy making and we believe it is highly relevant in the music context.

(4) The economic evidence

36. MBIE has clearly stated its view that extending copyright term will not bring net benefits to New Zealand. The reasons for that view are outlined further in a Select Committee report outlined further below. However a key component of that view is the perceived economic impact of extending term on New Zealand and New Zealand consumers.

37. MBIE is well aware of Recorded Music New Zealand's view that the analysis commissioned from Ergas in 2009 is plainly wrong and proceeds on a number of incorrect assumptions. We do not intend to rehearse here the reasons for that view, as whatever the merits of the Ergas study, it is outdated and it is time for a fresh analysis based on the music market as it stands today.

38. We believe that the “compelling evidence” MBIE refers to in the Issues Paper is the new market conditions outlined above which justify a fresh analysis. In our view, the economic impact on New Zealand in today’s market is unlikely to be significant enough, on its own, to determine the policy outcome.

(5) Other arguments made against term harmonisation

39. The Issues Paper notes the reasons it has not included term of protection as a specific issue:

> “170 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 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.”

40. The Select Committee report summarises the arguments made in opposition to term extension as follows:

> 34.1. the increase in prices for copyright works term extension would bring;
>
> 34.2. that it would inhibit the creation of new works, access to information and research;
>
> 34.3. that it would add costs to and unnecessarily restrict community groups, schools, universities, libraries and museums;
>
> 34.4. that it would delay the entry into the public domain of culturally significant New Zealand music and the creation of new music based on those works;
>
> 34.5. that it would exacerbate the orphan works problem[8]; and
>
> 34.6. that 15-30 years would be a sufficient copyright term to incentivise creation of copyright works.

41. Regarding the final reason above, the Issues Paper notes that New Zealand is obligated under the Berne Convention to provide a term of protection of 50 years or more.

42. We have already addressed the first reason above - there is little evidence consumer pricing would increase as a result of harmonising copyright term.

Availability of music for the public to enjoy

43. A longer term does not mean that works will be “locked up” and not available to consumers. Copyright provides the incentive for businesses to digitise and reissue classic recordings. In fact the opposite is true in the music industry.

44. The introduction and rapid acceptance of streaming services for music has enabled New Zealand record companies to take their rich back catalogues of recordings to a world audience. Over the last five years these companies have embarked on an intensive programme to digitise their catalogues and make them available via legal digital platforms. This programme has to date involved re-issuing more than 750 New Zealand artist’s albums, in addition to those already available on streaming services, with hundreds more planned and in progress. These reissues include historic recordings from

pioneering New Zealand labels such as Zodiac, Viking and Kiwi Pacific, the huge catalogues of Philips and HMV, and the internationally influential catalogue of Flying Nun.

45. It is a huge task reissuing such a large number of albums, requiring significant investment of time and money. If those recordings are protected by copyright the incentives are greater to digitise and make them available, which is for the benefit of all New Zealanders.

Creation of new works/information and research

46. Protecting music by copyright law does not make that music any less available for information and research – depending on the particular use proposed, there may be a licence fee payable, but we are not aware of evidence indicating there is a market failure in this area. We would be happy to consider any specific evidence that copyright protection has prevented such activities and that licences were not available on reasonable terms.

Impact on libraries, museums and educational institutions

47. We acknowledge the issues faced by non-profit cultural institutions when working to preserve and catalogue music. We also note concerns around orphan works. As noted in our answer in relation to orphan works, it is usually straightforward to identify the owner of copyright in music and we envisage most of the issues faced by non-profit institutions would not be related to music.

48. We do not believe these concerns should dictate a policy decision on whether to extend term *per se* because they can be addressed in other ways. We understand that non-profit institutions are dedicated to protecting New Zealand's cultural heritage and this goal does not seem well served by those institutions arguing for less copyright protection for that heritage. It would be more useful to discuss the specific issues these institutions are experiencing and see what can be done to alleviate them. We stand ready to do this with MBIE and stakeholders.

(6) Proposed phase-in

49. Finally, when the government was proposing to introduce extension of term around the time of the TPP, it proposed implementation by way of "phase-in", ie a gradual introduction of the extended term of a period of several years. Recorded Music New Zealand stands by the submissions we made at the time, to the effect that the phase-in would be extremely complex and expensive to implement, especially in a market the size of New Zealand.

50. Added to that, we believe that in the new business environment, the perceived benefit to New Zealand of the phase-in would be minimal to vanishing.

51. We have not included detailed arguments here addressing phase-in, because we do not believe it is under active consideration.

PROBLEMS WITH EXCLUSIVE RIGHTS

Issue 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?"**

1. The exclusive rights laid out in the Copyright Act are critical for right holders and are the basis of music industry licensing and enforcement.

2. Music does not have any issues or problems with the exclusive rights or how they are expressed. We have made some comments on the right of communication to the public in our response to **Issue 19**.

SECONDARY LIABILITY PROVISIONS

Issue 16:	**"Are there any problems (or benefits) with the secondary liability provisions? What changes (if any) should be considered?"**

(1) Summary of Music's Position

2. The secondary infringement provisions in sections 35 – 39 are important provisions which Music relies on to undertake effective public performance licensing and enforcement. Of particular importance are section 38, which relates to permitting the use of premises for infringing public performance and section 39, which relates to supplying equipment for infringing public performance.

3. Section 38 (permitting use of premises for infringing performance) is presently limited to literary, dramatic or musical works. We submit that it should be amended to include sound recordings.

4. Both secondary liability provisions are effective and accepted tools for copyright owners to ensure that copyright is not infringed.

(2) Response

5. As set out elsewhere in this submission, OneMusic is a joint venture between APRA AMCOS and Recorded Music New Zealand for the joint licensing of musical works and sound recordings for public performance.

6. OneMusic currently licences tens of thousands of businesses around the country every year. OneMusic licensing representatives generally rely on the primary infringement provisions, by contacting the business owner or individual who is responsible for authorising the playing of music or music videos in their business.

7. OneMusic licences venues and business owners in the hospitality and retail sectors for all their background music use, and also generally in the case of hospitality for when the use features music such as live bands, DJs or karaoke. A significant number of these premises use Background Music Service Providers (sometimes called "MSPs"). These are businesses that supply venues a music solution by way of playlists of music and sometimes the equipment needed to perform that music.[8]

8. When a business owner, who has music supplied by a MSP, refuses to take out an appropriate public performance licence, OneMusic relies on the secondary infringement provisions to approach the Music Service Provider (MSP) that has supplied equipment to that premise (s 39). OneMusic also finds it useful to be able to communicate the requirement for a public performance licence through Music Service Providers, who are aware that they need to communicate this message to the businesses they

[8] Some MSPs pay the OneMusic public performance fee on behalf of their clients, meaning that their clients pay just one bill that covers all of their music requirements. If the MSP used does not pay the public performance fee on the client's behalf, the client must take out a public performance licence from OneMusic directly.

supply. It assists us in encouraging MSPs to have this conversation when they sell their service into a business, particularly with new businesses that may not be aware of their obligations.

9. The secondary infringement provisions in ss 38 and 39 therefore play an important role and provide a very helpful additional avenue to progress licensing, should a licence not be taken out by those engaged in primary infringement.

10. An additional area where these secondary infringement provisions is useful to rights holders is in the area of concert and event licensing. APRA AMCOS and Recorded Music New Zealand look to the promoter of individual events to hold the licence in these cases, as the promoter collects ticket fees and authorises the performance. OneMusic looks to the promoter to apply for a licence prior to an event taking place.

11. While this usually takes place, there have been instances where promoters, while fully aware of their obligations, refuse to take out a licence. In this situation APRA AMCOS has in the past contacted the owner of the premise/venue/facility where the performance is planned to take place, and advised them that an infringing performance is about to take place and noted their secondary liability, should the promoter not take out the licence.

12. This approach usually results in a venue contacting the promoter to say that they will not allow the performance to take place in their venue if the licence is not in place . While OneMusic is not aware of any instance where it has looked to join a venue to legal proceedings on the basis of secondary infringement, the ability to have an additional avenue to pursue concert promoters is very helpful in the licensing process.

13. One particular problem which is encountered is that s 38 (permitting use of premises for infringing performance) only covers copyright in literary, dramatic or musical works. This is a gap in protection which needs to be remedied by including sound recordings. It is noteworthy that sound recordings are included in s 39.

14. Sections 38 and 39 are important tools for OneMusic. Although we have not taken formal legal action under this provision, it is useful to have as an option should a licence not be taken out by those engaged in primary infringement.

AUTHORISATION LIABILITY AND LINKING

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

(1) Summary of Music's Position

1. Authorisation liability is a key principle for Music and other right holders, especially in the digital environment.

2. However as noted in the Issues Paper, the New Zealand provision needs to be changed (to accord with the approach taken in the UK) so as to allow liability for authorisation where the authorising occurs outside the jurisdiction but the authorised act takes place in New Zealand.

3. The Issues Paper includes a discussion of linking to infringing content in connection with authorisation. The question of liability for linking is not limited to authorisation and, depending on the specific facts, linking can also constitute communication to the public. Various forms of linking by egregious pirate sites have been held by courts in the UK, EU and US to constitute communication to the public and authorisation.

4. There is no case law on the topic of liability for linking in New Zealand, so it is not possible to identify any specific problems. In the circumstances we don't believe that government should attempt to legislate liability for linking. Due to the nuances involved this is best left to the courts.

5. See also our response to **Issue 60** which relates to a possible safe harbour for search engines.

(2) Issues Paper

6. Following a series of points in relation to authorisation, the Issues Paper makes the following comments in relation to linking:

> "184. While there have been some New Zealand court decisions relating to authorisation in the copyright context, they have involved the making of physical copies of works protected by copyright. There have been no cases on what might constitute authorisation in the digital environment. This may lead to uncertainty as to which activities constitute 'authorisation' and therefore require the copyright owner's permission.
>
> 185. An example where this has become an issue is with the providing of links to infringing content on the internet.
>
> …
>
> 186. One example of linking to infringing content is where a website (W) provides links to infringing content on other websites but website W does not host the infringing content itself. When people who visit website W are directed to the other websites they can then download the infringing content there. When they download the content they will be making infringing copies on their devices and so will be infringing copyright.

187. Website W does not host any content itself so does not make or distribute infringing copies. In this case it is unclear whether website W is 'authorising' others to do a restricted act by providing the links.

188. Internet search engines can also provide links to infringing content. The algorithms that search engines use often do not distinguish been infringing and non-infringing content hosted on websites.

189. There appear to be no New Zealand cases on linking, but the Federal Court of Australia has held that providing links to infringing material can constitute 'authorisation'.

190. One problem in relation to websites that link to infringing material may be that often the websites are hosted outside of New Zealand. Infringing copyright in New Zealand requires infringing acts like authorisation to take place in New Zealand. Overseas-hosted websites that link to infringing content do not therefore infringe the copyright owner's authorisation right in New Zealand. This contrasts with the UK, where the 'authorisation' does not have to happen in the UK. The UK Court of Appeal has ruled that their authorisation right covers overseas authorisation, as long as the subsequent infringing act happened in the UK.

191. Websites linking to infringing material can be hosted by ISPs and other online platform providers. This raises a question as to what extent they might be considered to be authorising others to do a restricted act by hosting such websites."

(3) The role of linking in online piracy

7. Linking is a central feature of the internet and the same is true of online piracy. Many forms of online piracy rely on links to distribute infringing content. Some examples are summarised in the Music Piracy – Background section of our submission and include:

- piracy sites like newalbumreleases that are notorious for distributing music before its commercial release date, via links to music stored on cyberlocker sites
- mp3 link sites like imp3goo that aggregate links to infringing music files from elsewhere on the internet.
- deliberate posting of links to infringing music on social media such as Facebook and Twitter
- BitTorrent sites like The Pirate Bay – which offer either torrent files or magnet links, the metadata files needed to enable users to find and download infringing files on the BitTorrent network.

8. Not all linking will lead to liability, but it is critical for right holders to have a remedy to address these egregious forms of online piracy. In many of these cases, we believe there will be liability for communication to the public. There may also be liability for authorisation depending on the specific facts.

9. In the UK, EU and US, courts have confirmed the liability of various types of piracy link sites under communication to the public or authorisation or both:

- In *EMI Records v British Sky Broadcasting*,[9] the Court held that the operators of three link aggregator sites infringed the claimants' copyright by communication to the public and by authorising infringements.

- In *Dramatico v British Sky Broadcasting*,[10] the Court held that the operators of The Pirate Bay were liable for authorising infringements.

- In *Stichting Brein v Ziggo*,[11] the Court held that the operators of The Pirate Bay were liable for communication to the public.

- In *Paramount v British Sky Broadcasting*,[12] the Court held that the operators of two link aggregator sites were liable for communication to the public and authorisation of infringement.

- In *Stichting Brein v Wullems (Filmspeler)*,[13] the Court held that the sale of the multimedia player "Filmspeler" which contained links that allowed users to directly access works published on streaming websites without the right holders' authorisation constituted communication to the public.

- In *Goldman v Breitbart News Network*,[14] the Court held that news sites embedding in their articles a tweet containing an infringing image violated the plaintiff's exclusive display right (equivalent to communication to the public), and that the fact that the image was hosted on a server owned and operated by an unrelated third party (Twitter) did not shield them from that result.

10. In Australia, a piracy links site has been held to be authorising the infringements of its users. In *Universal Music v Cooper*,[15] the plaintiff record labels sued Cooper for communication to the public and authorisation of infringement by users of the MP3S4FREE website. The basis for these alleged infringements was Cooper's conduct in creating the website and allowing users access to hyperlinks that then resulted in the user downloading copies of the plaintiffs' sound recordings.[16]

11. Tamberlin J held that the particular acts in issue of providing access to hyperlinks did not constitute "communication to the public" under either limb of the definition.[17] However the Court held that the defendant's actions did fall within the extended definition of "authorisation" in s 101(1A) of the Australian Act.[18] The Court held that there was:

9 *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] EWHC 379 (Ch).
10 *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] EWHC 268 (Ch).
11 Case C-610/15, *Stichting Brein v Ziggo BV and XS4ALL Internet BV* ECLI:EU:C:2017:99.
12 [2013] EWHC 3479 (Ch).
13 Case C 527/15, *Stichting Brein v Jack Frederik Wullems (Filmspeler)* ECLI:EU:C:2017:300.
14 *Goldman v Breitbart News Network*, No 17-CV-3144 (KBF) (SDNY, 15 February 2018).
15 *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972.
16 Cooper was also sued for copying for a limited number of infringing sound recordings found on his hard drive: at [55].
17 At [63] – [67].
18 "(1A) In determining, for the purposes of subsection (1), whether or not a person has authorised the doing in Australia of any act comprised in a copyright subsisting by virtue of this Part without the licence of the owner of the copyright, the matters that must be taken into account include the following:
(a) the extent (if any) of the person's power to prevent the doing of the act concerned;

"a reasonable inference available that Cooper, who sought advice as to the establishment and operation of his website, knowingly permitted or approved the use of his website in this manner and designed and organised it to achieve this result."[19]

12. We note that Tamberlin J's interpretation of "to make available on-line" is a narrow definition, and likely reflects an outdated understanding of the role of linking in making content available. Case law since the Cooper case (as outlined above) has confirmed that piracy links sites are liable for communication to the public.

13. There is no case law on the topic of liability for linking in New Zealand, so it is not possible to identify any specific problems. In the circumstances we do not believe that government should attempt to legislate liability for linking. Due to the nuances involved this is best left to the courts.

(4) Jurisdiction where authorising party is outside New Zealand

14. As noted in the Issues Paper, there is currently a problem with the jurisdictional aspects of authorisation in New Zealand.

15. At present, section 16 of the New Zealand Copyright Act reads:

"**16 Acts restricted by copyright**

(1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34, the following acts *in New Zealand*:

…

(i) to authorise another person to do any of the acts referred to in any of paragraphs (a) to (h)."

16. In *Inverness Medical Innovations Inc. v MDS Diagnostics Ltd* [20], Woodhouse J stated:

"In respect of copying, the evidence does not establish that either of the defendants, in New Zealand, copied any of the works. Nor do I consider that liability for infringement could arise by one of the defendants authorising Pharmatech, or another overseas entity, to copy the work overseas. **Infringement arising by doing the restricted act of authorising the making of a copy is, having regard to the provisions of s 16(1), directed to authorising another person to make a copy in New Zealand**."

Woodhouse J made it clear in the following paragraph that "a territorial restriction applies to what is authorised".[21]

17. Accordingly, copyright in a work is directly infringed only by a person who, without the consent of the owner, **authorises** another to do **in New Zealand** one of the acts set out in s 16(1)(a) to (h). "Authorisation" is a separate act of infringement from the act that is itself infringed. As a result of

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(b) the nature of any relationship existing between the person and the person who did the act concerned;
(c) whether the person took any other reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice."

19 At [84].
20 93 IPR 14 at [250].
21 At [251].

Inverness the act of authorising must occur in New Zealand. This is different from the position applying in the UK which was in part the model for the New Zealand provision.[22]

18. In the UK, the position is different and the territorial restriction on the scope of a copyright owner's exclusive rights does not apply to authorising. Section 16 of the UK CDPA 1988 states:

> **"16 The acts restricted by copyright in a work**
>
> (1) The owner of the copyright in a work has, in accordance with the following provisions in this Chapter, the exclusive right to do the following acts *in the United Kingdom:* …
>
> (2) Copyright in a work is infringed by a person who without the licence of the copyright owner, does *or authorises* another to do, any of the acts restricted by the copyright."

19. In *ABKCO Music & Records Inc. v Music Collection International Ltd*,[23] the UK Court of Appeal rejected the argument that s 16(2) had no extra territorial effect and that, hence, it could not apply to a licence granted outside the UK. Hoffmann LJ noted[24] that while in principle the law of copyright is strictly territorial in its application, citing *Def Lepp Music v Stuart-Brown*,[25] he stated that in his view the reason why s 16(2) places no limit upon the place of authorisation is that the requirements of territoriality are satisfied by the need for the act authorised to have been done within the United Kingdom.

20. Neill LJ similarly held that s 16(2) required no territorial limitation, stating:[26]

> "It is plain that the "doer" of a restricted act will infringe the copyright if, but only if, he does that act within the United Kingdom. The act, if committed outside the United Kingdom, would not be a restricted act. I can however see no satisfactory basis for placing a similar territorial limitation on the liability of a person who 'authorises another to do' a restricted act. It is to be noted that **authorising another to do a restricted act is not itself a restricted act**."

21. In the United Kingdom operators of piracy sites have been found liable for "authorising" users' infringing acts of copying and communication to the public located in the UK.

22. In New Zealand the territorial limitation on the act of authorising leads to anomalies particularly in relation to possible action against infringing pirate sites.

23. Almost without exception operators of pirate sites do not host these on servers in New Zealand (see further information in the Music Piracy – Background section). Therefore on the clear and plain meaning of s 16 at present it would not be possible to rely on *authorisation* on the part of the operator of an off shore website.

24. We submit that the New Zealand provision needs to be changed to accord with the approach taken in s 16(2) of the UK CDPA 1988 so as to allow liability for authorisation where the authorising occurs outside the jurisdiction but the authorised act takes place in New Zealand.

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22 See cross-referencing footnote in s 16(1) of Copyright Act 1994 which sites s 16(1), 4 of UK CDPA.
23 [1995] RPC 657 (*"ABKCO"*).
24 *ABKCO*, at 660.
25 [1986] RPC 273.
26 *ABKCO*, at 663.

COMMUNICATION TO THE PUBLIC

Issue 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?"

(1) Summary of Music's Position

1. The right of communication to the public ("CTTP") is critical to the music industry (and other right holders) as it underpins licensing and enforcement in the digital environment. The right originates from WIPO Treaties and has been implemented in laws around the world.

2. There have been no problems in practice with the operation of the right. However, there is very little case law in New Zealand concerning CTTP and as a result many issues have not been definitively tested in court.

3. We comment below on paragraph [206] of the Issues Paper that, in the course of discussing "communication works", may have created confusion around the interpretation of "communication to the public". Paragraph [206] of the Issues Paper states (in the context of the definition of "communication work") that:

> "On demand content is streamed on request to an individual viewer or household. We have heard that there is uncertainty over whether the viewer or household constitutes 'the public'."

4. However, this is a matter that is not at all uncertain under New Zealand law (or under the WIPO Treaties that the New Zealand law implemented): the right of communication to the public includes on-demand transmissions to users in their homes. The only uncertainty is that created by the Issues Paper. We assume this is a result of the para [206] discussion being in the context of "communication works" and their relationship to traditional broadcasts. Nonetheless for the avoidance of any doubt we set out some comments below.

(2) Background to Communication to the Public

5. The right of communication to the public created by s 16(1)(f) was introduced in order to bring New Zealand into compliance with the WIPO Copyright Treaty 1996. Art 8 of the WIPO Copyright Treaty provides:

> "…authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including 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."

6. The right of communication to the public has been implemented around the world. In the EU it was implemented via article 3 of the EU Directive which provides that: "Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."

7. Relevantly to New Zealand, the right was also implemented in the UK, following the European Directive, and in Australia.

8. A key feature of the implementation in the EU and UK , following the wording from the WIPO Treaties, is the explicit marking out of "making available", ie making content available in such a way that recipients can access it *at a time and place chosen by them*.

9. As per the EU text, this wording explicitly covers on-demand transmissions, for example those offered by services such as Spotify and Apple Music for music, Netflix and Lightbox for film, and TVNZ On Demand and Sky's Neon for TV broadcast.

10. When the right was introduced in New Zealand in 2007, it did not include wording to explicitly distinguish on demand communications. "Communicate" is defined as:

> "Transmit or make available by means of a communication technology, including by means of a telecommunications system or electronic retrieval system, and communication has a corresponding meaning."

11. As the Issues Paper notes [196], the communication right replaced references to transmission by traditional broadcasting methods. The new term "communication to the public" was intended to:

- Clarify that broadcasting over the internet and making content like television programs, podcasts, movies and sound recordings available on the internet were captured;

- Be technologically neutral in the sense that it would encompass how content might be distributed in the future.

12. This is further confirmed by the judgment in *Munwha Broadcasting Corporation v Young International 2009 Limited*[27] when Potter J dealt with the issue of the extent of "the public" in the context of the communication to the public right. She held that there was communication *to the public* where there was a communication for reception by anyone who wanted to receive it and even though each communication was one-to-one.

13. Potter J held that the plaintiff's submissions were persuasive namely that a broadcast from Korea to persons receiving the broadcast by set-top box in New Zealand was a communication "for reception by the public because it was a broadcast in Korea intended for reception by anyone who wished to receive it (upon payment of a licence fee)".[28]

14. Potter J held that, if s 16(1)(f)/s 33 were interpreted to exclude from the restricted act of communicating, any and all communications which are one-to-one (and arguably one-to-more-than-one, short of "to the public" generally), "the property right of the copyright owner under s 14 could be rendered nugatory or at least seriously compromised and undermined" and that this could not be "the intended purpose of the legislation."[29]

15. We consider it is clear law in New Zealand (as elsewhere) that the right of communication to the public includes on demand transmissions received by subscribers at a time and place chosen by them. The

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27 HC Auckland, CIV-2010-404-203, Potter J, 17 December 2010.
28 At [97] and [104].
29 At [104].

New Zealand courts typically interpret domestic legislation giving effect to treaty obligations in a way which is consistent with the Treaty[30] as was the case in *Munwha*.

30 *New Zealand Airline Pilots' Association Inc v Attorney General* [1997] 3 NZLR 269, 289 (CA):

> "We begin with the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations … that presumption may apply whether or not the legislation was enacted with the purpose of implementing the relevant text … In that type of case national legislation is naturally being considered in the broader international legal context in which it increasingly operates."

COMMUNICATION WORKS

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

(1) Summary of Music's Position

1. We agree with the need to guarantee protection of live transmissions (whether broadcast or transmitted via the internet). Live sports news and entertainment events illustrate why broadcasters are justified in seeking protection. Such transmissions are vulnerable to piracy by way of illegal streaming sites that can intercept the broadcast or internet transmission and make it available to unauthorised persons, who may exploit it commercially.

2. The original rationale for the creation of broadcast works was that there was no existing underlying work in tangible or material form. In 2007 government wanted to make this protection technologically neutral and created the category of communication work. However the actual scope of "communication work" as adopted extends beyond this original rationale and appears to protect any transmission over the internet. We accept that this new category of work has been created, although it is unique to New Zealand. We believe that it has caused confusion by conflating protection for the *transmission itself* with the protection of the *content carried by the transmission*.

3. However, we acknowledge that the category of "communication work" in itself has not caused any practical problems for Music so far, and that the category is important to broadcasters and others to undertake enforcement. In the timeframe we have not been able to work through a legislative solution to protect all interests concerned but we would be happy to participate in this process with MBIE as it progresses through the review.

4. Regardless of what MBIE decides in relation to the definition of communication work, the exceptions that apply to communication works should be adjusted to apply to broadcasts and live transmissions only.

(2) The Issues Paper

5. The Issues Paper notes that the 2008 amendments to the Copyright Act created a new type of copyright work namely "a communication work"[31] which:

> "… means a transmission of sounds, visual images, or other information, or a combination of any of those, for reception **by members of the public**, and includes a broadcast or cable programme."

6. As the Issues Paper notes:[32]

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[31] This reads: "A transmission of sounds, visual images, or other information, or a combination of any those, for reception by members of the public, and includes a broadcast or a cabled programme."

[32] At [201].

- In 2008 references to "broadcasting" and "cable programmes" were replaced with references to "communication works".

- The terminology "was intended to incorporate transmission of copyright works on line and be technologically neutral to take account of future technological advances."

- New Zealand "is the only country [in the world] that protects transmissions in general as a category of work in their own right".[33] Many other countries treat over-the-air broadcasts as copyright works but this does not usually extend to broadcasting over the internet.

- For this new category of work

> "Often the transmitted content is protected by copyright, like a movie. Sometimes it is not (eg a live rugby game)." [34]

7. Para [204] of the Issues Paper notes that the concept of "communication work" is different from the "right to communicate a work to the public". Recognising the implications of what was done in the 2008 Amendment Act, the Issues Paper then states:

> "The concept of communication work effectively gives the person transmitting the communication work rights over the communication itself, even though they may not own the copyright in the all [sic] of the underlying works incorporated in the communication work."[35]

8. The Issues Paper then raises two issues with the definition of communication work. The first relates to the definition of the public and how this works with on demand transmissions. We address this in our response to Issue 18. The second relates to retransmission.

(3) Context and History

9. It is important to understand the international context of these developments. In particular the WIPO Treaties required the introduction of a new, broad, technology neutral *right* of communication to the public. This right is critical to right holders as outlined in our response to **Issue 18**. The right contemplates that right holders will have the ability to do or authorise the communication to the public of the existing categories of works.

10. The WIPO Treaties did not require the introduction of a new *category of work,* ie a communication work, and New Zealand is alone in the world in having provided protection for internet transmissions as such.[36] This seems to have been caused partly by conflating the concept of a technology neutral right with a technology neutral type of work. In MED's 2007 publication *The Copyright (New Technologies and Performers' Rights) Amendment Bill Frequently Asked Questions*"[37] it was stated:

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33 At [202].

34 It should be noted that the broadcast of live rugby games with commentary, slow motion replays and the like would have qualified as a 'television broadcast' under the 1962 Copyright Act and as a 'broadcast' under the Copyright Act 1994 pre 2008.

35 At [204].

36 Frankel *Intellectual Property in New Zealand* Lexis Nexis (2nd Edition 2011) at 226 records that the creation of a new 'communication work' is not a requirement of either WIPO Treaty.

37 2007 p 2.

> "Consistent with the technology-neutral communication right, the Bill provides copyright protection for all communication works (for example, transmission via the Internet), not just the signals carrying content in broadcasts and cable programmes."

11. The original rationale for protecting "**broadcasts**" as a separate category of copyright work in 1956 in the UK and in 1962 in New Zealand was to protect broadcasters against pirating of their broadcast "signal", or transmission. Because, in many instances at the time, sound or television broadcasts were transmitted live they were of an experimental nature and therefore did not fit into one of the then existing categories of copyright works *which required them to be in writing or in a tangible/material* form.[38] As a result on a number of occasions unlicensed and poor quality reproductions of BBC live transmissions had been made and sold.[39] So significantly the creation of **broadcast** category of work was to protect copyright in a broadcast where there was no underlying work in material form such as a film or pre-recorded programme and the broadcast was 'live' - for example a live news programme or live sports game.

12. By creating a new category of work ie 'communication work' the 2008 amendments in New Zealand have gone beyond that original rationale.

(4) The Scope of Communication Works Goes Beyond What is Needed

13. We certainly agree with the need for protecting broadcasts *and internet transmissions* of live events (whether sport, news or entertainment) where there are no underlying existing works..

14. Live sports events illustrate why broadcasters are justified in seeking protection of their signals. Such online 'broadcasts' (for example Premier League football) are vulnerable to piracy by way of illegal streaming sites that intercept the broadcast or internet transmission of it and make it available to unauthorised persons, who may exploit it commercially. Such live transmissions fall squarely within the original rationale for broadcasts noted in the previous section.

15. The new category of 'communication work' goes beyond this rationale, granting post-transmission rights to the "authors" of communication works. This confuses protection for the programme-carrying signal with the protection of the content carried by the signal. We cannot see the value in creating a new copyright work in the transmissions themselves. Insofar as there is an original underlying work comprising a film, literary, dramatic, musical or artistic work or a compilation in material form, then there is already a work that can be sued on by the owner or exclusive licensee. In addition, after the live event has been recorded it will have copyright protection as a film and again can be sued on by the owner or exclusive licensee.

16. Applying the current definition of 'communication work' in a music industry context illustrates the unintended and undesirable consequences of creating this new category of work. For example, Spotify as a transmitter of sound recordings would seem to own rights in a new copyright work which is the transmission. This might perhaps be precluded by the requirement of originality in section 14. However, in any case, there seems to be little value in this right as Spotify could neither license nor

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38 Laddie Prescott Victoria The Modern Law of Copyright (3rd edition 2000) 8.3. (Note this reference is deliberately to an earlier edition of this text).

39 Ibid and Gregory Committee Cmnd 8662, para 117. This rationale was adopted by the New Zealand Dalgleish Committee Report in 1959.

enforce the right without the underlying sound recording and musical work rights holders who own the works being transmitted.

17. We accept that this new category of works has now been created (where none was required by the WIPO Treaties). But its scope extends beyond what is needed. As set out in the summary, we acknowledge that the category of "communication work" in itself has not caused any practical problems for Music so far, and that the category is important to broadcasters and others to undertake enforcement. In the timeframe we have not been able to work through a legislative solution to protect all interests concerned but we would be happy to participate in this process with MBIE as it progresses through the review.

18. An illustration of how the definition of "broadcast" can be made technologically neutral is found in the UK Copyright Designs and Patents Act 1988 which provides as follows:

> "In this Part a "broadcast " means an electronic transmission of visual images, sounds or other information which—
>
> (a) is transmitted for simultaneous reception by members of the public and is capable of being lawfully received by them, or
>
> (b) is transmitted at a time determined solely by the person making the transmission for presentation to members of the public,
>
> and which is not excepted by subsection (1A); and references to broadcasting shall be construed accordingly.
>
> (1A) Excepted from the definition of "broadcast" is any internet transmission unless it is—
>
> (a) a transmission taking place simultaneously on the internet and by other means,
>
> (b) a concurrent transmission of a live event, or
>
> (c) a transmission of recorded moving images or sounds forming part of a programme service offered by the person responsible for making the transmission, being a service in which programmes are transmitted at scheduled times determined by that person."

19. The above definition, while not compliant with WPPT, illustrates that in seeking to create a technologically neutral definition in respect of a *method* of transmission, New Zealand has gone too far in its new category of work.[40]

20. The consequences of this error are evident when considering exceptions granted to the makers of communication works – see further below.

[40] Notably the UK definition includes internet transmissions to the extent that they take place simultaneously on the internet and by other means (typically called "simulcast"), involve concurrent transmission of a live event or involve a programme that is transmitted at scheduled times determined by the maker of the transmission (typically called "webcast").

(5) Unjustified Expansion of Exceptions

21. In 2008 when introducing "communication works" it appears that in essence a "find and replace" approach was adopted. So in Part 3 of the Act dealing with permitted uses all references to "broadcasts" and "cable programmes" were replaced with "communication works".

22. But the effect of this has been to extend the permitted uses in ways that interfere with legitimate licensing of sound recordings, as set out below.

Section 87

23. Section 87 provides that the:

> "free public playing or showing of a communication work … does not infringe any copyright in –
>
> (a) The communication work; or
>
> (b) Any sound recording or film included in the communication work"

24. We believe that section 87 itself is an anomaly – see our response to **Issue 51**. That aside, expanding section 87 beyond broadcast to effectively any kind of transmission takes the exception well beyond its original scope.

25. If, against our submission, Government decides to retain s 87, we submit that it should be limited to broadcasts (or at least internet transmissions where there is no underlying work in material form) and not be extended to communication works. The unnecessary extension from broadcast and cable programme to communication works undermines and affects a legitimate potential licensing stream and is likely inconsistent with NZ's obligations under international treaties.

Section 48

26. Similar issues arise under s 48. This section applies:

> "When a copy *of a communication work* is
>
> (a) Made or communicated by or on behalf of an education establishment; or
>
> (b) Made or supplied by an educational resource supplier to an educational establishment."

27. Under s 48(2) and (3) the making or communication of a **copy** of the communication work by or on behalf of the educational establishment (or by or on behalf of the educational resource supplier) does not infringe copyright **"in any work included in it"** if the copy is made or supplied for the educational purposes of the educational establishment.

28. When this provision was under consideration MED/MBIE justified expanding "broadcast" to "communication work" in s 48 on the following basis:[41]

[41] MED Clause by Clause analysis page 40: Responding to submission from Motion Picture Association, Screenplay, APRA / AMCOS.

> “The passages carried over from existing section 48(1), where it is not currently a condition that the any [sic] work included in broadcast work must have been included in the broadcast with the permission of the copyright owner. Currently, liability for infringing copyright lies with the broadcaster or cable service provider, rather than with the educational establishment. It is therefore appropriate that under new section 48 liability for copyright infringement lies with the person communicating the communication work.”

29. Copies of such communication works could be used by the music department in a university or school for educational purposes without more.

30. At present we license such musical works and sound recordings to educational establishments and this revenue is then returned to rights holders. By providing a free permitted use, the legislature is interfering with a normal licensing exploitation of such works.

USING TERM “OBJECT” IN COPYRIGHT ACT

DIXON v R

Issues 20:	**“What are the problems (or benefits) with using ‘object’ in the Copyright Act? What changes (if any) should be considered?”**
Issue 21:	**“Do you have any concerns about the implications of the Supreme Court’s decision in *Dixon v R?* Please explain.”**

(1) Music’s Position

1. We support the submissions of Sky on these two issues.

USER-GENERATED CONTENT

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

1. Music does not see problems with how the Copyright Act applies to user generated content, which should be treated like any other content under the Act.

2. We would first clarify that the term "UGC" is often used to describe what is more accurately called *user uploaded content (UUC)* where the user is simply uploading copies of third parties' works to an online service.

3. Consumers love to use music as a soundtrack to their home videos, or part of a mash-up or a lip synch, and share the videos with their friends. Music companies have recognised and responded to consumers wanting to engage with music in different ways and have licensed YouTube and Facebook, the major platforms that make "UGC" content available.

4. YouTube is licensed by APRA AMCOS, major record companies and some independents in respect of user-generated content. Videos that are uploaded by users and incorporate music can be claimed by relevant copyright owners, tracked and monetised via YouTube's Content ID tool.

5. Facebook is licensed by APRA AMCOS, major record companies and some independents for the use of music on Facebook, Instagram and Messenger. These licences enable users to engage with music in a variety of ways, including to share personal videos incorporating music, soundtrack personal videos from a library of audio recordings, record and live-stream "lip-synch" performances, pin snippets of licensed music to their personal Facebook and on Instagram stories, there is also the option to add a music sticker which plays a snippet of licensed music.

6. It is sometimes suggested that user generated content should be the subject of an exception. This is not needed as the market has provided a solution, and would be seriously harmful to right holders' interests. Of course the existing fair dealing exceptions apply to UGC equally as to other content and makers of UGC are entitled to rely on them.

7. Since music companies have licensed major UUC platforms, consumers are able to freely engage with music, while the internet platform monetising the music pays a share to music right holders.

8. While there are no problems with how the Act treats UGC as such, there are problems arising from the appropriation of music by certain online platforms that are commonly used for user generated content, and the safe harbour regime that has allowed this to happen – that is a different issue that is addressed in our response to **Issues 59-62**.

RENOUNCING COPYRIGHT

Issue 23:	**"What are the advantages and disadvantages of not being to be able to renounce copyright? What changes (if any) should be considered?"**

1. We are not aware of any problems with copyright owners not being able to renounce copyright. However, we recognise that where copyright subsists in a work, the owner has freedom of choice as to how it licenses or exploits its copyright work.

2. We therefore do not object to the creation of a scheme to allow creators or copyright owners to formally renounce their rights if they wish to do so. For example, a voluntary register of renounced rights could be operated by IPONZ.

OTHER CONCERNS WITH RIGHTS

Issue 24:	**"Do you have any other concerns with the scope of the exclusive rights and how they can be infringed? Please describe."**

1. As set out in our response to **Issue 15**, the exclusive rights are critical to rights holders and form the basis of music industry licensing and enforcement. There are no concerns and we are not seeking any changes. We have made some comments in relation to the right of communication to the public in response to **Issue 18**.

MORAL RIGHTS

Issue 25: "What are the problems (or benefits) with the way the moral rights are formulated under the Copyright Act? What changes to the rights (if any) should be considered?"

1. The moral rights relevant to the music industry are:

   - The moral right of songwriters and composers (a) to be identified as the author of the work and (b) to object to derogatory treatment of their work.

   - The moral right of performers (a) to be identified as performer and (b) to object to derogatory treatment of a performance.

2. Moral rights are important to creators as non-economic recognitions of their authorship and creativity.

3. Music is not aware of any practical problems in the area of moral rights.

4. The right to object to derogatory treatment has never been interpreted in New Zealand, but overseas case law suggests the right is narrow.

5. The right to object to derogatory treatment may be relevant in other contexts, when considering:

   - A possible exception for parody and satire –see our response to **Issue 39**.

   - Uses of taonga that are offensive or inappropriate. Clearly moral rights protection is not sufficient to provide protection for taonga. See our response to **Issues 93 to 97**.

PERFORMERS' RIGHTS

Issue 27: "Will there be other problems (or benefits) with the performers' rights regime once the CPTPP changes come into effect? What changes to the performers' rights regime (if any) should be considered after those changes come into effect?

(1) Summary of Music's Position

1. Music does not see any problems or issues arising from the performers' rights regime as amended by the CPTPP.[42] In practice, New Zealand featured performers have been receiving remuneration for the use of their recorded performances in broadcast and public performance for over 20 years under Recorded Music New Zealand's Direct-to-Recording Artist Scheme.

(2) The Issues Paper

2. In the section on Performers' Rights the Issues Paper notes [para 238] that the Act prior to 30th December 2018 provided performers with the right to consent to recording or live communication. The CPTPP requires New Zealand to join the WIPO Performers and Phonograms Treaty (WPPT) and this in turn "requires that performers be given certain moral and economic rights over recordings made and the broadcasting of, their live performances" [para 241].

3. The Issues Paper notes that the Trans-Pacific Partnership Agreement Act 2016 already contains the changes required to join the WPPT and CPTPP and that those changes came into force on 30 December 2018.

(3) Performers' Rights Regime and Direct to Artist Scheme

4. As outlined elsewhere in this submission, Recorded Music New Zealand is the Collective Management Organisation for sound recording right owners in New Zealand, licensing communication, public performance and certain limited reproduction rights on behalf of its members. Recorded Music New Zealand provides blanket licences to television and radio broadcasters, and through its OneMusic initiative with APRA AMCOS, provides blanket licence solutions for a wide range of NZ businesses and organisations publicly performing and copying its members' recordings. Recorded Music New Zealand collects licence income from many thousands of music users each year and distributes this income to record labels and recording artists as annual royalties.

5. At the time of writing Recorded Music New Zealand represents approximately 2,125 individual Master Rights Holders (copyright owners of sound recordings), representing many millions of individual recordings (the numbers growing every day with new music continuously being created and released). The master rights holders represented include:

   (a) The three "major" record companies in New Zealand: Universal Music NZ Ltd, Warner Music NZ Limited, and Sony Music Entertainment;

42 Brought into force by the Comprehensive and Progressive Agreement for Trans- Pacific Partnership Amendment Act 2018.

(b) Independent record companies and distributors including Rhythmethod Limited, Southbound Distribution, Border Music, DRM Limited, Flying Nun Records, Arch Hill Recordings and Loop Recordings;

(c) Smaller independent companies which are often owned by individual recording artists and bands and include Years Gone By Limited (Avantdale Bowling Club), The Drop Limited (Fat Freddy's Drop), Massive Entertainment Limited (Six60) and Black Seeds Limited; and

(d) Over 2,000 other independent master rights holders representing all genres and styles, including current and legacy artists and located throughout New Zealand.

6. As part of its licensing of sound recordings, Recorded Music New Zealand actively operates the "Direct-to-Recording Artist" Scheme. This has been in place for some 23 years since 1995. Under this scheme Recorded Music New Zealand distributes 50% of the revenues Recorded Music New Zealand obtains (after costs have been deducted) to New Zealand featured bands and artists directly. This is a monetary return to featured performers on each relevant sound recording.

7. To benefit from the Scheme, both the Master Rights Holder and the recording artist must agree and then register under the Scheme. The royalties collected by Recorded Music New Zealand are then distributed 50/50 direct to the master rights holder and the recording artist. Where a recording artist owns their own recordings, they receive both shares.

8. Recorded Music New Zealand provides for and actively encourages performers to join its Direct-to-Recording Artist Scheme. Currently Recorded Music New Zealand has over 3,000 individual recording artists registered in the Direct-to-Recording Artist Scheme. This continues to grow on a month-by-month basis and ensures a significant portion of the licence income collected is paid directly to New Zealand recording artists each year.

TECHNOLOGICAL PROTECTION MEASURES

Issue 28:	**"What are the problems (or benefits) with the TPMs protections? What changes (if any) should be considered?**
Issue 29:	**"Is it clear what the TPM's regime allows and what it does not allow? Why/why not?"**

(1) Summary of Music's Position

1. The current TPM provisions in the Copyright Act are inadequate to protect right holders against even the most egregious conduct.

2. As set out elsewhere in this submission, streaming services have become the most popular way for consumers to enjoy music, representing nearly 70% of recorded music revenues in 2018. Streaming services offer access to a catalogue of around 40 million recordings. There is no windowing of content, as all music is released globally on the same day each week.

3. Spotify and YouTube offer the option of music streaming for free, in return for watching advertising. However, premium versions of streaming services offer additional benefits in return for payment of a monthly fee. One of the most popular of these benefits is the ability to listen to music offline while not connected to the internet.

4. Music streaming services rely on TPMs in order to differentiate these offerings to consumers. Devices and services that enable these TPMs to be circumvented are undermining a core revenue stream for right holders. This is not a theoretical problem: stream ripping from YouTube is widespread with 20% of New Zealanders using stream ripping sites in a 3 month period.

5. 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.

6. Stream ripping sites are the very type of threat that TPM prohibitions were intended to guard against. Despite this, it is not clear that the current TPM provisions would provide an effective remedy against the operator of a stream ripping site, app or browser extension, due to the complicated and unnecessary knowledge requirements, and the absence of a prohibition on circumventing access control TPMs.

7. The TPM provisions need to be amended as set out in this submission.

8. The changes to the Act which Music seeks: are

    (a) The enactment of the provisions on access control TPMs contained in the 2016 TPPA Amendment Act;

    (b) A prohibition on circumventing access control TPMs;

(c) Changes to the definition of 'TPM circumvention device' to harmonize with the definitions in Australia and the UK;

(d) A change to the knowledge requirement in s226A and the suspended ss226AB and AC;

(e) The inclusion of a presumption; and

(f) The inclusion of additional acts in s226A to cover 'distributes' and 'has in his possession for commercial purposes'.

(2) The Issues Paper

9. In paragraphs [244] – [247] the Issues Paper contains a short description of TPMs and the two main types, namely **copy controls** and **access controls**. Examples of each type are provided. Para [247] states:

> "TPMs can facilitate the development of online business models for the delivery of copyright works to consumers. They can also impede the reasonable use of copyright works by consumers and business."

10. In the section entitled Current Situation, the paper notes the following:

(i) Only copy control TPMs are protected.[43] Access controls are not included. These *were* included in the TPP Agreement Amendment Act but as these obligations were suspended under CPTPP, the provisions have not been brought into force.[44]

(ii) Section 226A prohibits dealing in a TPM circumvention device, providing a service intended to enable or assist a person to circumvent a TPM; publishing information that enables or assists another person to circumvent a TPM if the person knows or has reason to believe that the device or service will be used to circumvent a TPM.[45]

(iii) The actual act of circumventing a TPM is not prohibited in the Act.[46]

(iv) There are a series of designated exceptions to TPM prohibitions one example is that people may provide a TPM circumvention device to a "qualified person". Qualified persons are certain librarians, archivists or an educational establishment the user of a copyright work who wishes to make use of a copyright exception may also ask a qualified person to assist them to circumvent a TPM but only if the copyright owner or exclusive licensee has refused to assist.[47]

(v) Any person may use a TPM device to circumvent a TPM to make use of one of the exceptions in Part 3 of the Act.[48]

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43 At para [248].
44 At para [254].
45 At para [249].
46 At para [250].
47 At para [251].
48 At para [252].

11. It is clear from paragraphs [255] and [256] that the Ministry wishes to obtain information on the TPM regime.[49]

(3) The TPM provisions in the TPP Agreement Amendment Act 2016

12. On 21 November 2016 Parliament passed the Trans Pacific Partnership Agreement Amendment Act 2016. This was in anticipation of all TPPA states ratifying the Agreement. As a result of the US withdrawal, this Agreement proceeded in a different form, as the Comprehensive and Progressive Agreement for TPP ('CPTPP').

13. The changes required for this revised version of the Treaty were implemented in New Zealand by the Comprehensive and Progressive Agreement for Trans Pacific Partnership Amendment Act 2018 (which came into force on 30 December 2018).

14. In relation to TPMs the primary change between the TPPA and CPTPP provisions is that Article 18.68 of the TPP Treaty was suspended. MFAT's comparison between the TPPA and CPTPP states that as a result of the suspension of that Article:[50]

> "New Zealand will not have to provide more extensive protection to technological protection measures (TPMs), the digital "locks" used to protect copyright works.

15. Article 18.68(1) required Treaty states to provide "effective legal remedies against the circumvention of effective technological measures".[51] In turn, "effective technological measures" were defined[52] to mean:

> "Any effective technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, or phonogram, or protects copyright or related rights related to a work, performance or phonogram."

16. The suspension of the Article 18.68 TPM provisions has no doubt been undertaken by MFAT with an eye on future free trade agreement negotiations including the EU – NZFTA and a possible UK FTA (post Brexit). No doubt the issue of TPMs is seen as a possible negotiating "card".

17. But the fact that New Zealand has already previously implemented Article 18.68 in the 2016 TPPA Amendments demonstrates that Parliament was previously willing to properly implement that Article including (as discussed below) TPMs covering access controls. The 2016 amendments will therefore be taken by free trade negotiators from other states or trade blocs as the starting point on TPMs. It therefore seems unrealistic for the Issues Paper to proceed on the basis as though the 2016 amendments never occurred.

18. Nonetheless in the next section we go on to address the issues and problems arising from New Zealand's current TPM regime.

(4) What are the problems with TPM protection?

49 Testing the TPM's regime at [255] and [256].
50 *CPTPP v TPP* - https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/understanding-cptpp/tpp-and-cptpp-the-differences-explained/.
51 This in turn is reaffirming that TPPA states must implement these same provisions from the WIPO Internet Treaties.
52 Article 18.68(5).

19. The TPM provisions implemented in the 2008 amendments were at a time when sound recordings supplied to the New Zealand market were overwhelmingly physical CDs or digital purchases (downloads) via such services as iTunes.

20. The first introduction of smart phones into New Zealand did not occur until late 2008 when a few parties began to parallel import Apple iPhone devices into New Zealand. It was not until 2009 and later with the convergence of smart phones, better broadband and subsequently Wi-Fi services that smart phones began to achieve rapid market penetration in New Zealand.

21. Streaming services for music were in contemplation at the time of the 2008 amendments but not in operation in New Zealand.

22. The rapid uptake of smart phones by New Zealanders from 2011 onwards coupled with later and different models of smart phones meant that the conditions were right for streaming services.

23. As set out elsewhere in this submission, streaming services such as Spotify (May 2012) and Apple Music (July 2015) have effected a fundamental change to the way in which sound recordings are now consumed by New Zealand consumers. Whereas in 2009 the market comprised predominantly physical CDs and digital downloads, by 2018 there has been a very significant switch by New Zealand consumers to using streaming services.

24. Streaming services are fundamentally different from digital downloads. With both CDs and digital downloads, purchasers have paid to *own* a physical CD/single or digital CD/track. With streaming the consumer is given *access* to the world-wide portfolio of sound recordings licensed to the streaming service by copyright rights holders.

    (a) In the case of Spotify, the consumer has a choice between a free service where there are advertisements or a premium service with no advertisements but carrying a per month subscription fee;

    (b) Apple Music operates purely on a subscription fee and does not offer a free advertisement-based option.

25. Some streaming services allow users to download the sound recording to their device so as to permit off-line access. This form of digital download can only be accessed via the particular subscription music service and is not transferrable to another device. The track is not owned by the user.

26. Copyright owners /artists whose works are streamed are remunerated on the basis of a per track per stream payment. So the rights holders rely on continuing access by consumers to the sound recordings on the streaming service for their payments. No longer is there a one-off purchase price paid for ownership (and as a result a lifetime's access to a physical CD or download). Instead consumers now simply obtain access to the sound recordings.

27. The streaming services that now operate in New Zealand rely on **access control TPMs** which are quite different from those operating in 2008 in relation to physical CDs and digital downloads. Because streaming subscribers do not own the music they consume, their TPMs implement a variety of measures designed to control access and in that way prevent consumers from copying and downloading sound recordings (other than in the limited circumstance described). Access control TPMs are really at the heart of most internet-based services that now disseminate creative content.

This extends well beyond music streaming services. So access control TPMs are used for online access to journal databases and cloud-based software applications as well as online access to movies and television programmes distributed by Netflix, Lightbox and Neon.

28. Detailed descriptions of the TPMs used by music streaming services are not provided in these submissions for reasons relating to security

29. At present the fact that New Zealand's TPMs provisions do not cover access controls is a major gap in the legal protection for streaming services and for any new consumption models that will no doubt grow up in future. A further major gap is the fact that the act of circumventing a TPM is not prohibited.

30. No doubt it is tempting for officials to think that the circumvention of TPMs is unlikely in New Zealand. Nothing could be further from the truth. In 2006 for example in relation to PlayStation games and consoles a New Zealand student, Mr Van Veen designed and produced circumvention software which bypassed the TPMs governing Sony's PlayStation consoles and the copying of PlayStation games. This circumvention device/software was rapidly disseminated to the UK and Hong Kong. It led to proceedings being brought in New Zealand by way of interim injunction to restrain any further dissemination and subsequently for damages.[53]

Stream Ripping

31. A further problem which has arisen since 2008 is stream ripping. In submissions to the Select Committee in 2007 Recorded Music New Zealand warned that this was a problem on the horizon and was a reason why improved TPM provisions were required (compared to those being then implemented). Since 2008 there has been a rapid rise in stream ripping and dedicated websites have been created to facilitate stream ripping. These have included youtubeMP3.com and convert2mp3.com (amongst many others). New sites arise when website blocking measures are adopted against existing sites. More information on stream ripping is included in *Music Piracy – Background*.

32. Stream ripping 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. The process has become the most common way of illegally downloading music[54]

33. 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.

34. 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

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53 The damages case is *KK Sony Computer Entertainment v Van Veen* (2006) 71 IPR 179.

54 For a detailed breakdown of New Zealand consumers' use of stream ripping websites refer to Music Piracy Background Annex 1 and Horizon Music Consumer Study Annex 2.

access; and

(c) diverting sales of permanent downloads.

35. 90 percent of stream ripping downloads are sourced from YouTube, although ripping can also take place from other streaming services such as SoundCloud.

36. There are different varieties of stream ripping sites and services that differ both in the technical details of their operation, and also the user facing elements. As regards the user experience, some stream ripping services simply offer an input box for a URL, which the user derives from the streaming service, and then a downloaded file. Other services offer enhanced functionality. For example some offer a search facility for users to enter artist and track information and obtain a download, thereby avoiding the need for the user to visit the streaming service separately to obtain the URL (for example see convert 2mp3). [55] Others offer lists or charts of popular recordings (for example see http://www.freemusicdownloads.world/). [56]

37. In the case of stream ripping services involving YouTube, the circumvention is of YouTube's own TPMs. YouTube uses various TPMs that involve elements of access control (and are not described in detail here for security reasons). For the purposes of effective protection, it is essential that access controlled TPMs be included within the definition of TPM in New Zealand.

38. The provisions which were implemented in 2016 as part of the TPP Agreement should therefore be brought into effect – but with a number of improvements outlined in the next section.

(5) What changes should be considered?

39. The changes which we seek are as follows. These comments are directed to the current definitions enacted with the effect from 30 December 2018 by the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Amendment Act 2018. But in several cases reference is also made to the provisions emailed in 2016 but which are not yet in force.

(a) Access control TPMs must be included

40. We strongly submit that there is a need to enact provisions governing access control TPMs. Such provisions *were enacted* as part of the 2016 TPPA Amendment Act ie:

(i) The definition of access control TPM in s 226;

(ii) The inclusion of access control TPM in the definition of TPM in s 226; and

(iii) Section 226AC prohibition on circumventing access control TPMS.

41. Given that these provisions were previously passed by Parliament in 2016 in anticipation of the TPPA coming into force, they need to be brought into effect. As explained in section (3) modern streaming services rely on access control TPMs. So the gap in the law in New Zealand is a serious issue.

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[55] As at 6th June 2018.
[56] As at 6th June 2018.

(b) Circumventing Access control TPMs

42. The 2016 Amendments enacted s 226AC providing a prohibition on circumventing access control TPMs. This provision needs to be brought into force (with consequential amendments discussed below). It is a major gap for there to be no prohibition on the act of circumventing access control TPMs.

(c) Definition of TPM circumvention device

43. This term is presently defined in s 226 as follows:

> "Means a device, product, or component that –
>
> (a) is promoted, advertised , or otherwise marketed by or on behalf of a person referred to in section 226A(1) for the purpose of circumventing a technological protection measure; or
>
> (b) has no commercially significant purpose or use other than to circumvent a technological protection measure; or
>
> (c) is solely or primarily designed or produced for the purpose of circumventing a technological protection measure."

44. The New Zealand definition places a high onus of showing under heading (b) that the circumvention device "**has no commercially significant purpose or use** other than to circumvent a technological protection measure". By contrast 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"[57] or "has only a limited commercially significant purpose or use".[58]

45. This difference in wording can be important. For example, in cases involving the use of TPM circumvention devices called modchips in relation to PlayStation2 games, the persons selling the devices often argued that the modchips had a role in providing backup copies of the PlayStation games.[59] Sceptical courts ended up discounting that particular argument on the facts because there was no real demand or need for a backup copy of a game.

46. But the words in the New Zealand provision "*has no commercially significant purpose or* use" set an unnecessarily high bar and will make it difficult in a particular case to meet that standard despite the fact that the circumvention device is being actively promoted, advertised, marketed or used as having the purpose or use of circumventing the TPM. The other "purpose" or "use" is often just a smoke screen masking or attempting to mask the real intent.

47. We therefore recommend that the New Zealand provisions be harmonised with those applying in Australia and the UK and that the definition of "**TPM circumvention device**" in s 226 read:

> "(b) Has only a limited commercially significant purpose or use other than to circumvent a technological protection measure."

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57 Section 296ZD(1)(b)(ii) UK CDPA 1988.

58 Section 10(1) Copyright Act 1968 (Aust) definitions of 'circumvention device' and 'circumvention service' (as amended by Schedule 12 ss 2 and 3 Copyright Amendment Act 2006).

59 *Kabushiki Kaisha Sony Computer Entertainment v Ball* [2005] FSR 159.

48. Subsection (c) of the definition should be widened in the same way that s 296ZD(1)(b) of the UK CDPA 1988 is worded. In the English provision the third alternative limb reads:

> "Primarily designed, produced, **adapted or performed** for the purposes of **enabling** or **facilitating** the circumvention."

49. So sub-paragraph (c) would read:

> "(c) Is solely or primarily designed, produced, adapted or performed for the purposes of enabling or facilitating the circumvention of a technological protection measure."

50. Even though the 2016 TPP amendments are not in force, it is sensible to be looking at those provisions as well. Consistently with the changes to the definition of 'TPM circumvention device', we submit that the following changes should be made to the prohibition in s 226AB on providing services to circumvent technological protection measures. Section 226AB(1) should read:

> "(b) The service has only a limited commercially significant purpose or use other than to circumvent a technological protection measure:
>
> (c) The service is solely or primarily designed, produced, adapted or performed for the purpose of circumventing a technological protection measure."

(d) The knowledge requirement: Additional prohibited acts in 226A

51. 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".

52. In the provisions contained in the 2016 Amendment there are similar knowledge requirements. In relation to s 226AB (providing a service to circumvent technological protection measures) the same knowledge requirement is contained in sub-section (2).

53. In s 226AC, relating to circumventing access control TPMs, the knowledge requirement is:

> "(a) A knows or has reason to believe, that A is circumventing an access control TPM."

54. This element requires a copyright owner to prove a very specific type of knowledge on the part of the person engaged in dealings about what its customers will do with a device in the future. This requirement is likely to make it difficult if not impossible for copyright owners to use the provision for enforcement. The specific type of knowledge required is also inconsistent with provisions in other jurisdictions on distributing circumvention devices; and has been proven to be inadequate through case law (in particular in the UK). We therefore submit it is not providing "adequate legal protection and effective legal remedies against the circumvention" of TPMs as required by the WIPO treaties.[60]

55. The difficulty in proving the type of specific knowledge (i.e. that the TPM spoiling device will or is likely to be used to infringe copyright in a TPM) can be illustrated by practical examples. A highly relevant reported case is *Sony Computer Entertainment v Ball*[61]. The case was commenced in the UK against a

[60] With respect to sound recordings, WPPT Article 18.
[61] *Kabushiki Kaisha Sony Computer Entertainment v Ball* [2005] FSR 159.

defendant (Mr Ball) who was selling “mod chips” that, when used in conjunction with a PlayStation console, enabled the use of pirate PlayStation games.

56. In that case, there were two legislative provisions that potentially applied to Mr Ball’s actions, a previous provision and a new amended provision. The old provision in the UK legislation (that applied to Mr Ball’s actions before a specified date) required Sony to prove that the defendant “knew or had reason to believe” that the circumvention device would be used to make infringing copies i.e. closely similar to the wording in ss 226A(a), 226AB(2) (not in force) and 226AC (not in force). The relevant provision, previously s.296 of the UK Copyright, Designs and Patents Act 1988, is reproduced as Section 6 below for easy reference.

57. The Court considered a number of arguments from both parties regarding whether Mr Ball could be regarded as having this knowledge. This became a major issue in the case, was time-consuming, and did not provide a useful outcome. The court in the case described the old section 296 in the UK Act as creating a “lacuna”[62] in Sony’s rights caused by the technical drafting of the legislation.

58. Having addressed the old section 296, the Court in *Sony v Ball* went on to apply the new provision, section 296ZD of the current UK Act. That section is reproduced in Section 6 below, and includes the elements set out above in our proposed amendment for the definition of “TPM circumvention device”. Applying that provision,[63] which does not include a knowledge requirement linked to infringement of copyright, the court held that Mr Ball would be liable, because the device fell within the definition of prohibited TPMs, and he could not escape liability by arguing that he did not have knowledge or reason to know of a likely future event.[64]

59. We submit that the issues raised by the *Sony v Ball* case present a compelling illustration of the need to modify the knowledge requirement from s 226A (and in 226AB and 226AC).

60. In the UK provision s 296ZA is less restrictive in its wording. The section states:

> “(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.**”

61. Similarly in s 296ZB the offence provision it is a defence to any prosecution for the defendant:

> “To prove that he did not know, and had no reasonable ground for believing, that –
>
> (a) The device, product or component; or
>
> (b) The service,
>
> **enabled or facilitated the circumvention of effective technological means**.”

62 Ie a gap: see paragraph [23].

63 There is a defence of innocent infringement in s 296ZD(7) where the defendant did not know or have reason to believe that his acts enabled or facilitated an infringement of copyright.

64 See paragraph [39].

62. In Australia[65] the knowledge requirement is that the defendant "knows, or ought reasonably to know, that the device is a circumvention device for a technological protection measure" and similarly in respect of services ie an objective test.

63. We submit that based on the above provisions the current s 226A (and the suspended s 226AB and 226AC) place New Zealand out of step with its major trading partners.

64. Further, the knowledge standard to dealings in TPM circumvention devices and services should be a standard that does not inhibit the Court in inferring knowledge or constructive knowledge from the circumstances surrounding the dealings. (Dealers are unlikely to confess, thereby giving direct proof of knowledge.) If actual knowledge is required, an inference, short of direct proof of knowledge, would still be possible but it means the level of proof required from a copyright owner is higher and more difficult to meet.

65. As to the constructive knowledge standard, a more useful standard to use, rather than "knew or had reason to know" would be "knew or ought reasonably to have known". This standard enables a Court to find against the defendant if a reasonable person in the circumstances would have known. This standard was used in New Zealand in s35(1)(a) of the 1994 Act (as amended by the Copyright (Parallel Importation of Films and Onus of Proof) Amendment Act 2003) i.e. that person knows or ought reasonably to know".

66. Importantly, this is consistent with the standard of proof contained in the Australian provisions.[66]

67. Further, it is submitted that there should be a presumption in favour of the copyright owner, which the defendant may rebut by providing evidence that he or she did not have the requisite knowledge or constructed knowledge. This would ensure that in a hypothetical case of a defendant who genuinely did not have the knowledge nor the ought reasonably to have known, despite the TPM having the characteristics set out in the definition for that term, that defendant would be entitled to put its case, while not requiring copyright owners to positively prove an additional element in every case.

68. These issues as to proof are equally relevant to **Issue 76** (*what changes (if any) should be considered to help copyright owners take action to enforce their copyright)*.

69. Finally, we recommend that additional acts need to be included in the prohibition in s 226A. In the equivalent provision in the UK (s 296ZD) the prohibited acts include "*distributes*" and "*has in his possession for commercial purposes*". The Australian provisions[67] also include "distributes". These terms are already used in the New Zealand Act in relation to secondary infringement[68] so are entirely familiar.

70. We submit that the wording of s 226A should therefore be amended to incorporate the same knowledge requirement as is contained in Australia. This amendment should also incorporate the prohibition on TPM services mentioned in the previous section of the submissions and should also include the expanded category of infringing acts. The wording therefore we recommend is:

65 Section 116AN and s 116AP.
66 S116AO and 116AP; see also s116AN in respect of the act of circumventing an access control protection measure.
67 SS116AO and 116AP.
68 SS 36 and 37 Copyright Act 1994.

"**S226A prohibited conduct in relation to technological protection measure**

(1) A person (A) must not make, import, *distribute*, sell, let for hire, offer or expose for sale or hire, or advertise for sale or hire, *or have in A's possession for commercial purposes*, a TPM spoiling device that applies to a technological protection measure if A knows *or ought reasonably to know that the device is a TPM spoiling device*;

(2) A person (A) must not provide a *TPM spoiling* service that applies to a technological protection measure if A knows or *ought reasonably to know that the service is a circumvention service for a technological protection measure*."

71. The same knowledge requirement should be incorporated in ss 226AB and 226AC (which are not yet in force).

(6) Schedule (UK Provisions)

72. The two UK provisions referred to in the previous section are as follows:

(a) The original form of s 296 UK CDPA 1988

"Devices designed to circumvent copy-protection

296.

(1) This section applies where copies of a copyright work are issued to the public, by or with the licence of the copyright owner, in an electronic form which is copy-protected.

(2) The person issuing the copies to the public has, the same rights against a person who, knowing or having reason to believe that it will be sued to make infringing copies –

(a) makes, imports, sells or lets for hire, offers or exposes for sale or hire, or advertise for sale or hire, any device or means specifically designed or adapted to circumvent the form of copy-protection employed, or

(b) publishes information intended to enable or assist persons to circumvent that form of copy-protection.

as a copyright owner has in respect of an infringement of copyright.

(2A) where the copies being issued to the public as mentioned in subsection (1) are copies of a computer program, subsection (2) applies as for the words "or advertises for sale or hire" there were substituted "advertises for sale or hire or possesses in the course of a business".

(3) Further, he has the same rights under section 99 or 100 (delivery up or seizure of certain articles) in relation to any such device or means which a person has in his possession, custody or control with the intention that it should be used to make infringing copies of copyright works, as a copyright owner has in relation to an, infringing copy.

(4) References in this section to copy-protection i11cl11de any device or means intended to prevent or restrict copying of a work or to impair the quality of copies made.

(5) Expressions used in this section which are defined for the purposes of Part [of this Act (copyright) have the same meaning as in that Part.

(6) The following provisions apply in relation to proceedings under this section as in relation to proceedings under Part I (copyright) –

(a) section 104 to 106 of this Act (presumptions as to certain matters relating to copyright), and

(b) section 72 of the Supreme Court Act 1981, section 15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and section 94A of the Judicature (Northern Ireland) Act 1978 (withdrawal of privilege against self-incrimination in certain proceedings relating to intellectual property);

And section 114 of this Act applies, with the necessary modifications, in relation to the disposal of anything delivered up or seized by virtue of subsection (3) above."

(b) Section 296ZD UK CDPA 1988

296ZD RIGHTS AND REMEDIES IN RESPECT OF DEVICES AND SERVICES DESIGNED TO CIRCUMVENT TECHNOLOGICAL MEASURES

(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 (C) manufactures, imports, distributes, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or has in his possession for commercial purposes any device, product or component, or provides services which—

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

(ii) have only a limited commercially significant purpose or use other than to circumvent, or

(iii) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of,

those measures.

(2) The following persons have the same rights against C as a copyright owner has in respect of an infringement of copyright—

(a) a person—

(i) issuing to the public copies of, or

(ii) communicating to the public,

the work to which effective technological measures have been applied;

(b) the copyright owner or his exclusive licensee, if he is not the person specified in paragraph (a); and

(c) the owner or exclusive licensee of any intellectual property right in the effective technological measures applied to the work.

(3) The rights conferred by subsection (2) are concurrent, and sections 101(3) and 102(1) to (4) apply, in proceedings under this section, in relation to persons with concurrent rights as they apply, in proceedings mentioned in those provisions, in relation to a copyright owner and exclusive licensee with concurrent rights.

(4) Further, the persons in subsection (2) have the same rights under section 99 or 100 (delivery up or seizure of certain articles) in relation to any such device, product or component which a person has in his possession, custody or control with the intention that it should be used to circumvent effective technological measures, as a copyright owner has in relation to any infringing copy.

(5) The rights conferred by subsection (4) are concurrent, and section 102(5) shall apply, as respects anything done under section 99 or 100 by virtue of subsection (4), in relation to persons with concurrent rights as it applies, as respects anything done under section 99 or 100, in relation to a copyright owner and exclusive licensee with concurrent rights.

(6) The following provisions apply in relation to proceedings under this section as in relation to proceedings under Part 1 (copyright)—

(a) sections 104 to 106 of this Act (presumptions as to certain matters relating to copyright); and

(b) section 72 of the [F2 Senior Courts Act 1981], section 15 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 and section 94A of the Judicature (Northern Ireland) Act 1978 (withdrawal of privilege against self-incrimination in certain proceedings relating to intellectual property);

and section 114 of this Act applies, with the necessary modifications, in relation to the disposal of anything delivered up or seized by virtue of subsection (4).

(7) In section 97(1) (innocent infringement of copyright) as it applies to proceedings for infringement of the rights conferred by this section, the reference to the defendant not knowing or having reason to believe that copyright subsisted in the work shall be construed as a reference to his not knowing or having reason to believe that his acts enabled or facilitated an infringement of copyright.

(8) Subsections (1) to (5), (6)(b) and (7) and any other provision of this Act as it has effect for the purposes of those subsections apply, with any necessary adaptations, to rights in performances, publication right and database right.

(9) The provisions of regulation 22 (presumptions relevant to database right) of the Copyright and Rights in Databases Regulations 1997 (SI 1997/3032) apply in proceedings brought by virtue of this section in relation to database right."

APPROACH TO EXCEPTIONS

(1) Summary of Music's Position

1. The foundation of copyright in New Zealand is adequate and clear copyright protection to provide the legal certainty to invest and take risks. Now that licensing is the overwhelming way in which income is derived from many copyright works (including music), it is critically important to have certainty over any exceptions or permitted uses so that rights holders can know what they can license. Certainty is also a requirement of the Berne 3-Step test.

2. The permitted uses contained in Part 3 of the Act result from detailed policy considerations by policy makers and respective Select Committees. The use of statutory permitted uses is a feature of copyright law shared with many common law countries such as the UK, Canada and Australia.

3. The Issues Paper itself exemplifies the importance of policy making through a detailed analysis of the evidence regarding any alleged problem or benefits of existing permitted uses, any uncertainties and what changes and conditions should apply.

4. We strongly support the continued use of the legislative statutory permitted uses in Part 3.

(2) The Issues Paper

5. The Issues Paper states at [266] that although its main focus is to identify any problems with the Copyright Act as it currently is, it has included a discussion on fair use because of debate about that. (We are aware that Internet NZ has called for the implementation of "an open fair use style exception".)

6. However, at [267] the Issues Paper makes it clear that MBIE needs a much better understanding of any problems with the current exceptions regime before it would consider alternatives. It therefore directs submitters to focus on the problems or benefits with the current situation (our current permitted acts/exceptions) rather than on reasons why New Zealand should incorporate a fair use exception.

(3) Response

(a) Innovation and Legal Certainty

7. The foundation of copyright in New Zealand is adequate and clear copyright protection. This provides the legal certainty needed to invest and to take commercial risks.

8. Licensing is now the overwhelming way in which income is obtained from music copyright. It is critically important for artists and rights holders, who are investing in the creation of music, to know with certainty what rights they have and any exceptions. Having clear and certain exceptions/permitted uses that are not open-ended gives certainty to artists and rights holders as to:

- What they can license to provide an income from their work; and
- What has been carved out as a permitted use.

9. Such clear and certain exceptions are consistent with the Berne 3-Step test (incorporated in Article 13 TRIPS Agreement) which provides an essential yardstick for any exception. The first requirement of the 3-Step Test is that exceptions must be limited to "certain special circumstances". By having the "certain special cases" in statutory form, those creating copyright works are given the maximum possible certainty.

(b) The Permitted Uses in Part 3

10. Part 3 of the Act contains a series of permitted uses allocated (as the Issues Paper notes)[69] according to particular uses, particular users and particular works. There are also certain limitations on liability.[70]

11. Section 40 sets out that the provisions in Part 3 "are to be construed independently to one another so that the fact that an act is not permitted by one provision does not mean that it is not permitted by another provision".

12. The permitted uses contained in Part 3 are the result of detailed consideration of the various exceptions by policy makers and respective Select Committees.

13. The New Zealand Copyright Act comes from a shared tradition of copyright legislation tracing back to the Imperial Copyright Conference in 1910 at which it was agreed that common copyright legislation would be introduced in the United Kingdom and in the then self-governing dominions comprising (*inter alia*) Canada, Australia, India and New Zealand.[71] A feature of this common copyright legislation has been the specific permitted uses prescribed by legislation. This feature continues today in the UK, Canada, Australia and New Zealand.

14. It has been our experience from the Copyright Act 1994 and the 2008 amendments that there is significant advantage in legislative formulation of exceptions. This allows detailed consideration across a broad range of users, owners and uses of:

- The policy reasons for exceptions.
- The evidence of a need for an exception and why the requirement cannot be met via licensing.
- The consequences of a particular exception for both users and owners.
- The safeguarding conditions that may be needed as part of the permitted use.
- Consideration of comparator provisions in comparable jurisdictions so as to judge what is best for New Zealand.

15. Ultimately many of the exceptions are the result of compromise designed to achieve a fair balance.

16. The process being adopted by this Issues Paper itself exemplifies the process. It is consistent with good policy making. The Issues Paper has asked for feedback and information on the existing exceptions,

69 At [258].
70 At [259].
71 Dalgleish Report para 6; Brown & Grant *The Law of Intellectual Property in New Zealand* para 4.4.

what are the benefits or problems, is there any uncertainty over a particular issue[72] and what changes should be considered. These questions allow receipt of information and an assimilation as to what is occurring in the market. The answers to these issues involve policy analysis and consideration against the background of the Berne 3-Step Test and the Government's policy framework including wellbeing.

17. These are not factors that an individual High Court Judge is able to properly assess in the context of a court case - yet that is what fair use or a more flexible approach to exceptions would involve. High Court Judges are not equipped to make the sorts of detailed policy decisions that have been involved in the various statutory exceptions (for example the conditions surrounding the format shifting exception in s 81(A)). In any individual case coming before the Judge, the court is limited to the evidence that the parties choose to put forward. The evidence that may come before an individual High Court Judge applying an open-ended exception may never include the sorts of policy information that will come before MBIE as a result of this Issues Paper.

(c) Conclusion

18. We strongly support the continued use of the legislative statutory exceptions in Part 3. These provide the necessary certainty needed for copyright creators to invest and take commercial risks.

72 For example Issue 41.

EXCEPTIONS AND LIMITATIONS (PART 5)

FAIR DEALING

Issue 30:	**"Do you have examples of activities or uses that have been impeded by the current framing and interpretation of the exceptions for criticism, review, news reporting and research or study? Is it because of a lack of certainty? How do you assess any risk relating to the use? Have you ever been threatened with, or involved in, legal action? Are there any other barriers?"**
Issue 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?"**
Issue 33:	**"What other problems (or benefits), if any, have you experienced with the exception for reporting current events? What changes (if any) should be considered?"**

(1) Summary of Music's Position

1. As to fair dealing for research and private study we raise the issue that "research" covers a range of uses from non-commercial research to full commercial research services which charge a fee for their work. We support amendments to this fair dealing provision (as in the UK) to restrict research to non-commercial research.

2. We have not encountered any problems in relation to fair dealing for the purposes of criticism, review and reporting of current events. Recorded Music New Zealand and APRA AMCOS provide licences to media (both print and electronic) to cover audio visual and other use of musical works and sound recordings on their websites in ways which extend beyond the scope of the exception for reporting current events. This is an example of commercial licences being available to give the news media wider scope and use rights.

3. We do not agree that there is a lack of certainty in the fair dealing provisions. As the Issues Paper notes, the assessment of fair dealing in any specific case is a question of fact, degree and interpretation, however guidance can be taken from the principles well established in overseas case law.

4. If there is evidence of uncertainty, we propose that a set of guidelines, developed with input and participation from industry and other groups, and adopted by government (for example MBIE or IPONZ) would be the most helpful approach. We understand that some other submitters would also support a guidelines based approach. While it has not been possible to develop these guidelines during the consultation period, Music would be happy to participate in such a process in the future.

(2) The Issues Paper

5. The Issues Paper refers to ss 42 and 43 (the Fair Dealing provisions) and notes at [273] a lack of binding precedent to guide courts as to what amounts to "fair dealing" as there have been very few court cases

in New Zealand. It notes that whether a particular use falls within one of the exceptions is always a matter of fact, degree and interpretation.

6. At [275] the Issues Paper says that it has heard from some stakeholders that the lack of certainty resulting from the exceptions creates a chilling effect on the use, adaptation and consumption of copyright works.

7. Paragraph [276] notes certain complaints as to people using the exceptions principally in pursuit of a commercial outcome rather than in pursuit of knowledge for which they are intended.

8. Issue 33 asks what other problems (or benefits) have been experienced with the exception for reporting current events and what changes (if any) should be considered. Paragraph [278] notes that the distinction between news and entertainment may be changing with events increasingly being announced, noted and critiqued in online social media.

(3) Are there any Problems?

(a) Research or Private Study: S 43

9. In relation to fair dealing for *private study*, we have no problems or issues to raise.

10. As to research, there is an issue. The term "research" is not defined in the Act. 'Research' can encompass private and non-commercial research as well as the full gamut of *commercial research* by entities or businesses which undertake commercial research for profit and charge fees for their work.

11. In the UK (and Europe) the fair dealing provision for research has now been confined to research for a *non commercial purpose*.[73] This has the effect of preserving commercial licensing opportunities for copyright owners and recognises that it was unfair on rights holders to allow *carte blanche* use of copyright works where the researchers are able to charge a fee for their own work.

(b) Criticism, Review and News Reporting

12. As to these categories of fair dealing, at a general level there have been no problems encountered. Criticism, review and news reporting of musical works and sound recordings is welcomed by songwriters, artists and rights holders and is an important way for new works to be publicised.

13. We note however that there is often no need to copy extracts of music in order to review it and this is not what would normally be done in today's environment. Criticism or review is generally done by referring to a link on a licensed service such as Spotify, Soundcloud or YouTube.

14. However, in many instances the news media make use of music for purposes which extend beyond these categories to ones of general entertainment.

15. To meet this, there are well established practices of music licensing. Both APRA AMCOS and Recorded Music New Zealand already provide reproduction licences enabling media to use both published musical works and sound recordings in their "general entertainment programming. As well licences are provided to both print and electronic media that enables their audio visual communications of

[73] Section 29 CDPA 1988.

music. This allows the media to take advantage of the fair dealing exception but then to make much more expansive use of the music for pure entertainment of their viewers, readers and users of their websites in particular.

16. This is an example of commercial licences being available to give news media wider scope and use rights.

(d) Reporting current events

17. The only aspect of Issue 33 we wish to comment on concerns the use of sound recordings in "the reporting of current events". Although paragraph [278] of the Issues Paper states that the distinction between news and entertainment may be changing, the focus really must stay on the statutory words "reporting current events". (Neither 'news' nor 'entertainment' are referred to in this section).

18. We have found that it is relatively easy to ascertain whether there has been a fair dealing in relation to the use of musical works and sound recordings in reporting current events. The law around what is a "fair" dealing means that if there is a report on a current event involving an artist, for instance the test is whether it is necessary to have provided a copy of a work (or extracts from it) on a news website as part of reporting that current event. It is usually readily apparent whether the sound recording is a necessary part of the current event or simply an excuse to provide the work on a website without any real link to the event being reported.

19. As already noted under section (b) above rights holders already license to both print and electronic media so as to cover the expanded uses being made of music by news media in instances which would not qualify as "fair dealing". So any 'gap' is being met through licensing already.

(c) Guidance on fair dealing

20. We do not identify with the comment at [275] of the Issues Paper that there is a lack of certainty resulting from fair dealing that creates a chilling effect on the use, adaptation and consumption of copyright works.

21. Although there have been only a few decisions in New Zealand dealing with fair dealing, this is not indicative of a lack of guidance. The New Zealand fair dealing provisions in both the 1962 and 1994 Copyright Acts were drawn from the UK 1956 and 1988 Acts. The wording of the UK and New Zealand provisions was closely comparable and indeed also with the Australian fair dealing provisions.[74]

22. There are a considerable number of UK and Australian decided cases which provide guidance for the New Zealand courts and rights holders. In one of the leading New Zealand fair dealing decisions *Media Works NZ v Sky Television Network* case[75] Winkelmann J specifically referred to and applied a series of both UK and Australian decisions in reaching her conclusions as to the scope of fair dealing in that case.

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[74] Section 40(1), 41 and 42 Copyright Act 1968.

[75] (2007) 74 IPR 205.

(4) Solutions Sought

23. We do not seek any changes to ss 42 and 43 of the Act, apart from a narrowing of the fair dealing for "research" so as to encompass only non-commercial research.

24. Where there is commercial research, the contract research companies charge clients for their services and output. Both APRA AMCOS and Recorded Music New Zealand are ready to provide licences of their portfolios of works for the purposes of commercial research. Any fees under such licences (which are passed back to artists and rights holders) will be able to be recouped by contract research companies from the fees which they charge their clients.

25. As noted above, if there were to be any concern over uncertainty in respect of fair dealing for the purposes of criticism, review or news reporting, then we would support an approach of publishing fair dealing guidelines. We would be happy to participate in such a project to provide guidelines. These could be published on the IPONZ website.

INCIDENTAL COPYING

Issue 34: "What are the problems (or benefits) with the exception for incidental copying of copyright works? What changes (if any) should be considered?

1. Music is not aware of any problems with the exception for incidental copying of copyright works and we do not believe changes are required.

2. In relation to *sound recordings*, the exception (s41) provides that:

   "Copyright in a work is not infringed by:

   (a) The incidental copying of the work in … a sound recording; or

   (b) … the playing of a sound recording … in which a copyright work has been incidentally copied; or

   (c) The issue to the public of copies of a sound recording … to which paragraph (a) or (b) applies."

3. But subsection (2) makes it clear that for this provision a musical work, words spoken or sung with music or so much of a sound recording or communication work as includes a musical work or those words "must not be regarded as incidentally copied in another work if the musical work or the words sound recording or communication work is deliberately copied".

4. There is no definition of incidental in the legislation. The Modern Law of Copyright[76] suggests that incidental carries connotations of "what is casual, not essential, subordinate, merely background etc."

5. In relation to sound recordings the scope of the provision is likely to be very narrow. It is hard to imagine many cases where an earlier musical work, words spoken or sung with music or so much of a sound recording is *incidentally* copied into another work and not deliberately.

6. Where other such works are deliberately included or copied, then licences will be required from the relevant copyright owners. In our response to **Issue 40**, we address the licensing of samples of existing sound recordings.

7. As to musical works, these are not infringed either where the musical work is incidentally copied. But again s 40(2) excludes the exception where there has been deliberate copying.

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[76] Laddie, Prescott & Vittoria (5th edition 2018) para 21.81.

TRANSIENT REPRODUCTION OF A WORK

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

(1) The Issues Paper

1. The Issues Paper notes that the exception in s 43A was "intended to be limited to the reproduction right for transient copying of works in digital format made by devices or communication networks, like the internet as the result of automatic or inevitable technical processes". The Paper also states[77] that the processes are generally designed to increase efficiency.

2. The Paper notes at [288] that neither 'transient' nor 'incidental' is defined in the Act but that it appears to be analogous to 'copying since the definition of copying includes reproduction'.

3. Commentators have described the provision as limited because it does not capture technologies such as caching which may not be considered an integral and essential part of a technological process.[78]

(2) Music's response

4. We note there is no discussion in this section of the Issues Paper of the safe harbour for caching activities contained in s 92E of the Act. Section 92E is intended to address internet caching activities, not s 43A. There is therefore no reason to expand the scope of s 43A to accommodate caching. In our view the exception is already too broad, as set out below.

(a) The provision needs to state that the reproduction is temporary

5. The normal dictionary definition of 'transient'[79] is '*not durable or permanent, temporary, transitory; esp passing away quickly or soon, brief, momentary.*'

6. 'Incidental' is defined[80] as '*occurring as something casual or of secondary importance'.*

7. The statement in the Issues Paper that the exception was 'intended to be limited for transient copying ... as a result of automatic or inevitable responses' demonstrates and confirms that the intention was not to create something that was permanent. Rather it was designed to give protection where, as a result of an automatic process in communicating a work, there was a temporary reproduction.

8. The core and essential idea of the exception (as confirmed in the Issues Paper) is that the reproduction is to be only a *temporary* machine-driven process.

77 At [287].
78 At [289].
79 Shorter Oxford Dictionary.
80 Shorter Oxford Dictionary.

9. Unfortunately, in the drafting the introduction of the word 'or' in s 43A(a) in the phrase "is transient or incidental" has resulted in a meaning that does not accurately reflect that original intention. It allows for the possibility (not envisaged) of a *permanent* reproduction being excepted.

10. It is significant that the equivalent provisions in Australia, Canada, Singapore, the UK and EU all[81] contain the requirement of the reproduction being 'temporary'.

11. The issue has very real importance to rights holders. During the course of investigations into P2P file sharing by ISPs in New Zealand, Music has obtained evidence of an ISP which purchased expensive overseas caching equipment for many millions of dollars to enable it to cache the sound recordings that were the most frequently requested by its consumers from illegal P2P networks. By caching the sound recordings the ISP was able to speed up the ability of its consumers to obtain illegal sound recordings (and avoid slowing down its network because of the volume of requests). This caching was not just temporary and transient. Such caching involving specific and longer term storing of works should not be covered by s43A and this was never the intention.

12. Music therefore seeks a change to s43A(a) so that it reads "is transient and temporary".

(b) Removal of the words 'or lawful dealing' in s43A(b)(ii)

13. Subsection 43A(b)(I) already contains the words "enabling the lawful use of the work". The words 'or lawful dealing' simply add ambiguity and are unnecessary. A fair dealing with a work that is lawful is a 'lawful use'.

14. Music therefore seeks the deletion of the words 'or lawful fair dealing'.

[81] Australia s43A, 11A Copyright Act 1968; Canada section 30.71 Copyright Act 1985; Singapore s38A; UK s28A CDPA 1988; EU Article 5 of Directive 2001/29/EC

CLOUD COMPUTING

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

1. We are not aware of practical problems with the way copyright exceptions currently apply to cloud computing and we have not seen evidence of a need to consider changes.

2. Cloud computing is an invaluable tool in today's online landscape. As the Issues Paper notes [para 291], cloud storage enables users to store copies of works on a remote server, for access from a different location, and also enables users to back up the content of their devices to the cloud to protect against data loss.

3. Music companies' licensing of cloud services unlocked the full potential of music libraries, allowing users to store almost unlimited amounts of music, rather than being restricted by the storage space on their devices. These services may work in different ways, for example:

    (a) **Store and stream (e.g. Apple iCloud, Amazon Cloud Player, and Google Play):** Some licensed cloud services include functionality that enables users to stream and automatically synchronise copies of music files purchased from the online store operating the service. The licences therefore have specific constraints that are part of the commercially negotiated contract.

    (b) **Scan and match (e.g. Apple 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.

4. While cloud "matching" services enabled users to manage their music library, today more New Zealanders choose to listen to music via subscription streaming services such as Spotify and Apple Music. As set out in other parts of this submission, streaming services remove the need for a music listener to have a personal library and instead give access to some 40 million tracks in return for a monthly fee.

5. For music, the adoption of streaming services is on the rise. As set out in other parts of this submission, consumer research indicates that in a 3-month period, 61% of New Zealanders listened to music on a streaming service like Spotify. This number increases to 75% of 18-24 years old. Other entertainment content such as film and television is following the same trend. NZ On Air's 2018 report noted that the weekly reach of streaming video on demand has nearly doubled since 2016 – now reaching more than 6 in 10 people.[82]

6. Against this background, it is clear that any exceptions to allow use of cloud services for music and other entertainment content are unnecessary, and would undermine a market that is licensed. An

[82] NZ On Air *Where are the Audiences?, available at* https://www.nzonair.govt.nz/research/where-are-audiences-2018/ visited on 28th March 2019.

exception for using the cloud in this way would not be updating the Copyright Act for the present landscape, but rather making a change that is already outdated.

7. Internet NZ has suggested that a cloud-based exception should allow third parties to make copies on behalf of users.[83] This is especially problematic as it would allow commercial entities to benefit from offering services in a market already licensed by rights holders.

8. In addition, it would create a loophole that pirate sites could take advantage of. This is more than theoretical and has actually occurred in Germany, where the operators of stream ripping websites have argued that they are covered by Germany's private copy exception (which allows copying by a third party) and not liable for copyright infringement for the many thousands of sound recordings they make available.[84]

83 Internet NZ, Getting Copyright Right in the Information Age, available at https://internetnz.nz/getting-copyright-right-information-age, visited on 28th March 2019.

84 Under German law, a person can make single copies (of copyrighted works) for private use, as long as he or she does not make the copy from a source that is obviously illegal (Article 53 Copyright Act). The law also provides that the copy can be made by a third party, as long as the third party does not charge for the service. If a third party is involved in the copying process, it is crucial to identify the "maker" of the copy. If the user is considered the "maker" of the copy, the private copying exception applies in favour of the user and the act of reproduction is exempted from liability. If the service is considered the "maker" of the copy, the private copying exception does not apply and the service is liable for infringements of the reproduction right. See FCJ, case No I ZR 216/06 - *Internet Videorecorder*.

OTHER TECHNOLOGIES

Issue 37: "Are there any other current or emerging technological processes we should be considering for the purposes of the review?"

1. As set out in our responses to other issues, the music industry has embraced new technology and is driving innovation in the digital space. This includes licensing music widely in relation to emerging technology, for example interactive games, AR and VR experiences and voice applications for smart speakers; and adopting technology developments such as AI applications for composition. In addition, there is a growing local music tech industry, with New Zealand DJ tech company Serato gaining recognition globally, and US company InMusic recently investing $10 million to contribute to a music tech hub in Auckland.

2. We do not believe it is useful to consider specific technologies in the abstract, but we urge policy makers to keep in mind that music and other copyright works are the driving force behind many technological developments and consumers' enjoyment of them. Copyright policies that seek to advantage technological development at the expense of copyright protection will not ultimately enhance New Zealander's social, cultural and economic wellbeing.

DATA MINING

Issue 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?"

1. Data mining (also known as text and data mining, "TDM", and content mining) is defined in the Issues Paper as "using a computer programme to extract patterns from large datasets."[85] Internet New Zealand defines data mining as "using computers to read the contents of documents, photos, spreadsheets, maps and other sources of information … [to] create useful insights".[86]

2. As explained in our response to **Issue 7**, the music industry makes extensive use of data in its business and operations and some of that data has substantial commercial value. The music industry is itself experimenting with AI techniques, as referred to in our response to **Issue 37**.

3. So as a digital industry, we are in full agreement with the Issues Paper that "the use of data mining is becoming increasingly common and the insights it can produce are valuable".

4. However, we are not aware of any problems with the current legal position in New Zealand. In particular we have not seen evidence that an exception to copyright infringement is needed in order to facilitate a *third party* to *copy or communicate* sound recordings, musical works or related data, in circumstances where a licence could not have been negotiated for the specific use. We note the general comment in the Issues Paper that it would be "costly and time consuming to obtain the necessary licences" [87] but we have not seen evidence of this in the context of the music industry.

5. Nonetheless we acknowledge that some countries have enacted limited exceptions for data mining. If government finds there is sufficient evidence to justify an exception for data mining, any such exception should (as per the EU and UK exceptions):

   (a) Only apply where there is lawful access to the data in the first place;

   (b) Be limited to the reproduction right, ie it can allow copying to the extent necessary for the activity but should not allow communicating or making available; and

   (c) Apply only for non-commercial research activities.

6. There is no need for an exception to extend beyond non-commercial research in circumstances where licensing could be undertaken by business wishing to use copyright works for commercial projects. Any exception of this nature would interfere with right holders' normal exploitation of their work.

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85 Ministry of Business, Innovation & Employment Issues Paper: Review of the Copyright Act 1994 (November 2018) at [296].

86 InternetNZ Getting Copyright right in the Information Age: An InternetNZ Position paper at 13.

87 Ministry of Business, Innovation & Employment, above n 1, at [300].

PARODY

Issue 39: "What do problems (or benefits) arising from the Copyright Act not having an express exception for parody and satire? What about the absence of an exception for caricature and pastiche?"

(1) Summary of Music's Position

1. Music has not encountered any problems arising from the lack of express exception for parody. Nor is it aware of any complaint having been made or proceedings commenced in New Zealand in respect of a parody sound recording or musical work.

2. Music is cautiously supportive of a fair dealing provision for parody. But any such proposal will need to be properly scoped for more detailed consideration.

3. The safeguards which Music would see as necessary are:

   (a) Any such exception should be under the umbrella of fair dealing (as has been done in the UK and Australia.)

   (b) The categories of caricature and pastiche in the UK provision are not required. Australia has chosen to adopt an exception based on parody and satire. However Australian commentary suggests that satire may go too far, so that for New Zealand a parody exception would provide ample protection.

   (c) The moral right in respect of derogatory treatment will need to be safeguarded and considered as will issues of cultural offence.

4. We note the reference to in the Issues Paper to mash-up apps. Music companies, both record labels and music publishers are currently actively licensing mash-ups and music sampling, as set out elsewhere in this submission. The simple availability of a tool for mash-ups would not justify overriding existing licensing practices.

(2) Issues Paper

5. The Issues Paper notes at [308] that the Act presently does not include any express provision for parody and satire. It is said[88] that a person wanting to use a copyright work to create a parody or satire would need to either gain permission from the copyright owner or rely on the current fair dealing provisions for criticism, review or news reporting.

6. The Issues Paper notes that a number of comparable jurisdictions such as Australia, Canada and the UK have introduced or developed exceptions that allow for parody and satire.

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88 At [309].

7. Reference is also made to test whether there are issues with facilitating freedom of expression. In particular, paragraph [318] speaks of meme-generators and mash-up and remix apps being readily available to New Zealanders

(3) Music's Response

8. Music has not encountered any problems arising from the lack of an express exception for parody or satire. We are not aware any significant number of complaint having been made or proceedings having been commenced in New Zealand where a parody or satirical copy of a musical work or sound recording has been released.

9. In the case of musical works a licence is always available for another artist to record or re-record a "cover" of a work. Where lyrics are changed or adapted that is done either with the permission of the original right owner or under the fair dealing exception which can include satire. This is a feature of musical works that has existed for many decades. An example might be Gerry Merito, a member of the popular all-Māori Howard Morrison Quartet, wrote the lyrics to 'My old man's an All Black' a 'bitter-sweet parody' of Lonnie Donegan's 'My old man's a dustman'. The songs humour was a commentary about the decision of the All Blacks to tour South Africa without Māori. Ultimately the new work was produced (and resulting royalties from the new musical work, shared) with the original copyright owner's permission.

10. Music is cautiously supportive of a fair dealing exception for the purposes of parody only. However, any such proposal would need to be properly scoped for more detailed consideration. We see a number of issues that would need to be addressed. These are:

(a) Fair Dealing provision should be incorporated

11. Any such exception needs to be brought under the umbrella of 'fair dealing' so that the safeguards created by the fair dealing exceptions will apply. This is the model used in both the UK[89] and Australia.[90] This introduces the safeguard that the dealing must be fair and in particular the degree to which the nature and extent of use is justified by the purpose of the use.

(b) Caricature and Pastiche Unnecessary

12. We consider that a fair dealing exception which is limited to parody is all that is required. The Australian provision is limited to parody and satire.

13. The Australian text Ricketson *The Law of Intellectual Property*[91] notes that "satire" in the Australian provision "may be thought surprising as it has broader scope from parody". The author notes that satire would "be available where a work is used to ridicule some social phenomenon that has nothing to do with the content of style of the work or other works, of the author". This means that the courts will need to pay particular attention to the requirement of fairness and this "may be used by the courts to rein in an unauthorised use in a satire of a work that is extraneous and incidental to the subject of the satire."

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[89] UK s 30A CDPA 1988.
[90] Australia s 41A and 103AA Copyright Act 1968.
[91] Para 11.57.

14. Ricketson notes that support for such an interpretation is to be found at paragraph 44 of the Supplementary Explanatory Memorandum to the Act in 2006.

15. It might be thought that if satirical use of a work is extraneous or incidental to the work or works by a particular author or creator then it is a step too far, that satire is unnecessary and parody is sufficient coverage.

(c) Moral Right: Derogatory Treatment

16. One of the key moral rights is the right to object to derogatory treatment of a work. The term 'treatment' is defined in s98(1) to mean "any addition to, deletion from, alteration to, or adaptation of the work…" The treatment of a work is derogatory if, whether by distortion or mutilation of the work or otherwise, the treatment is prejudicial to the honour or reputation of the author.[92]

17. There will be a tension between a parody exception and this moral right at the margins.

(d) Culturally offensive works

18. There is another dimension which sits alongside the moral right and that concerns culturally offensive parody works. This too will need to be carefully scoped if any parody fair dealing is put forward.[93]

(e) Licensing of Music

19. We note that the Issues Paper does refer to the availability of mash-up apps being available in the market generally. In this regard there is a significant and ongoing practice of music rights holders licensing mash ups and sampling of musical works and sound recordings by other artists so the availability of a mash-up app does not give any legitimacy to mash-ups *per se*. These will still need a licence from the rights holders.

[92] Section 98(b).

[93] A possible example of this is the version of Pauly Fuimano's bill board number 1 hit *How Bizarre*. The version stole my car contains some lyrics that may well be considered offensive or demeaning to Māori see https://www.letssingit.com/hemi-and-sharon-lyrics-stole-my-car-3h46bl2

QUOTATION

Issue 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?”**

1. At [322] the Issues Paper notes that the use of quotations is permitted under US and UK copyright law and states that MBIE has heard that “presentations given in the US or the UK relying on fair use or the quotation exception cannot be subsequently shared with the New Zealand audience without editing out third party content to the detriment of the lecture”.
2. With respect to music and lyrics used in conjunction with music, we are not aware of any problems relating to quotations or extracts, and the current law seems to work well.
3. If extracts of a sound recording or musical work or literary work in the form of lyrics need to be used for the purpose of criticism or review, this is permitted by the current section 42 (as MBIE notes). As per our answer on criticism and review generally (**Issues 30-33**), there is often no need to copy extracts of music in order to review it – this can generally be done by referring to a link on a licensed service such as Spotify, Soundcloud or YouTube.
4. Beyond s 42, fair dealing is also permitted for the purposes set out in section 43.
5. Any use of extracts from sound recordings or musical works or lyrics beyond this should be licensed, and there is a well-established market in the music industry for licensing these “samples”. For example, a sample of the Adeaze track “A Life With You” was licensed to Mariah Carey for her song “Your Girl”.
6. For these reasons there is no need to change the law relating to quotations for music.

EXCEPTIONS FOR LIBRARIES AND ARCHIVES

Issue 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."**
Issue 42.	**"Does the Copyright Act provide enough flexibility for libraries and archives to copy, archive and make available to the public digital content published over the internet? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?"**
Issue 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?"**
Issue 44.	**"Does the Copyright Act provide enough flexibility for libraries and archives to make copies of copyright works within their collections for collection management and administration without the copyright holder's permission? What are the problems with (or benefits arising from) this flexibility or lack of flexibility? What changes (if any) should be considered?"**
Issue 45.	**"What are the problems with (or benefits arising from) the flexibility given to libraries and archives to copy and make available content published online? What changes (if any) should be considered?"**

(1) Summary of Music's Position

1. As to **Issue 43** Music submits that as a result of the widespread availability through streaming services of some 40 million works either free or on payment of a small subscription, there is simply no warrant for the mass digitisation of music by libraries and archives.

2. As to **Issues 41, 42, 44 and 45** Music submits that in respect of sound recordings the *Library exceptions* in ss 51, 56, 56A-C are no longer needed. Again, the wide availability of millions of tracks via licensed streaming services provides full accessibility to an extensive repertoire and does not require replicating by libraries. The exceptions will undermine licensing income to artists and rights holders.

3. In relation to *Archive exceptions* Music submits that s57 is no longer necessary as licences are indeed available.

4. As to the copying for preservation and archiving, Music recognises the role of the National Library. If there is evidence of an exception being required for archiving and preserving *historic* sound recordings, then Music would welcome a dialogue to determine the appropriate parameters for such an exception.

(2) The Issues Paper

5. The Issues Paper summarises the exceptions available to not-for-profit libraries and archives, noting that the purpose of the exceptions is to allow these libraries and archives to:

   (a) Supply copies of works to users for the purposes of research and private study;

   (b) Obtain copies of works from other libraries that they cannot otherwise obtain;

   (c) Copy works within their collections for preservation and replacement purposes; and

   (d) Communicate works in digital form to authenticated users.

6. The Issues Paper addresses at [326] a number of areas where libraries and archives have concerns about the existing exceptions as follows:

   The exceptions (it is alleged):

   - are unclear and confusing to apply
   - hinder, or do not facilitate, mass digitisation projects
   - do not allow copying for collection management purposes
   - do not facilitate collecting and making available content 'born' digital
   - cannot be used by museums and galleries.

7. Librarians have told MBIE that the current library and archives exceptions are unclear and confusing to apply because of the uncertainty around their scope and use. This could potentially lead to users being unable to be supplied copies of works for research and private study and libraries and archives being prevented from supplying copies of works to other libraries or from copying for the purposes of preserving or replacing items within their collections.

8. Libraries and archives are also concerned that the current exceptions inhibit their ability to meet the growing demand to convert physical content to digital form and make it publically available over the internet.

9. A further concern is that current exceptions may also be unnecessarily limiting people's access to knowledge because the exceptions focus on providing digital copies at a physical location.

10. MBIE has heard that the exceptions only target the digitisation of physical content already held by the libraries and archives and do not take proper account of the vast amount of content that was created exclusively in digital form and only published online ('born digital'). Another concern is that libraries and archives want to be able to collect, preserve and make available to the public digital content published online to ensure New Zealand's documentary heritage is preserved.

(3) Music's Response

11. Our response on Issues 41 – 45 is directed solely to sound recordings and musical works.

Issue 43: Mass Digitisation

12. In relation to *music,* we strongly question the assumption embedded in Issue 43. This asks the question whether the Act provides "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". Although the next question is directed to what are the problems (or benefits) arising from this flexibility of lack of flexibility, both options appear to proceed from the standpoint that there should be such flexibility to facilitate mass digitisation.

13. There is wide public access to music in New Zealand through digital downloads and streaming services. Spotify has over 40 million works in its library. It offers a free service (supported by ads) or a subscription based service. Members of the public wanting to purchase individual works can do so from any of the streaming services.

14. All the existing streaming and download services return the licensing income from this widespread availability to artists and rights holders.

15. Music submits that with such widespread availability of music either free or on payment of a small subscription, there is simply no warrant for the mass digitisation of sound recordings (and consequently the underlying musical works.)

Issue 41, 42, 44 and 45

Libraries

16. In response to Issues 41, 42, 44 and 45, Music submits that the exceptions available to libraries in respect of sound recordings are not needed.

17. Section 51 provides for libraries copying (other than a digital copy) any **item** in their collection for authorised purposes. This reference to 'item' seems limited to physical items. Subsection (2) allows digital copies of the item in certain circumstances.

18. Section 56 covers *unpublished works* which would include an *unpublished* sound recording. This would be very rare and would obviously not cover tracks that have been published.

19. Section 56A-C cover communicating digital copies of works (which would include sound recordings) to authenticated users in certain limited circumstances.

20. Music submits that these provisions are, in today's market, not needed, not appropriate or not applicable to sound recordings. The summary is as follows:

    (a) Libraries do not generally supply copies of sound recordings to users for research and private study. Users can listen to sound recordings (in some cases without payment) via licensed streaming services such as Spotify. Making copies of sound recordings available to the public is problematic and inappropriate, as licensed services are available for this purpose. Further as

explained in answer to Issue 11 the volume of sound recordings now available via digital downloading and streaming services is vast and much greater than was previously available via physical copies.

(b) Libraries do not generally obtain copies of sound recordings from other libraries in order to supply them. Again, to the extent that there may have been a demand for borrowing CDs in the past, the demand has now been met by licensed streaming services which enable users to listen to sound recordings.

(c) We understand that s 56A - C may allow libraries to communicate sound recordings *in digital form* to authenticated users. This exception was not needed in 2007 and is irrelevant now, as that demand has now been met by licensed streaming and download services. Indeed, the exception allowing communication of sound recordings to authenticated users in certain circumstances,[94] though expressed narrowly, is completely inappropriate in an environment where licensed streaming and download services for sound recordings are so accessible.[95]

21. We agree with the trends as MBIE has outlined them in para 325 – including the rapid shift to digital technology, a growing demand for content to be digitised, and a growing quantity of content that is being produced only in digital format. In the music industry, the demand for digital content has been met by licensed services that allow streaming and download of works on a licensed basis. We understand, nevertheless, that these concerns may be more relevant for other forms of copyright works.

22. In these circumstances:

(a) There is no need for libraries to undertake the above activities (and we are not aware of any libraries that wish to do so in respect of sound recordings).

(b) Exceptions to allow these activities are not warranted and would cut into right holders' licensed income.

Archives

23. Section 57 provides that two archives, a designated sound archive and a film archive, may play a sound recording held in the archive to an audience of members of the public without infringing on the terms of subs (3) as to payment to attend. Significantly sub (4) provides that the section does not apply to the extent that licences authorising the playing of a sound recording are available and the archive knew that fact.

24. Licences would be available from Recorded Music for this purpose.

25. The area that may be relevant for sound recordings is the copying of works for preservation and replacement purposes (ie archiving). A very limited number of libraries and archives may hold copies of sound recordings for cataloguing and preservation purposes – in fact, there is a deposit requirement. Under legislation, all publishers in New Zealand must deposit their publications with the

94 Section 56A Copyright Act 1994.

95 It is noteworthy that a later exception covering archives (s 57(4)) provides that the exception does **not** apply if and to the extent that licenses authorising [the excepted event] are available.

National Librarian. Music recordings (including CD, cassette, and digital) are included in the requirement.[96]

26. The activities of non-profit archives in seeking to archive and preserve *historic* sound recordings for non-commercial purposes are in a different category from activities intended to communicate digital copies to library users.

27. If there is evidence of exceptions to copyright being required for these activities, then Music would welcome a dialogue with non-profit archives to facilitate this and to determine the appropriate parameters of these exceptions.

28. It should be noted that in the case of sound recordings, it is usually straightforward to identify the copyright owner and the short (50 years from the date of release) duration of protection means that the creator is often alive while the recording is still in copyright. These factors mean that in many cases it will be possible to obtain licences for archiving activities from the copyright owner of sound recordings.

29. An example of this is the recent deposit of historic master tapes from the Flying Nun catalogue at Alexander Turnbull Library, achieved with the agreement of the copyright owners and recording artists concerned. The record label and many of the recorded artists had become concerned that some of the tapes were at risk of deteriorating, and many artists were concerned that the master tapes and the music they contained may be lost forever, unless steps were taken to bring them together in the Library's climate-controlled and earthquake-proofed environment.[97] Curator Music for the Library, Michael Brown, said "Flying Nun has consulted with artists about the project, which has been important to its success so far. We're committed to protecting all the artists' rights inherent in the material."[98]

Musical Compositions

30. Musical works are often embodied in the form of sheet or print music. Commonly editions of print music are published for the purposes of private music tuition and performance. There are long held traditions of music publishing and the making available of print music for these purposes.

31. The copyright in relation to printed musical works is generally held by music publishers and specifically print music publishers who specialise in this form of publishing.

32. In the case of print music, rights (except in certain narrow circumstances) are not assigned to APRA or AMCOS but are administered directly by the print music publisher concerned. Long held and well established licensing practices are in operation by music publishers

33. We are not aware of any specific examples, evidence of uncertainty or inflexibility leading to undesirable outcomes as a result of current exceptions.

96 Part 4 of the National Library of New Zealand (Te Puna Mātauranga o Aotearoa) Act 2003.
97 Flying Nun Press Release, July 13 2018, flyingnun.co.nz.
98 National Library Press Release, July 13 2018, natlib.govt.nz.

MUSEUMS & GALLERIES

Issue 46:	**"What are the problems with (or benefits arising from) excluding museums and galleries from the libraries and archives exceptions? What changes (if any) should be considered?"**

1. We understand that galleries and museums may have concerns about copyright infringement arising from:

   (a) Cataloguing and archiving their collections, and collection management more generally; and

   (b) Making collections available online.

2. We are not aware of any issues relating to music and it seems likely that most concerns will relate to artistic and literary works of various kinds.

3. In the absence of further information it is not possible to say anything more than was said in relation to libraries, ie there is no need for exceptions to cover making music available online, since there are many licensed music services available, and any such exceptions would interfere with licensed markets.

4. If there is evidence that galleries and museums need to make copies of music for preservation or collection management purposes, we would be happy to review and discuss further.

5. For completeness we note that Music routinely provides licences to museums and galleries around New Zealand for their playing of music in public as well as their copying of music for the purposes of playing or showing in public.

EDUCATION EXCEPTIONS

Issue 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?"**
Issue 48:	**"Are the education exceptions too wide? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?"**
Issue 49:	**"Are the education exceptions too narrow? What are the problems with (or benefits arising from) this? What changes (if any) should be considered?"**
Issue 50:	**"Is copyright well understood in the education sector? What problems does this create (if any)?"**

(1) Summary of Music's Position

1. The needs of educators and the importance of the creation of new works for use in education are recognised and balanced in the existing education exceptions. There are many creators of works specifically in the field of music education resources that depend on copyright and income from sales or licensing of the educational establishments in order to earn a living (and then create new original works).

2. Extensive licensing of the educational sector already occurs through licences offered by APRA AMCOS and Recorded Music New Zealand through OneMusic. These licences top up acts permitted by the exceptions in the Act by allowing wider use but with a licence fee.

3. The needs of educators, students and creators are already met by the existing educational exceptions when combined with the availability of a flexible licensing regime which is already being used by many educational establishments.

4. A major issue is that not all schools take up licences and a number infringe, whether by choice or through a lack of knowledge. As noted in our responses to Issues 47 and 50 there is insufficient direction from Government on this. A blanket licence for all schools would remove this issue and enable comprehensive resources to be provided to the school sector while safeguarding income to rights holders.

5. Music already provides licences for the provision of resources via intranet (Issue 47). We strongly support the existing page limits on multiple copying in s 44(3) and licences are provided to supplement this (Issues 48 and 49). The provision of a blanket licence for all schools would address many of the matters raised by Issue 50.

(2) The Issues Paper

6. The Issues Paper notes[99] that the Act includes specific exceptions that allow certain uses for the purpose of education. The exceptions are intended to allow the use of copyright works to facilitate teaching, learning and the creation of new knowledge, while having due regard to the rights of copyright owners.

7. Some examples of how educational institutions can use copyright works without permission from the rights holder include:[100]

   - A whole copy of a literary or musical work can be made by a teacher and used during a lesson
   - A sound recording can be played to students in class
   - Multiple copies of a literary or musical work can be made and distributed to students as long as the extract copied does not exceed more than 3% or 3 pages (whichever is greater)
   - Copies of websites (and the copyright works contained within them) can be stored and used for educational purposes.

8. The exceptions[101] enable the use of copyright works only to the extent that the exceptions permit. If educational establishments or others want greater use they must seek a licence (and pay the licence fee).[102] The exceptions allow for a certain amount of copying to be done at no cost, but some of the exceptions are intended to encourage copyright owners to make licensing schemes available to educational establishments. For example, section 45 only permits copying of films and sound recordings if no licensing schemes are available for such copying. In New Zealand, collective licences for educational establishments are issued by three main Collective Management Organisations.

9. The Issues Paper notes[103] that it is up to individual educational institutions or users to decide whether to get a licence for uses broader than the exceptions allow, like copying of a larger proportion of works or sharing works with students online. The practice of educational institutions and users differs widely across the country.

   Possible issues

10. At [344] the Issues Paper states that we have heard that the education exceptions:

    - are framed for a traditional classroom environment and do not take into account current teaching practices and modern technology
    - create unnecessary distinctions based on the technology used
    - do not cover copyright works being communicated by teachers to students over the internet

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99 At [340].
100 Issues Paper at [341].
101 Issues Paper at [342].
102 Apart from section 48 on copying of communication works, which does not apply if licences are available.
103 Issues Paper at [343].

- may be too broad in some cases
- may be too narrow in some cases
- are not well understood by those in the teaching profession.

11. The relevant questions from the Issues Paper are Issues 47–50.

(3) The Exceptions in Part 3 of the Act

12. In these submissions we focus solely on sound recordings and musical works.

Sound Recordings

13. The exceptions relating to sound recordings can be briefly summarised as follows:

(a) Section 45 provides that copyright in a sound recording is not infringed by its copying for educational purposes on the specific terms set out in s 45(4).[104] Essentially this is where the lesson relates to the learning of a language and is conducted by correspondence. It is important to note that these carve outs do not apply *if licences authorising the copying of the work are available under a licensing scheme* and the person doing that copying knew that fact.[105]

(b) Section 47(2) exempts the playing or showing for the purposes of instruction of a sound recording to an audience consisting of persons who are students or staff members of an educational establishment.[106]

(c) Insofar as there might be a communication work comprising the streaming of sound recordings and these were to attract a separate copyright (see our submissions on Communication Works at Issue 19), then certain exceptions are available under s 48.

Musical Works

14. The exceptions relating to musical works can be briefly summarised as follows:

(a) Section 44 allows the copying of musical works for the purposes of preparation for instruction, use in the course of instruction and in the course of instruction when done by someone giving a lesson in an educational establishment.[107] In the case of reprographic copying of copyright works including musical works s 44(3) imposes limits on copying of 3% of the work or three pages whichever is the greater.

(b) Section 44A allows storage for educational purposes but the exception does not apply if the educational establishment knowingly fails to delete the stored material within a reasonable time after the material becomes no longer relevant to the course of instruction for which it is stored. This is designed to prevent ongoing retaining of copies by educational establishments in circumstances where a course (for which the stored material was prepared) has been

104 There are further provisions in s 45(2) and (3) in relation to films or film sound tracks.
105 Section 45(5).
106 Section 47(1) and (2).
107 Or on their behalf.

discontinued or a new course of instruction instituted (in which case the old material no longer applies).

(4) Licensing of Musical Works and Sound Recordings for Educational Purposes

15. APRA AMCOS and Recorded Music New Zealand jointly license all Universities and (separately) all Polytechnics in relation to their use of musical works and sound recordings. Further details are provided below.

16. In the case of Schools, four CMOs (APRA AMCOS, Recorded Music New Zealand, Screenrights and CLNZ) jointly communicate with schools concerning licensing through a dedicated website. They also operate through the Zealand School Trustees Association (NZSTA) to administer licensing. Schools go through the NZSTA portal to take out the licence or renew using an online form. In the case of musical works and sound recordings to schools, the licensing to Schools is done through OneMusic (the licensing joint venture between APRA AMCOS and Recorded Music New Zealand). http://www.getlicensed.co.nz/licence-options/hear-more/

17. Currently APRA AMCOS/Recorded Music New Zealand/OneMusic have licensed:

- 8 Universities
- 19 Polytechnics
- 1,561 Schools.

18. The needs of educators, the value of education and the importance of the creation of new works for use in education are all recognised and balanced in the education exceptions.

19. APRA AMCOS and Recorded Music New Zealand note there are many creators that work *specifically* in the area of music education resources that depend on copyright and the related income from sales and/or licensing of schools and educational establishments to earn a living to then support the creation of new original works.

20. The current education exceptions enable defined uses of original works for educational purposes or within the course of instruction but envisage that a school, teacher or student may still need to purchase and/or license the use of copyright works.

21. To further supplement the needs of educators and students, rights holders routinely operate licensing schemes for the use of copyright works providing blanket licensing to cover activities that fall outside the exceptions. So in a practical sense, those in the education sector have access to the music they wish to use in the ways that appear to work for them.

22. For instance APRA AMCOS and Recorded Music New Zealand offer education licensing schemes via OneMusic that enable schools to:

- Perform music in public – concerts, recitals, fundraisers, school balls, discos, prize giving, open days.

- Communication of music via school intranets; communications of sound recordings and recordings of performances via school intranets.
- Perform music at massed school events and competitions such as Big Sing and Kapa Haka.
- Produce school musicals (subject to restrictions) and perform works (in certain circumstances) in a dramatic context.
- Operate radio stations.
- Use music on hold.
- Play music embedded in films.
- Make multiple copies of musical works and recordings (in print or other form).

23. The OneMusic Schools Licence essentially 'tops-up' the exceptions in the Act by allowing such wider use but with a licence fee. Under the OneMusic Schools Licence teachers are able to make a limited number of photocopies of a musical work for each original score they or the school owns.

24. From time to time in consultation with the Education sector and in response to changing needs these licences are reviewed and updated.

25. For instance this year in response to discussions with schools the APRA AMCOS boards have agreed to expand and modernise the rights within the agreement to include digital reproduction of print music and remove under licence the permitted copy limits within the agreement allowing teachers to make as many copies of an original as are required for the members of the class or ensemble. Further we will expand the licensed rights on offer to allow digital sharing of audio-visual content and to include online synchronisation rights for musical works.

26. Certain APRA AMCOS and Recorded Music New Zealand, songwriter, composer, publisher, artists and label members rely on royalties via OneMusic licence schemes with educational establishments. Without these royalties musical works and resources used in schools may struggle to be created in the first place.

(5) Response to Issue 47

27. We are of the view that the Act, when copied with a flexible licensing regime provides the necessary flexibility for educators, students and creators. The changing needs of educators, students and creators can be resolved (and are now) via licensing. Rights holders work hard to educate Boards, principals and teachers as to what they can do under the Act and what additional activity and resources are available to them under a licence.

28. The major issue currently is that not all schools take the opportunity to take out a music copyright licence. OneMusic has 1,561 individual schools licensed this year (out of a total of approximately 2,700). As the Ministry will be aware schools in New Zealand are bulk funded and Boards of Trustees choose how to spend their allocated funds. Copyright licensing is often not a priority. Further, for obvious public relations reasons, rights holders are reluctant to use the courts to enforce their rights

with schools. Schools therefore either choose to wilfully infringe or attempt to work within the statutory limitations.

29. Overseas (Australia, UK, Canada and Europe) this is not a problem as schools licensing is administered (and funded) centrally by government on behalf of *all* schools. In our submission this should be the process in New Zealand also. A blanket licence for all schools would take this issue away from individual schools and Boards and would be a practical way to provide comprehensive resources for the schools sector.

Intranets

30. At a broad policy level OneMusic is supportive of the use of intranets as a means of delivering course material to students. However, intranets are closed systems which are limited to persons having passwords. As to the content of course material uploaded to intranets, discretion is usually reserved to teachers and lecturers as to what works are provided to their students in this way.

31. We already license the provision of copyright works to students via intranet.

32. There have been a number of instances where CMOs in New Zealand have discovered by accident and anecdote (via students) that large scale unauthorised copying of copyright works has been undertaken by educational establishments *outside the terms* and limits of the statutory provisions including the limits in s 44(3). This material has then been provided by intranet. Because access to the intranet is only available by password this has enabled a cover up as to what is occurring. If there were to be any statutory provision allowing use of intranets. There will need to be a concurrent safeguard and ability to audit intranets to protect the interest of rights holders and CMOs.

(6) Response to Issues 48 and 49

33. In respect of these issues we make two submissions.

(a) Retain the limit of 3% or three pages in s 44(3)

34. We strongly support the continued operation of this provision. The limits in s 44(3) were the subject of detailed consideration at the time of the 1994 Act. In particular the Hon George Gair was brought in by the then Government as an independent third party to broker a solution between copyright owners and educational establishments as to the permissible limits of copying to be allowed under this provision. The solution in s44(3) has been an enduring one and the current limits underpin a number of existing licensing schemes between CMOs and educational establishments.

35. In its 2007 analysis MED noted of s 44 that there would sometimes be difficulties with ascertaining quantity when it comes to copying limits but noted that both the UK and Australian copyright legislation prescribes limits on copying under such an exception using similar rules concerning percentages and numbers of pages. They did not see a better way of resolving the issue.[108]

(b) Where licensing schemes are available

[108] 2007 clause-by-clause analysis p [29].

36. In the case of sound recordings we support the provision in s 45(5) namely that, if and to the extent that licences authorising the copying of a work in the circumstances set out in s 45(4) are available, then the exceptions do not apply. As has been noted throughout these submissions the licensing of the use and playing of sound recordings now provides critically important revenue for recording artists and labels seeking to monetise their sound recordings.

37. As outlined earlier, both APRA AMCOS and Recorded Music New Zealand offer licensing schemes for the copying of music and sound recordings. We have not had any comments or complaints from licensees as to the scope of the licences being made available.

(7) Response to Issue 50

38. It is critical that the issue of copyright is well understood. Clarity and certainty are imperatives. Our day to day role is to explain to the education sector what the law allows, what licences permit and then adapt licence schemes to be fit for purpose. One influential educator has said:

> "One of the things that I always insist my school does is to keep our OneMusic license. That's a nice, straightforward way of dealing with copyright issues at school. Simplicity and clarity is what educators need – both for themselves and their students. Lack of clarity makes things extremely confusing and difficult for teachers who are often not trained to have an understanding of copyright. The more clarity and definition the law can offer the education sector in this rapidly transforming environment, the better."[109]

39. We do not consider that copyright, education exceptions and the available licensing regimes are universally understood across the Education sector, as illustrated by less than 60% of schools taking up licenses. Additionally, the issues of compliance and licensing are dealt with by the individual school's Board of Trustees and we feel there is insufficient direction from Government on this. As noted in answer to Issue 47, some schools will ignore the exception limits and licensing requests and choose to infringe. We are confident from information and experience that many unlicensed schools are operating outside of the statutory exceptions and are committing primary and secondary infringement.

40. As noted in our response to Issue 47 a blanket licence for all schools would remove this issue and enable comprehensive resources to be provided to the school sector while safeguarding income to rights holders.

[109] Jeni Little [Chair of Music Education New Zealand Aotearoa, Head of Music – Green Bay High School] – Composer, Teacher & Ethnomusicologist.

FREE PUBLIC PLAYING EXCEPTIONS

Issue 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?"

(1) Summary of Music's Position

1. Section 81 allows the free public playing of sound recordings by clubs, societies and other charitable organisations. Sections 87 and 87A permit any public performance venue to play or show a communication work without paying to license the underlying sound recordings – although a licence for the underlying musical works is still required.

2. There are problems with these exceptions:

   (a) There is an unfair distinction between how the musical work copyright and the sound recording copyright are treated

   (b) There is an anomaly whereby pay-per-view transmissions are included within the exception

   (c) Due to the introduction of "communication works" in 2011 and the resulting changes to the Act, the section 87 and 87A exceptions have been expanded beyond their originally intended scope.

3. Sections 87 and 87A should be amended to:

   (a) Give equal treatment to sound recordings as to musical works, by adopting the amendments that have been made to the equivalent provision in the UK; and

   (b) So they apply only to broadcasts and not the wider category of communication works (see our response to **Issue 19**).

   (c) Section 81 should be repealed as the equivalent section has been in the UK.

(2) Issues Paper

4. The Issues Paper notes that section 81 provides for an exception that allows the free public playing of sound recordings by clubs, societies and other organisations. The Issues Paper identifies that s 81 only relates:[110]

   > "… to sound recordings, and not any other works contained in the recording like the lyrics (ie the literary work) and the musical score (ie the musical work) of a song. This means that a club or society still needs additional permissions (ie licences) to play a sound recording in reliance of this exception because the exception does not extend to these underlying works."

5. Sections 87 and 87A extend beyond clubs to all public performance venues and permit venues to play "communication works" without making payment for the underlying sound recordings. The Paper notes:

[110] At [371].

"Under sections 87 and 87A the free public playing or showing of a communication work does not infringe copyright in the communication work or any accompanying sound recording or film in the communication work. The exceptions are designed so that recipients of communication works are not required to get authorisation to freely play or show the works in public if the copyright owners have already made their works freely available to the public or have already charged a free to receive the works."

Importantly however the public playing exceptions, like s 81, do not provide for the free playing of the "accompanying" musical or literary works comprising the communication work. This means that those who seek to rely on ss 87 or 87A must obtain a licence for those copyright works, but not for the sound recordings underlying the communication work. The Issues Paper states that "[t]he policy rationale for not extending these exceptions to copyright in the underlying works is unclear".[111]

(3) Background – OneMusic and public performance licensing

6. As set out in other parts of this submission, Music undertakes its public performance licensing in New Zealand via OneMusic, a joint venture between APRA AMCOS and Recorded Music New Zealand. The right holders that receive royalties as a result of OneMusic licensing include all of the right holders represented by Recorded Music New Zealand which range from the New Zealand branches of the three major record companies, to Independent record companies and distributors including Rhythmethod Limited, Southbound Distribution, Border Music, DRM Limited, Flying Nun Records, Arch Hill Recordings and Loop Recordings; smaller independent companies which are often owned by individual recording artists and bands and over 2,000 other independent sound recording rights owners representing all genres and styles, including current and legacy artists and located throughout New Zealand.

7. OneMusic has been seen as a leading example of joint licensing, which has been achieved in only a couple of other countries around the world. The joint initiative has been well received by business owners. OneMusic licenses retail stores, hospitality spaces such as bars, restaurants and pubs, exercise facilities such as gyms and fitness studios, music on hold (MOH), schools and tertiary education providers, airlines and many other instances where music (live and recorded) is publicly performed. OneMusic also licenses B2B music service providers who compile and supply music to these premises.

8. Businesses obtain real value from sound recording rights holders' content.

(4) Section 87 and 87A - Problems and anomalies

9. Sections 87 and 87A provide, in essence, that the free public playing or showing of communication works does not infringe copyright in sound recordings included in these communication works.

10. The meaning of "communication work" in both ss 87 and 87A is broad and will capture any radio or television content: i.e. "a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme".[112]

11. Section 87, as presently worded, results in a safe harbour which applies to free-to-air and now pay-per-view communication works. The wording of s 87A also results in a safe harbour which applies to

[111] At [376].
[112] Section 2 of the Act.

free-to-air but not to pay-per-view communication works. The net effect has been the creation of two serious anomalies.

(d) First anomaly: Pay-per-view broadcasts and communication works fall within the safe harbour

12. Pay-per-view broadcasts and communications qualify for the safe harbour. So subscribers (to pay services and communications that include sound recordings) may play or show these in public to the benefit of their businesses. Yet sound recording copyright owners receive nothing from public performance of their works.

(b) Second anomaly: ss 87 and 87A apply only to sound recordings

13. Sections 87 and 87A do **not** permit the playing of the underlying *musical work* in public for free. Accordingly, the performance of a musical work in public contained in a broadcast/communication work **will** amount to an infringement of copyright unless the person using the work has a licence from APRA (representing the collective rights management of the copyright owners of musical works ie the composers).

14. Sections 87 and 87A create an unnecessary distinction between sound recording copyright owners compared to musical work copyright owners.

15. The safe harbours provided in ss 87 and 87A affect *solely* owners of the sound recording copyright. In contrast, an owner of a musical work copyright **is** entitled to charge for the performance of its work in public. However importantly,[113] a musical work cannot be broadcast/communicated without being incorporated into some form of sound recording, that is, without the sound recording being made available to broadcasters/persons communicating it (except in the cases of live performances).

16. It is only when there is airplay of a *sound recording* that *musical composition* copyright owners receive payment from both broadcasters and members of the public playing the work in public.

17. Both the UK Copyright Tribunal and the Canadian Board of Copyright during copyright licensing hearings, have held that equal treatment and value should be afforded to both musical works and sound recording works. Likewise the New Zealand Copyright Tribunal has held that as a matter of law, both copyrights are the same.[114]

18. The permission of **both** copyright owners is required for the broadcast of music on radio and television. Furthermore, a licence is *also* required from the musical work owner to play radio and television in public. Therefore it is inequitable that, because of ss 87 and 87A, a sound recording copyright owner has no right to license or grant permission for the playing of sound recording works on radio and television in public.

19. We note MBIE's comment in the Issues Paper that "the policy rationale for not extending these exceptions to copyright in the underlying works is unclear" [para 376]. We note that the WIPO

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113 Unless the musical work is being performed live in a broadcast, a relatively rare occurrence.

114 *PPNZ v Radioworks & Anor*, COP 19 dated 19 May 2000; and *Federation of independent Commercial Broadcasters v PPNZ*, COP 1 dated 23 May 1977 in which the New Zealand Copyright Tribunal stated:

> "the manner in which statutory rights have since been created leads us to the view that as a matter of law neither right is superior, the one to the other. Whether one may be superior to the other in any given circumstances could be a question of fact **but is not a question of law**."

Copyright Treaty requires New Zealand to provide protection for secondary uses of musical works, so it is not open to New Zealand to extend the exception to underlying musical works.[115]

(c) The broadening of activities permitted under ss 87 and 87A

20. The broadening of activities permitted under the 2008 and 2011 amendments to the Copyright Act further dilutes the rights of the sound recording copyright owner in the public performance arena.

21. The definition of "communication work" is far broader than the previous definition of "broadcast". Under the broader definition, *any* type of transmission of sound will be included within s 87 (and new s 87A as well).

22. The pre-amended version of s 87 was specifically *limited* to apply only to broadcasts that were played on radio or television in public or cable programmes. The broadcaster (such as a radio or television station) was required to have a licence for the use of the radio spectrum and therefore could be contacted by both Recorded Music and APRA to ensure that their broadcast of music was licensed.

23. Due to the broadening of s 87 to cover any "communication work", a sound recording covered by s 87 could be transmitted by any person (either located in New Zealand or overseas). The owner of a sound recording work will therefore in many cases not know whether its sound recording being communicated (and subsequently played by a business in public) has been licensed or not. This is especially so for any international communications streamed over the Internet.

24. Accordingly, there is an inevitable outcome from the current position that a sound recording copyright owner will not obtain royalties from the communication of its work. Allowing licensing of the persons who *play* the communication work (including a sound recording) in public would ensure that some remuneration would flow back to the sound recording copyright owner. Such licensing is presently not available because of the unequal "safe harbour" created by ss 87 and 87A between sound recordings and the underlying musical compositions.

(5) Possible solution: UK example

25. The United Kingdom provides a helpful precedent for reform of current legislation. Exceptions provided in s 67 and s 72 of the CDPA 1988 did not apply to rights of composers, lyricists and music publishers, administered by PRS for Music. So whilst a charity or not-for-profit organisation could use broadcast or recorded music without a PPL licence, it still required a licence from PRS. Concern was expressed from both right holders and music users that the exceptions did not balance interests correctly and did not conform with Article 8(2) of the Rental and Lending Directive. This directive requires member states to provide a right to equitable remuneration for owners of copyright sound recordings and performers when commercially reproduced sound recordings are broadcast or are otherwise communicated to the public.

26. In 2003, and again in 2011, s 72 of the CDPA was amended to exclude the public broadcasting of **certain** sound **recordings** from the class of permitted activities in respect of copyright.

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115 The equivalent international treaty for sound recordings, WPPT, also requires this protection in article 15(1) – however we note that since acceding to WPPT December 2018, the New Zealand government has filed a full reservation to article 15(1) meaning it is not giving that protection for sound recordings.

27. Section 72 of the CDPA, after the 2011 amendment, now reads as follows:

72 Free public showing or playing of broadcast

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

(a) the broadcast;

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

(c) any film included in it.

(1A) For the purposes of this Part an "excepted sound recording" is a sound recording—

(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.

(1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public—

(a) [...]

(b) is necessary for the purposes of—

(i) repairing equipment for the reception of broadcasts;

(ii) demonstrating that a repair to such equipment has been carried out; or

(iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.

(2) The audience shall be treated as having paid for admission to a place—

(a) if they have paid for admission to a place of which that place forms part; or

(b) if goods or services are supplied at that place (or a place of which it forms part)—

(i) at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast..., or

(ii) at prices exceeding those usually charged there and which are partly attributable to those facilities.

(3) The following shall not be regarded as having paid for admission to a place—

(a) persons admitted as residents or inmates of the place;

(b) persons admitted as members of a club or society where the payment is only for membership of the club or society and the provision of facilities for seeing or hearing broadcasts ... is only incidental to the main purposes of the club or society.

> (4) Where the making of the broadcast ... was an infringement of the copyright in a sound recording or film, the fact that it was heard or seen in public by the reception of the broadcast ... shall be taken into account in assessing the damages for that infringement.

28. Virtually all commercially released sound recordings are encompassed within the definition of "excepted sound recordings" confirmed in s 72(1A).[116] The *effect* of this amendment is that a person showing or playing in public a broadcast containing such recordings requires a licence from the owner of the sound recording work[117] - ie a PPL licence (PPL is Recorded Music's counterpart in the UK).

29. It is significant that the UK legislature elected in 2011 to further broaden the category of "excepted sound recordings" so that an even greater range of sound recordings now require the necessary licence.[118]

30. Accordingly, under the 2003 and 2011 amendments to the CDPA, a person showing or playing in public commercial sound recordings included in a radio or television broadcast must obtain a licence from the owner of the sound recording copyright work.

31. We propose that the New Zealand legislation be amended in a similar fashion to adopt the UK approach or (more simply) to repeal ss 87 and 87A.

(6) Equal treatment for sound recordings played in clubs and societies

32. The playing of a sound recording as part of the activities of, or for the benefit of, a club, society or other organisation is a *permitted act* under the Copyright Act. This does *not* infringe copyright in the relevant sound recording provided the conditions at s81(2)(a) to (c) are met by the relevant organisation.

33. However, as with ss 87 and 87A, s 81 does **not** permit the playing of the underlying *musical work* for free. The playing of a sound recording in the circumstances set out in s 81 **will** amount to an infringement of copyright in the *underlying musical work* unless the person has a licence from One Music.

34. Section 81 therefore also contains a mismatch between the rights of the composer of the *musical work* on the one hand, and the absence of rights for the owners of copyright in the *sound recording* on the other.

35. We propose that section 81 be repealed to remove this anomaly. The equivalent section in the UK (section 67) which was the model for the New Zealand provision was repealed in 211. An important part of the rationale for the repeal of the UK s 67 was concern as to the inequality of a situation in which the UK equivalent of APRA was able to collect a license fee, whereas the UK equivalent of Recorded Music was not.[119]

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116 *Copinger & Skone James* on Copyright, 16th edition, para 9-220.

117 *Copinger & Skone James on Copyright*, 15th edition, para 9-200 (page 571); 16th edition para 9-220 (page 656-7).

118 In particular, the 2011 amendment removed a carve out for broadcasts shown or played in public which "form part of the activities of an organisation that is not established or conducted for profit", so that a license now **is** required in those circumstances (whereas prior to 2011 no such license was required).

119 UK Intellectual Property Office, "Consultation on Changes to Exemptions from Public Performance Rights in Sound Recordings and Performers' Rights", paras 40 and 41, 2008. Other key factors were the need for consistency with EC law and international treaty arrangements.

FORMAT SHIFTING

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

1. This response should be read together with our response to **Issue 36** (cloud computing).

2. The Issues Paper notes that s 81A of the Act as currently enacted allows owners of legitimately acquired sound recordings (including musical and literary works) to make copies of those sound recordings (and associated works) for their own personal use. The rationale for the exception was that "once a person has *purchased* recorded music, they should be free to 'format shift' that recording, rather than having to pay for the same music again."

3. The Issues Paper states that:

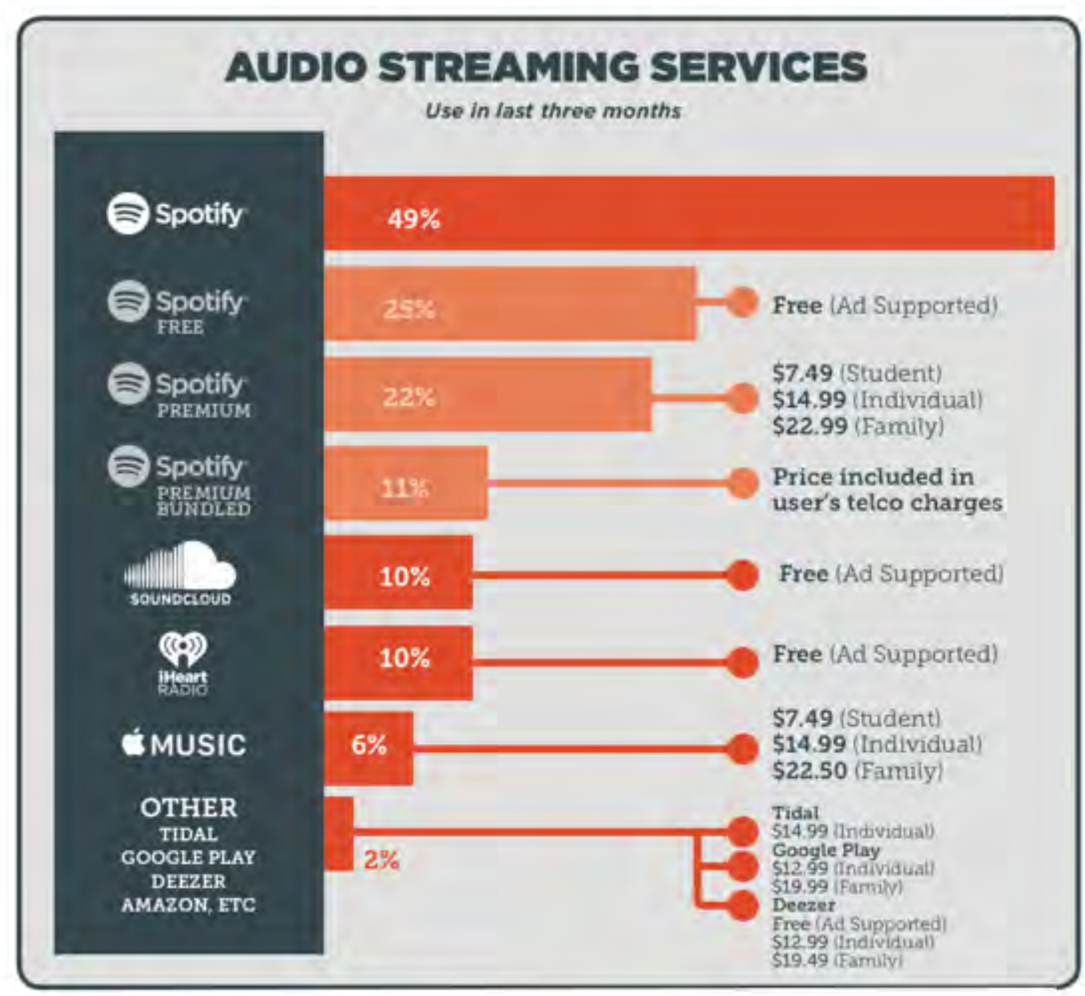
> "The format-shifting exception is tied closely to the use of physical devices, like MP3 players or smartphones, to play the format-shifted copies of sound recordings. Currently, a number of services allow users to upload their sound recordings to the cloud, and then provide access to those recordings 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."

4. Music has no issue with the format shifting exception as it currently stands. However, for the reasons already set out in our response to **Issue 36** (cloud computing), the exception should not be expanded beyond its current scope. Personal and domestic use of music is now licensed by right holders in the form of on demand streaming and other digital download services, and any exception in this area would cut across a legitimate market.

5. In any case, the need for the format shift exception is historic: at the time of its introduction in 2007 the dominant format for purchasing sound recordings was CDs. Consumers wanted the ability to "rip" music from a CD onto an iPod or other mp3 player, an activity that is virtually unheard of today. The exception was seen as acceptable at the time because it was accepted that when a person purchases a CD, they have paid for unlimited plays of the sound recording in the future.

6. Fast forward to 2019, and the dominant method of enjoying music is via on demand streaming services, where users either listen to streamed music for free with advertising and limited functionality, or pay a monthly fee for unlimited access to music. Streaming services generally allow users to listen to music on any of their devices, including their desktop computer or smartphone.

7. Some streaming services, including Spotify, offer a premium version of their service in return for a monthly fee which offers additional functionality including the ability to listen offline without an internet connection. For those who want to share music within their family, some services also offer a "family plan" which for a higher monthly fee allows use by multiple different people in the household. The below summarises the different streaming services and their price points.



8. Licensed streaming services have fulfilled the consumer demand to access music anywhere anytime. Crucially, remuneration for right holders in the streaming environment is not based on a one time up-front fee, as it was in the CD buying environment. In the streaming environment, right holders get paid according to how many times each song is played.

9. In light of the above, the format shifting exception clearly has no application for consumers using on-demand streaming (which in 2018 represented nearly 70% of recorded music revenues).

10. Of course, some consumers are still buying CDs or other physical formats and they still have the benefit of the exception.

TIME SHIFTING

Issue 53: “What are the problems (or advantages) with the way the time shifting exception operates? What changes (if any) should be considered?

1. From the perspective of Music, there are no problems with the way the time shifting exception operates. Time shifting for music is becoming increasingly irrelevant because streaming services (such as Spotify, Apple Music and Tidal) already provide on-demand music streaming enabling individual consumers to listen to whatever track they want *whenever they want*.

2. All of these on-demand services are licensed by copyright owners and provide critically important income for them – as explained elsewhere in this response. There is therefore no reason or basis for extending the exception. Importantly s 84 already specifically excludes from its scope on-demand services (s 84(1)(c) and the second example).

3. We therefore submit the provision should stay as is.

EXCEPTIONS RELATING TO COMMUNICATION WORKS

Issue 55: "What are the problems (or advantages) with the other exceptions that relate to communication works? What changes (if any) should be considered?"

1. We have already addressed these matters in dealing with other issues:

   (a) As to s 84 please see our response to **Issue 53** (Time Shifting); and

   (b) As to ss 87 and 87A please see our responses to **Issue 19** (Communication work) and **Issue 51** (Free Public Playing).

2. We have no other comments to make.

CONTRACTING OUT

Issue 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?"

1. At paragraph [413] the Issues Paper notes that the Australian Law Reform Commission in its report on *Copyright in the Digital Economy* discussed imposing limits on contracting out of the Copyright Exceptions in Australia in particular in relation to exceptions for libraries and archives and fair dealing exceptions.

2. We note in passing that the recommendations of the Australian Law Reform Commission noted in the Issues Paper have not been acted on by the Australian Parliament.

3. We are not aware of any problems with allowing copyright owners to limit or modify existing exceptions through contract

4. In fact contractual terms have enabled and supported the explosion of options for consumers to enjoy music legally. Through on-demand streaming services, products and prices can be differentiated to suit consumers' needs and to ensure creators and investors are paid fairly.

5. For example, streaming services such as Spotify and Apple Music offers consumers options to pay for a subscription at different levels depending on the features offered, or listen to advertising

6. These contractual licensing arrangements are carefully calibrated by rights holders to permit access to consumers in return for appropriate commercial gain. Music therefore submits that rights holders should not be restricted in the way in which they license or contract with consumers of music.

7. The Act already contains provisions recognising the primacy of contract s 81A Format Shifting[120] and ss 45(5) (education exception) 57(4) (Archives exception).

[120] As noted at [411] of the Issues Paper.

INTERNET SERVICE PROVIDER LIABILITY

Issue 59:	**"What are the problems (or benefits) with the ISP definition? What changes, if any, should be considered?"**
Issue 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?"**
Issue 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."**
Issue 62:	**"What other problems (or benefits) are there with the safe harbour regime for internet service providers? What changes, if any, should be considered?"**

(1) Summary of Music's Position

1. The safe harbour regime has caused a number of problems and needs to be reviewed in its entirety.

   (a) The regime has created a market distortion whereby online platforms that rely on user uploaded content have an unfair advantage. For music companies that license these online platforms, the safe harbours have led to an unfair value gap as outlined further below. For individual creators and others, the safe harbours have allowed platforms to appropriate their music without permission and without paying fairly (**Issues 59, 61, 62**).

   (b) In addition, the related notice and take down regime is ineffective to address large scale piracy on the internet and is failing copyright owners (**Issue 62**).

   (c) The safe harbour provisions and their global equivalents are routinely abused by sites that are structurally and intentionally infringing. A recent example is MegaUpload, whose operator relied on the host safe harbour to claim that MegaUpload is a neutral storage service, while at the same time deliberately distributing infringing files and cynically relying on a purported system of notice and take down (**Issue 62**).

   (d) Consumer research shows that a third of people use search engines to find piracy sites. There is no need to introduce a safe harbour for search engines, rather the review should focus on the role of search engines in directing users to piracy (**Issue 60**).

2. The safe harbour regime should be reviewed and changes made to ensure that:

   (a) Safe harbours are available only to passive intermediaries and not entities that actively engage with content.

(b) Notice and take down can only be relied on by truly passive host providers, and that notice and take down means "notice and stay down".

(c) There are safeguards against pirate sites using the safe harbours as shelter for illegal activities.

3. In addition, the role of search engines in directing users to piracy, and the reasonable steps they could take to prevent this, should be considered and factored in to the review.

(2) International context for safe harbours

4. In the early days of the internet, internet service providers (ISPs) were concerned about liability for copyright infringement for copies that were produced in their networks or services as a result of technical processes, and also for the infringements of third parties using their services.

5. In order to ensure that the essential infrastructure for the internet could develop without fear from unreasonable liability, many legislators, including those in the US (in 1998) and EU (in 2001), enacted a system of limitations on liability for ISPs (commonly called "safe harbours"). The safe harbours were not intended to shield internet services from liability where they themselves engaged in distribution of copyrighted material or where they intervene or participate in the communication and making available of copyright content, but rather to ensure that innovation was not thwarted by the fear of copyright liability in certain cases where technologies or services were used by third parties.

6. 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*"[121]. Similarly, in Europe, the European Commission stated in 2000 that the intermediary liability regime in the E-Commerce Directive[122] was intended to strike *"a careful 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"*[123].

7. The safe harbours were granted in return for ISPs taking steps to stop infringement when they receive a right holder notice and in other circumstances where infringement is apparent.

8. At the time the safe harbours were originally enacted, it was not possible to foresee either the scale of the infringing content problem that would follow, or the proliferation of different kinds of online platforms and their activities, as set out further below.

(3) Value Gap/Unfair Market Conditions (Issues 59, 61, 62)

Issue 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.

121 *Ibid.*p.2

122 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)

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

(a) Problem/Evidence

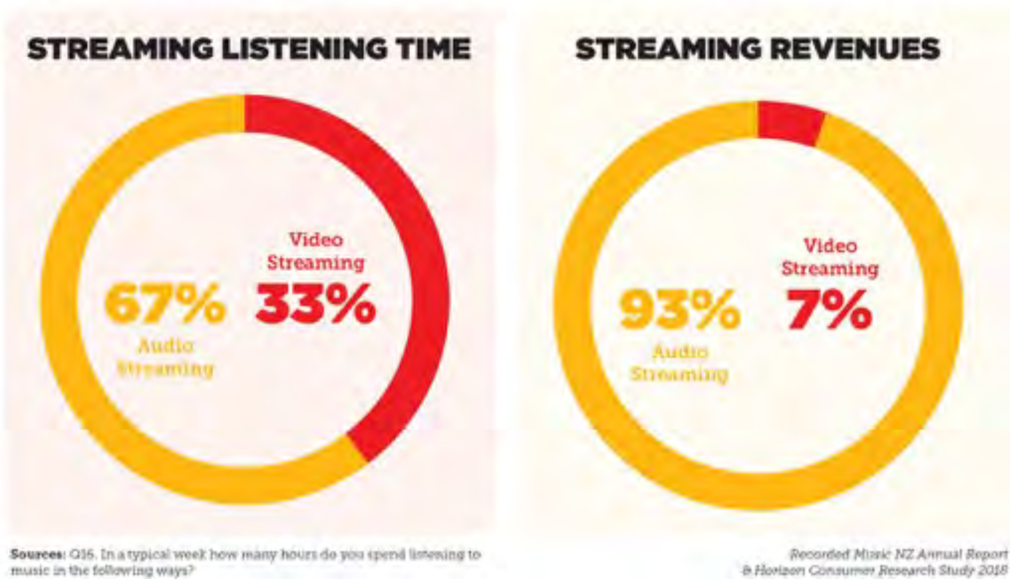
9. Yes - the safe harbour provisions have led to a situation where the market conditions for licensing music to certain digital music services are unfair.

10. This is shown by the dramatic gap between the revenues paid to artists and record companies by two types of online music services. On the one hand, platforms such as YouTube encourage members of the public to upload content, which is then streamed to the world. On the other hand audio streaming services, such as Spotify and Apple Music, negotiate licences with right holders before making any music available, and do not stream content provided by members of the public.

11. The gap in value is starkly illustrated by the graph opposite/below. In New Zealand in 2018, video platforms with approximately 1.9 million users paid $5.4 million in recorded music revenues. Audio streaming platforms with approximately 1.8 million users paid $68.8 million in recorded music revenues. In other words, audio streaming services paid 13 times more recorded music revenues per user than video streaming services.

12. This value gap is caused by the safe harbour regime in the Copyright Act and similar regimes around the world and the associated notice and take down regimes. Although some user upload platforms, including YouTube, are now licensed, it was not a fair negotiation. These platforms built up their audiences by streaming music uploaded by members of the public, and relying on the host safe harbour to claim they did not need to obtain licences at the outset in the usual way, claiming that only their users could be liable under copyright for the content available on the services. This put right holders in an unfair bargaining position and reduces the revenues they are able to obtain in licence deals, while giving user upload platforms an unfair advantage over other digital music services.

13. The value gap is further demonstrated when considering the popularity of video streaming relative to the revenues it returns, as indicated in the graph below:



14. User upload content services have become popular consumer substitutes for music services like Spotify and Apple Music. For example YouTube has become a favoured channel for enjoying music. 63% of New Zealanders report using YouTube or another video streaming service to watch or listen to music in the past three months - which exceeds the number of people using audio streaming (61%).[124]

15. When asked why they don't pay for a subscription to a music service, 22% of New Zealanders, and 45% of 18-24s, said "anything I want to listen to is on YouTube".

16. There is further evidence of the value gap from overseas data and information. A 2017 study by US economists[125] found that the safe harbours in the US are causing losses to the US music industry of between $650 million and $1 billion.

124 Horizon Research. 2018. *Music Consumer Study November 2018*.

125 T Randolph Beard, George S. Ford, Michael Stern Safe Harbours and the Evolution of Music Retailing, available at http://www.phoenix-center.org/PolicyBulletin/PCPB41Final.pdf, visited on 2nd April 2019.

17. The European Commission and Parliament has recognised the evidence of the value gap in issuing its proposal for a Directive on Copyright and including this statement in its explanatory memorandum[126]

> "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."

In its proposal for a Directive, the European Commission included provisions addressing, among other things, the application of safe harbours to user uploaded content services. On 26 March 2019 the European Parliament voted in favour of the Directive. Once adopted the Directive will confirm that UUC services (called Online Content Sharing Services in the Directive) are primarily liable for acts of communication to the public/making available to the public and consequently are not eligible for safe harbour protection.

- The problem has also been recognised in the United States, where the Copyright Office is undertaking a review of the safe harbour provisions in the US DMCA, section 512.[127]

(b) Causes of the value gap

18. The reason for the value gap is the market distortion surrounding the application of the law to user uploaded content services.

19. Platforms that stream music uploaded by users ("UUC Services") claim the benefit of the host safe harbour. In general around the world as well as in New Zealand the host safe harbour provides that the platforms are not liable for infringing content uploaded by their users if they take steps to remove infringing content as and when they become aware of it - a process called "notice and take down".

20. Safe harbour privileges are not available to sites like Spotify or Apple Music because they do not stream content uploaded by members of the public.

21. The existence of the host safe harbour impacts commercial discussions in several ways:

    (a) Unfair advantage to UUC services: Relying on safe harbours to monetise music uploaded by users has enabled user upload platforms to build large global businesses based on the offering of music, attracting large numbers of users, while not properly remunerating the artists and record companies who risk the financial investment in that music in the first place.

    For example, although YouTube is now licensed by major music companies, it had several years advantage to build an audience while relying on safe harbours. By contrast, by the time Spotify

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126 Proposal for a Directive on Copyright in the Digital Single Market, 14.09.2016, page 3. See https://ec.europa.eu/digital-single-market/en/news/proposal-directive-european-parliament-and-council-copyright-digital-single-market visited on 17 March 2019.

127 See https://www.copyright.gov/policy/section512/ visited on 4th April 2019.

launched in New Zealand in 2012, it had obtained licences from major record companies and music publishers.

Another example is Soundcloud which built an audience without licences. Soundcloud operates a hybrid model with some music provided by licence partners, but also the ability for individual artists and creators to upload and share their music. Soundcloud is known for its playlist features and for several years has been used by artists and music creators as a platform for gaining exposure for music. Soundcloud was licensed by major record companies and independents between 2014 and 2016, after operating for a period without licences and claiming the benefit of safe harbour privileges in copyright law.

(b) Distorts negotiating position of right holders: Although some user upload platforms are now licensed by music companies, it wasn't a fair negotiation. In discussions, these platforms claim that due to the safe harbours 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. This adversely impacts the bargaining position of right holders, and reduces the revenues they are able to obtain in licence deals.

(c) Ineffective notice and take down means no ability to withhold content: Services like Spotify and Apple Music negotiate with right holders about the terms on which music will be made available before they launch. In contrast, user upload platforms already have music uploaded by users available on their service before the negotiations even start. The platforms rely on safe harbours – asking right holders to search their platforms for unauthorised content, and send individual notices to request it to be removed. The process of notice and take down is ultimately ineffective, especially in the face of such large volumes of content. This aspect is covered in more detail in the following section and was acknowledged publicly by Warner Music soon after they announced a deal with YouTube:

> Steve Cooper, CEO of Warner Music: "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." [128]

22. The combination of these factors, together with the growing popularity of UUC services, leave right holders with only bad options:

- agree to terms imposed by user upload content platforms and accept whatever revenues the platforms are prepared to share

- rely on ineffective "notice and take down" procedures to try to remove all their music from the platform – a near-impossible task due to the sheer volume of music available (see the section on notice and take down below), or

- attempt legal action against the platforms – again a near-impossible task for a New Zealand right holder.

[128] See https://www.recode.net/2017/5/5/15564782/warner-music-youtube-deal-google-dmca, visited on 4th April 2019.

(c) Who is affected and how?

23. Those affected by the lack of fair market conditions include composers, songwriters, recording artists and record companies, who do not receive fair returns for their investment and creative endeavour. The effect is felt equally in New Zealand as overseas, as evidenced by the New Zealand data set out above. There is also an impact across the wider music industry and related industries.

24. The impact on a record company is to distort its negotiating position. But for individual creators, many of whom could not hope to negotiate with a global platform, the situation is one of exploitation and appropriation of creative content:

> "As an artist it's difficult because nowadays I find myself in the same market as someone posting a video of their cat. It's so hard to make a fair distinction between something like that, and music. My life has been made harder as a result. It's quite distressing when you see how many times something of yours is viewed, but you don't see that interest in your work translating into your life."
>
> Bic Runga – Artist & Songwriter

> "The concept and reach of YouTube is brilliant but the financial reality is different for the majority of artists. The thing is… everybody knows that the money's there. Google reports billions of dollars in profits every quarter. But where does that go? Almost none of that wealth is distributed back to the creators who helped to generate it. If YouTube was purely a passive hosting platform, it would be more palatable. But it's a multi-trillion dollar industry that's not sharing the love."
>
> *Chris Van De Geer [stellar*] – Artist, Writer & Executive [BigPop]*

> "I'm concerned about the erosion of artists' rights… about the large-scale, systematic exploitation of the human desire for music by companies like YouTube, and the deliberate siphoning of income away from artists. They dress it up as 'sharing is caring', but it's actually just artists subsidising the profits of big-tech companies."
>
> Karl Steven [Supergroove] – Artist, Songwriter & Screen Composer

> "I don't think there's ever been a technology that didn't have a bright side and a dark side. But the explosion of opportunity provided by the huge online platforms like Google, YouTube and Facebook, is betrayed by the fact that it's so difficult for artists to make any money out of their work being used. The platforms simply do not make money without content – and it's disgraceful that they've managed to achieve so much without paying the people who create that content."
>
> Graeme Revell – Screen Composer [The Chronicles of Riddick, From Dusk Till Dawn, Gotham]

> "So many musical income streams are currently optional. Under the current law, platforms can choose not to pay for music. Is there a parallel commodity that people can choose not to pay for? Can people opt out of paying for power, data or tech hardware? This disparity creates huge uncertainty and doubt in music creators. These income streams need to be enshrined and clarified so that music creators can survive."
>
> Greg Haver – Music Producer [Manic Street Preachers, The Chills]

> "The internet changed things so quickly and there's so much still to be revealed about its nature. It scares me that big tech companies are determining so much of the future for artists – and for the world in general. So much has been made possible for us by sharing – but far more has been made possible for them by what we share."
>
> Salina Fisher – Composer, Performer & Fulbright Scholar

"Sometimes fans upload my work onto YouTube. I like the fact they're sharing my music with their followers and their friends, but I also wonder who's really benefiting from that. It's great to be building a following, but how do you make a living from endless free streams without getting paid fairly?

Amelia Murray [Fazerdaze] – Artist & Songwriter

"The internet has removed a lot of the barriers to entry for creators, which is a big advantage. Creators can now promote and distribute their music to a wide audience, cost effectively, without having to deal with the traditional gatekeepers, but I don't believe that the money music creators are receiving from tech platforms reflects the value that they add to them. Those platforms aren't necessarily about distributing and promoting music – rather, music is a means to a greater end for them; building an audience and the very valuable data and access to that audience.

To some of these businesses, music is just an input. It's like electricity or steel. The business of business is to keep your input costs low. The reality is though, that music is much more than an input. There's a huge social and cultural benefit inherent in music, so driving the value of it down, to the point where music creators can't survive, is counterproductive.

A company operating fairly in this space should have an ethos to respect the creativity and the business of music. If those things are respected then a fair result will usually follow."

Malcolm Black – Executive [Les Mills International], Artist & Songwriter [The Netherworld Dancing Toys] – NZ Writer Director, APRA AMCOS Board

25. While not all of these issues relate to copyright, there is no doubt that the safe harbour privileges, offered to passive technology providers to facilitate the development of the internet, have in fact allowed platforms to appropriate content and build their businesses off the back of unlicensed, partially licensed and under-monetised creative content, at the expense of the creative community.

(d) Possible solutions

26. The safe harbour privileges were intended for companies such as internet service providers that play a passive role in providing the infrastructure for the internet: the "pipes" and storage space used by others to transmit content. These intermediaries bear little resemblance to user uploaded content sites that exist today and actively monetise, promote and engage with content via curation and recommendations.

27. The safe harbours should be reviewed and changes considered to ensure that only passive intermediaries can rely on them. This would likely include amending the ISP definition and making other changes, including to improve notice and take down.

28. The legislative history of the safe harbour provisions shows that it was always Parliament's intention to limit them to passive intermediaries. The Annex in Section 7 below outlines the legislative history, including MED's statement in its 2002 Discussion Paper that: "where an ISP is itself actively involved in posting information on the Internet, the Ministry considers that it should not be excluded from liability".

(4) Notice and take down has become ineffective (Issue 62)

(a) Background

29. Safe harbour regimes around the world, including in New Zealand [s92C], offer a limitation on liability for service providers that store or host material on behalf of a third party. That limitation on liability is conditional on the service provider deleting or blocking access to specific items of infringing content in circumstances where (a) the provider has actual knowledge that content is infringing or (b) the provider has reason to believe it is infringing. One way that a provider would obtain actual knowledge is from a right holder notice, hence "notice and take down".

30. The rationale for this approach in the US (where it was originally enacted) was that a service provider cannot be expected to proactively monitor its entire service for infringements, but should be expected to act when fixed with actual or constructive knowledge. At the time the provisions were enacted, there was no way to predict the massive scale of infringing content, and corresponding take down notices, that would follow. It has been said in connection with the US notice and take down provisions that "Given Congress's understandable inability to anticipate the dramatic transformation of the Internet, the DMCA has failed to scale, rendering it increasingly obsolete and futile from an enforcement standpoint".[129]

31. In 2017, global record industry body IFPI sent notices to request takedown of over 11 million URLs containing pirated music content – an average of 30,000 each day. The notices were sent to over 6,700 different websites.

32. The problem applies to New Zealand as well as international repertoire. IFPI works with Recorded Music New Zealand to send take down notices on behalf of New Zealand right holders. Lorde's Melodrama has been the subject of 16,344 take down notices since its initial release, and Kimbra's Vows has been the subject of over 20,000 notices since it was released.

33. Notice and take down remains an important tool in the music industry to stop the spread of infringing content once it is online. However, the current system of notice and take down is ineffective to address large scale piracy on the internet and is failing right holders.

(b) Problem 1: scope of application of notice and take down

34. The first and primary problem with notice and take down is the scope of its application. Notice and take down is a process intended for neutral and passive host providers to remove incidental infringements from their service. It should not be relied on by sites that actively engage with content, or sites that are structurally infringing, to excuse their behaviour.

35. For example, of the top 20 pirate sites in New Zealand, as set out in the Music Piracy – Background Annex, other than stream ripping sites to which notice and take down is not applicable, all of them operate or purport to operate a "DMCA" or notice and take down policy.

36. The notice and take down provisions should be amended to clarify beyond doubt that only passive host providers can obtain a limitation on liability for undertaking notice and take down.

(c) Problem 2: ineffectiveness and reappearance of content

129 First Round Comments of [all the music industry bodies] in the matter of the US Copyright Office's Section 512 Study: Notice and Request for Public Comment at p 4.

37. In our experience the number of take down notices that are successful in removing content, and the speed at which take down happens, varies widely. Some sites comply with over 90% of notices and, with the help of automated systems, can remove content within an hour or two of the notice being sent. Other sites never comply or take several days to remove content. These sites are often based in jurisdictions where legal action would be difficult anyway, so there is no practical consequence to the site operator.

38. However the main problem with the current system is that notice and take down, unless it means notice and stay down, is ineffective to address large scale piracy on the internet. Most service providers remove only the specific URL link included in the take down 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 infringing copies of, the same infringing title which remain visible on the service; and

(b) content or links once removed are often quickly re-posted and most service providers do not take any steps to prevent this.

39. 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. See the example below:

> Service providers remove only the specific URL sent to them, e.g:
> 4shared.com/mp3/YZ1TeS6Yce/02_Taylor_Swift_-_Shake_It_Off.htm
>
> But multiple further URLs feature the same content:
> 4shared.com/zip/Y_vKzS_3ce/Taylor_Swift_-_Shake_It_Off__I.htm
> 4shared.com/rar/8eMJOkvBce/Taylor_Swift_-_Shake_It_Off.htm
> 4shared.com/rar/KiUBihtJce/Taylor_Swift_-_Shake_It_Off.htm
> 4shared.com/rar/PMiJi9udce/Taylor_Swift_-_Shake_It_Off.htm
> 4shared.com/rar/DzmK5mL_ba/Taylor_Swift_-_Shake_It_Off.htm

40. The problem is so widespread that approximately 96% of the take down notices sent by IFPI in 2017 involved notifying content to a site that had already been notified of the same content. The problem applies to New Zealand artists as equally as to international artists, as illustrated by the following examples:

- Lorde's album "Pure Heroine" was first located as a pirated copy on the cyberlocker Uploaded.net on 23rd September 2013, four days before it was officially released. During the next year, additional pirated copies of the same album were found on the same cyberlocker on 1,034 more occasions. Of course the number of people accessing those links is far greater.

- The album "Vows" by Kimbra was released in the US on 22nd May 2012. Over the next year following release, pirated copies of the album were located on a single cyberlocker, Uploaded.net, on 1,232 times.

- The album "Melodrama" by Lorde was first located on cyberlocker Rapidgator.net on 14th June 2017, two days before it was officially released. Sixteen days later at the end of June – during the initial release period in which interest in the album would likely be at its height – sixty-eight

separate copies of the album were located on the same cyberlocker. Twenty-five separate pirated copies were located on Rapidgator on 19th June 2017 alone.

(d) Possible solutions: stay down

41. There should be an obligation on service providers, once notified of an infringement, to take reasonable steps to ensure that all other copies of, or URL links to, that sound recording are also removed, and do not reappear in future.

42. This is an appropriate and proportionate obligation. In the case of a large service provider with significant volumes of content, the reasonable steps to be taken would include the use of technology. There is already well developed audio fingerprint technology which enables service providers to scan uploads and check them against a database of reference files. Such technology is already used by YouTube, Facebook and Soundcloud, and commercial solutions are readily available and are affordable for smaller players.

(5) Pirate Sites Rely on Safe Harbours

43. Safe harbours, and the related notice and take down system, were intended to confer limitations on the liability of passive intermediaries. However, they have become the refuge of music piracy sites. Many site operators argue that they are merely storing third party material and purport to take content down in response to right holder notices. Often however, their take down activities are a deliberate sham.

44. Recent examples of abuse of safe harbours involve Grooveshark and MegaUpload. Grooveshark was a pirate streaming site that claimed the benefit of the safe harbours under US law. 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.[130] The court described Grooveshark's activities as like a "Pez dispenser" as each time a song was removed due to a take down notice, Grooveshark ensured that another copy took its place.[131]

45. The phenomenon is not limited to the United States. Kim Dotcom, the operator of MegaUpload, claimed the benefit of the host safe harbour under New Zealand law[132] and claimed to operate a "DMCA take down policy". Documents produced as part of the criminal case revealed that the operators of MegaUpload, in response to notices, were only removing individual URL links, leaving the original file and other URLs intact.

46. While courts will often ultimately determine that safe harbours do not apply to pirate services, there is substantial time and resources involved for right holders in dealing with these arguments.

130 *Ibid.* p.11
131 *Capitol Records, LLC, v Escape Media Group, Inc.* No. 12-CV-6646(AJN), 2015 WL 1402049 (S.D.N.Y. Mar. 25, 2015
132 *Ortmann v United States of America* [2018] NZCA 253; [2018] 3 NZLR 475.

47. Music submits that the safe harbour provisions should be amended to clarify that they are not available to sites that (a) facilitate or enable mass infringement or (b) are designed or operated with the clear intention of inducing or promoting infringement.

(6) Linking, Search Engines And Safe Harbours

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?

48. We are not aware of any practical problems arising from the absence of either (a) an explicit exception for linking to copyright material or (b) a safe harbour for providers of search tools. In addition, introducing such an exception and/or safe harbour could have unintended negative consequences.

49. Search engines play an important role in facilitating online piracy: consumer research indicates that 33% of people used a search engine to find the pirate sites they used. The role of search in online piracy is addressed further in Music Piracy – Background section. Rather than looking to introduce a safe harbour where there is no evidence of a practical problem, the review should consider the role of search engines in online piracy and the steps they can take to encourage consumers to find and use legitimate sites. Search engines and other intermediaries should take reasonable steps to ensure that their services are not used in connection with piracy.

(7) Annex: Legislative History of NZ Safe Harbour Provisions

1. In case it assists the review, we include below a summary of the legislative history of the safe harbour provisions.

2. The Copyright (New Technologies and Performers' Rights) Amendment Bill was introduced in December 2006. This was in response to a review of the Copyright Act 1994 which began in 2001 with the release of the Ministry of Economic Development's discussion paper *Digital Technologies and the Copyright Act 1994*.

(a) Evolution of definition of "Internet service provider"

3. The Ministry of Economic Development released its Position Paper in December 2002. In relation to the definition of "internet service provider", the Ministry stated:

> "...ISPs provide a wide range of services, **not all of which warrant exclusion from liability**. In line with submissions on the discussion paper, the Ministry recommends that **a definition of "service provider", or some similar term, in the Act should be based on the nature of the activity** (for example, caching, hosting, providing transmission services) rather than on the nature or status of the organisation itself."

4. The footnote to this comment was "for example, see the UK Electronic Commerce (EC Directive) Regulations 2002, regulation 2 – definition of "information society service.""

5. The Ministry went on to state:

> "As such, **where an ISP is itself actively involved in posting information on the Internet, the Ministry considers that it should not be excluded from liability**. Conversely, where an organisation, not generally considered to be

an ISP, is providing those services (for example an educational institution or a library), it could be covered by the exclusions."

6. This is an important statement of intent for present purposes. It suggests that the Ministry's intent in framing ss 92B and C was for ISPs to expose themselves to liability where they are "actively involved in posting information on the Internet". On its face, this would support an argument that the "active" elements of UUC services excluded from the definition of "Internet services".

7. The paper discussing the outcomes of the Digital Copyright Review and recommending changes to the Copyright Act 1994 stated in relation to ISP liability:

> "...It is recommended that changes be made to the Act to limit the liability of ISPs in certain cases, thereby **ensuring that ISPs continue to provide their services and that cost-effective access to the Internet for New Zealanders continues**.
>
> Where an ISP **merely provides the physical facilities that enable a communication to take place** it is recommended that this not constitute infringement. It is also recommended that liability be limited for **some forms of caching** undertaken by ISPs in order to provide more efficient Internet services. Where an ISP hosts material posted by third parties, secondary infringement should be limited to where the ISP does not know that the material infringes copyright and upon obtaining knowledge takes action to remove or disable access to it."

8. Again, this statement supports an interpretation of the definitions of "Internet service provider" and "Internet services" that would not include those aspects of UUC services that are *active*, instead of "merely providing the physical facilities that enable a communication to take place" or "some forms of caching".

9. The Explanatory Note to the Bill stated that "the Bill gives effect to the Government's decisions to ... limit the potential liability of Internet service providers for both primary and secondary infringement in appropriate circumstances." It then went on to state:

> "Copying is a central function of the Internet and central to the services provided by Internet service providers (ISPs). Material may be reproduced at many stages during the course of a transmission and it may be virtually impossible to identify when and where many of these copies are made. Thus, where the material being copied is subject to copyright protection, an ISP may face potential liability for both primary and secondary infringement of copyright. There is a public interest in ensuring cost-effective access to the Internet, which may be affected by uncertain or increased liability for ISPs.
>
> Consistent with changes in other countries, the Bill introduces a definition of ISP and a range of provisions that limit ISP liability for copyright infringement in specific circumstances. In terms of primary liability, the Bill provides that an ISP is not liable where it is merely providing the physical facilities to enable a communication to take place. With regard to secondary liability, the Bill limits liability in respect of caching and storing of infringing material where the ISP does not know or have reason to believe that the material is infringing, and acts within a reasonable time to delete it or prevent access to it upon obtaining such knowledge. These limitations of liability will not exclude the possibility of copyright owners obtaining injunctive relief in respect of ISPs."

10. This statement is significant in that it draws a distinction between ss 92B and C on the basis that s 92B applies "in terms of primary liability", whereas s 92C applies "with regard to secondary liability". We note that neither s 92B or C actually draw a distinction on that basis. Instead, the difference between the sections focuses on potential liability for the conduct of a user of the ISP (s 92B), vs potential liability for storing user uploaded material (s 92C).

11. The net benefit of the proposal for users of copyright material was said to be that "increased certainty also encourages continued supply of copyright works and means of distribution (by Internet service

providers, for example) within New Zealand and from overseas, setting conditions to encourage continued access to information and innovations necessary for cumulative innovation."

12. In the first version of the Bill, Internet service provider was defined as "an entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing."

13. The first version of the Bill included cl 92A, which stated that cl 92B – 92D only applied to an Internet service provider that had adopted and reasonably implemented a policy that provided for termination, in appropriate circumstances, of the accounts of repeat infringers.

14. The Bill was referred to the Commerce Committee which reported back in July 2007. In relation to Internet service provider obligations, the Committee said "we recommend amending the definition of "Internet service provider" in clause 3(2) to ensure that a person who hosts material on websites or other electronic retrieval systems that can be accessed by a user falls within the definition." The effect of this was to introduce limb (b) of the definition of Internet service provider.

15. This change appears to have been made in response to submissions by Simon Lyall, InternetNZ, TelstraClear, Trade Me, Acacia Law, IPSANZ, NZLS, Orcon and Sky, that the definition of Internet Service Provider "appears not to apply to companies, webhosting providers, web forums etc which provide places for others to post material". The Officials' response was "Agree. The policy intention is to cover activities such as webhosting. It is recommended that the definition of ISP be redrafted so that it is clear that a person (which includes a company) who undertakes webhosting type activities falls within the definition."7

16. The second reading of the Bill occurred in March 2008. The definition of "Internet Service Provider" was amended so as to read:

> "Internet service provider means a person who does either or both of the following things:
>
> (a) offers the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing:
>
> (b) hosts material on websites or other electronic retrieval systems that can be accessed by a user."

17. The Commentary to the Bill stated, "We recommend amending the definition of "Internet service provider" in clause 3(2) to ensure that a person who hosts material on websites or other electronic retrieval systems that can be accessed by a user falls within the definition."

18. Again, these statements make clear that limb (b) of the definition was only intended to protect ISPs for users using their services insofar as those services involve *webhosting*. Obviously, that form of hosting is passive and does not involve the ISP actively promoting or encouraging users to access copyright infringing material.

TRANSACTIONS (PART 6)

COLLECTIVE MANAGEMENT ORGANISATIONS

Issue 63:	**"Is there a sufficient number and variety of CMOs in New Zealand? If not, which type of copyright works do you think would benefit from the formation of CMOs in New Zealand?"**
Issue 64:	**"If you are a member of a CMO, have you experienced problems with the way they operate in New Zealand? Please give examples of any problems experienced."**
Issue 65:	**"If you are a user of copyright works, have you experienced problems trying to obtain a licence from a CMO? Please give examples of any problems experienced."**

(1) Summary of Music's Response

1. As the Issues Paper notes, CMOs provide a significant benefit to copyright markets, connect copyright owners with users, simplify the complexity of the many licences that may exist in respect of a single copyright work and provide an efficient way for users to access copyright works. [133]

2. In the music industry in New Zealand:

   - **Recorded Music New Zealand** acts on behalf of sound recording copyright owners – record companies and recording artists - to collect for certain uses of sound recordings

   - **APRA AMCOS** acts on behalf of musical work right owners – songwriters and composers – to collect for certain uses of musical works.

   - **OneMusic** is a joint venture between APRA AMCOS and Recorded Music New Zealand formed for the purpose of allowing joint collections (ie on behalf of both sound recording and musical work right **owners**) for public performance when music is played in bars, clubs, businesses and other public performance venues. OneMusic is not a separate legal entity, but operates with a joint governance structure.

3. APRA AMCOS has been operating in New Zealand since 1926 and Recorded Music New Zealand since 1957. Although CMOs are not specifically regulated in New Zealand, [134] both organisations are affiliated with international counterparts and follow best practices from international codes of conduct in the areas of transparency, accountability and governance generally, and in their operations and dealings with members and users specifically.

4. The Issues Paper questions are not directed at CMOs themselves, however we take the opportunity below to set out some further background information that may assist the review.

[133] At para [452].
[134] At para [449].

(2) CMOs in the music industry

5. The importance of CMOs to a well-functioning copyright system has been recognised around the world. In January 2018 WIPO stated that:[135]

> "CMOs provide appropriate mechanisms for the exercise of copyright and related rights, in cases where the individual exercise by the rightholder would be impossible or impractical. Collective management is an important part of a functioning copyright and related right system, complementing individual licensing of rights, resting on robust substantive rights and corresponding enforcement measures. In this vein, CMOs are a policy bridge between rightholders and users."

6. The practical efficiencies of CMOs have been recognised and CMOs have been described as being "the most realistic way for copyright owners to exercise many of their rights":[136]

> "Collecting societies are practically, economically, and legally both viable and essential: practically, because copyright owners cannot be in an indefinite number of places at the same time exercising individual rights, and foreign right owners would be unable to exercise their rights outside their country of origin without extreme expense and difficulty; economically, because it is cheaper to share the financial expenses of negotiation, supervision and collection among the greatest possible number of right owners; and, legally, because it is impossible for users of works to obtain permission from every individual copyright owner, both national and foreign."

7. CMOs provide a particular benefit for smaller right holders who lack the bargaining power to negotiate a licence with large users of music. This has been recognised by the European Parliament:[137]

> "Collective management organizations play … an important role as promoters of the diversity of cultural expression, both by enabling the smallest and less popular repertories to access the market and by providing social, cultural and educational services for the benefit of their rightholders in public."

8. In addition to collecting royalties on behalf of their members, APRA AMCOS and Recorded Music New Zealand act as advocacy bodies and industry representatives and undertake a variety of industry related and charitable activities. These are outlined further in *New Zealand Music Industry.*

9. Finally, music CMOs play an important role in educating members and users about copyright. As well as assisting members who may not know about copyright and how to claim their royalties, music CMOs regularly provide information (but not legal advice) on copyright to music users and assist in connecting users with services that suit their needs. This information is used regularly as a general resource for those looking to use music in the course of their business or organisation.

10. We recognise that the questions raised in the Issues Paper are directed at the members and users of CMOs rather than CMOs themselves. However below we provide some background information which may assist the review.

Recorded Music New Zealand

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[135] World Intellectual Property Organization, 'Working Document – WIPO Good Practice Toolkit for CMOs', January 2018 at p 6 <https://www.wipo.int/edocs/mdocs/copyright/en/wipo_ccm_ge_18/wipo_ccm_ge_18_toolkit.pdf>.

[136] Gillian Davies et al, *Copinger and Skone James on Copyright* (17th ed, Sweet & Maxwell Ltd, London: 2016) at 27-02, 27-07.

[137] Recital 3, Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online uses (EU Directive 2014/26/EU).

11. Recorded Music New Zealand is a non-profit organisation which acts on behalf of sound recording copyright owners and exclusive licensees (generally record companies, digital aggregators and individual recording artists) to license and collect for certain uses of sound recordings including:

   - public performance of music in business premises – much of which is implemented through OneMusic – see further below
   - use of music in radio and television broadcast and non-interactive webcasting
   - use of music in catch-up television, pay television and streaming video on demand (SVOD) services.

12. The uses of sound recordings collected by Recorded Music New Zealand represent approximately 14% of total recorded music revenues in New Zealand. The remainder of the revenues (eg from streaming and download services and the sale of physical music such as CDs) derive from rights that are not collectively managed but negotiated by individual right holders.

13. As set out in our response to **Issue 27**, at the time of writing Recorded Music New Zealand represents approximately 2,125 individual "master rights holders" (copyright owners or exclusive licensees of sound recordings), representing many millions of individual recordings (the numbers growing every day with new music continuously being created and released).

14. The master rights holders represented include:

   - The New Zealand branches of the three "major" record companies: Universal Music New Zealand, Warner Music New Zealand and Sony Music New Zealand;
   - Independent record companies, distributors and digital aggregators including DRM Limited and Flying Nun Records;
   - Smaller independent companies which are often owned by individual recording artists and bands including The Drop Limited (Fat Freddy's Drop) and Massive Entertainment Limited (Six60); and
   - Over 2,000 other independent master rights holders representing all genres and styles, including current and legacy artists and located throughout New Zealand.
   - As part of its licensing of sound recordings, Recorded Music New Zealand actively operates the "Direct-to-Recording Artist" Scheme which is outlined further in our response to **Issue 27**.

15. Recorded Music New Zealand is mandated on behalf of its members to offer licences to music users operating in New Zealand and a number of Pacific islands.

APRA AMCOS

16. APRA AMCOS is the Australasian Performing Right Association. It administers performing rights (rights of broadcast, communication and public performance) collectively on behalf of its members who are songwriters, composers and their music publishers. AMCOS is the Australasian Mechanical Copyright Owners Society and administers particular rights to copy (generally online and mechanical

reproductions) collectively for its members who are music publishers and individual songwriters and composers. In 1997 the two CMOs became APRA AMCOS as one organisation.

17. APRA AMCOS has 100,000 members across New Zealand, Australia and the Pacific. In New Zealand it represents over 11,000 songwriters, composers and music publishers.

18. APRA AMCOS licenses organisations to play, perform, copy, record or communicate music in New Zealand, and then it distributes the royalties to songwriters and composers via 90 similar collecting societies around the world. Similarly, when New Zealand and Australian songs and compositions are performed overseas, Australian and New Zealand songwriters get paid via the collective system of reciprocal rights administration throughout the world.

19. Unlike Recorded Music New Zealand, APRA AMCOS directly licenses digital services such as Spotify and YouTube, and administers royalty collection in respect of live performances (in which there are no sound recording rights).

OneMusic

20. In 2013 Recorded Music New Zealand and APRA AMCOS launched OneMusic as a joint licensing company offering licensing service to all New Zealand individuals and businesses who are publicly playing or performing music.

21. The unique product offered by OneMusic is a joint licence for music, covering both the sound recording and musical work rights. OneMusic is a leading example around the world - we are only aware of one or two other countries that are licensing music jointly. The joint product has helped to simplify music licensing for users.

22. OneMusic offers licences for venues where music is played or performed, including retail stores, hospitality spaces such as bars, restaurants and pubs, exercise facilities such as gyms and fitness studios, music on hold, schools and tertiary education providers, airlines and many other instances where music (live and recorded) is publicly played or performed. OneMusic also licenses business to business music service providers who compile and supply music to these premises.

23. OneMusic collects the license fees and distributes that revenue between APRA AMCOS and Recorded Music New Zealand which then distribute to their members: songwriters, composers, music publishers, recording artists and record companies.

(3) Members of CMOs (Issue 64)

24. The Issues Paper asks whether members of CMOs have experienced any problems. While this question is not directed at CMOs themselves, we have included some comments regarding the relationship between right holders and each of the Music CMOs that may assist the review.

Open membership policy

25. Any eligible right holder may join each of the Music CMOs. For Recorded Music New Zealand, eligible right holders are set out here https://www.recordedmusic.co.nz/portfolio/membership-for-labels/. For APRA AMCOS eligible right holders are set out here http://apraamcos.co.nz/music-creators/join-apra-amcos/are-you-eligible-to-join/

Governance

26. Both APRA AMCOS and Recorded Music New Zealand have a governance structure intended to provide fairness and transparency for their members. The Board of Recorded Music New Zealand includes representatives of recording artists and independent record companies.

15. APRA and AMCOS are separate organisations with 2 separate boards. APRA manage the rights of AMCOS, hence the commonly referred name of APRA AMCOS.

16. The APRA board is comprised of 12 non-executive directors, all of whom are members. Six writer members are elected to the Board by the APRA *writer* membership and six publisher members are elected to the Board by the APRA *publisher* membership, ensuring a mix of writer and publisher interests is represented on the Board. Elections are open to all full writer members and all corporate representatives of publisher members. One writer Board position is reserved for a New Zealand writer. Currently this writer is Malcolm Black. The current Chairperson of the APRA board is New Zealander (but Sydney based) Jenny Morris.

Transparent management and distribution of revenue

27. Both organisations adhere to the highest international standards as regards collecting, managing and distributing revenues. Recorded Music New Zealand is affiliated to IFPI, representing the recording industry worldwide, and adheres to the standards set out in IFPI's Code of Conduct for Music Licensing Companies.[138] Recorded Music New Zealand has a distribution policy which addresses the licensing and collection of fees, calculation of royalties and provisions for managing any disputes. The distribution policy is available here: https://www.recordedmusic.co.nz/portfolio/distribution/

28. Further APRA AMCOS adhere to the Code of Conduct for Collecting Societies (AU) which sets out the standards of service that members of CMO's and licensees (who use their services) should expect and ensures that members and licensees have access to efficient, fair and low cost procedures for the handling of complaints and the resolution of disputes. Each year APRA's conduct is reviewed against its obligations under the Code. Each year the Code Reviewer has found APRA AMCOS to be compliant with the Code.

29. A copy of the Code can be found here: http://apraamcos.co.nz/media/1483/codeofconduct_2011.pdf.

30. APRA's distribution policy and practices can be found here: http://apraamcos.co.nz/about-us/governance-and-policy/distribution-rules/.

31. OneMusic publishes licence schemes, collects licensing income and then distributes this income according to an agreed tariff split schedule to both Recorded Music New Zealand and APRA AMCOS each month. Each CMO then distributes this licence income according to their respective distribution policies.

[138] See for example the IFPI submission available here: https://www.communications.gov.au/sites/g/files/net301/f/submissions/10781-ifpi.pdf

Complaints and Disputes

32. The two Music CMOs receive very few complaints, but each has developed an appropriate procedure for dealing with and resolving issues that arise with members.

33. Recorded Music New Zealand has an experienced member services team that interacts daily with members, and typically responds to queries on a same day basis. Because a large number of rights holders are individuals / independent recording artists, and many have little experience in the area of copyright and music royalties, they often seek personalised assistance.

34. If necessary (and it hardly ever is) Recorded Music NZ has an established complaints and disputes procedure published on its website:

    https://www.recordedmusic.co.nz/portfolio/feedback-complaints-and-disputes/

35. This can be invoked by members though this is rare. In all cases Recorded Music New Zealand asks that the issue first be outlined in writing with any available supporting documentation. When our members are open to meeting personally to discuss concerns, we arrange this, as we have experienced that talking through issues always helps all parties understand each other's position and issues.

36. So far this approach has resolved all issues Recorded Music New Zealand is aware of, but if the issue is not resolved to the complainant's satisfaction, there is the option of Alternative Dispute Resolution or Mediation as per the policy outlined above.

37. APRA AMCOS also has an established complaints procedure for both members and for those using its services as licensees. For more information see: http://apraamcos.co.nz/feedback-centre/.

(4) Users of CMOs (Issue 65)

38. Issue 65 asks whether users of CMOs have experienced difficulties in obtaining a licence. We include some comments below which may assist the review.

39. APRA AMCOS and Recorded Music New Zealand are not aware of any situation where they or OneMusic have refused a licence to any potential user, provided that they have the relevant mandate to give that licence. There are occasionally genuine disputes over the amount payable under a licence or licensees who are reluctant to take out the applicable licence for the music that they use in their business or in public. These can be small value licences or high value disputes but never involve refusing to licence or difficulty obtaining a licence from the Licensor's perspective.

40. The Music CMOs operate transparently and licensing is based on objective and non-discriminatory criteria. Applicable tariffs are transparent and available on our websites – the below are just a few examples:

    - OneMusic tariffs for public performance in different industries : https://www.onemusicnz.com/music-licences/
    - The OneMusic tariff and related information for schools https://www.onemusicnz.com/music-licences/schools/

41. Before issuing a new or amended tariff in a specific industry or business area, OneMusic will typically consult within that industry and with any industry representative bodies. For example prior to the publishing of the OneMusic Hospitality Licencing Scheme, OneMusic consulted with the Hospitality Association of New Zealand (HANZ), The Restaurant Association of New Zealand (RANZ), as well as with representative individual hospitality businesses throughout New Zealand. Feedback on the proposed scheme was gathered and this assisted with the final development of the scheme including the model used to calculate licence fees.

42. The Music CMOs have dedicated licensing staff to handle queries and aim to reply promptly to those seeking a licence. Often CMOs are able to offer a blanket licence but in cases where a suitable blanket licence does not exist, CMOs can provide contact details for the companies who may be able to license the use.

43. The complaints procedures outlined above can be invoked by users or users seeking a licence, but this is rare. In relation to large commercial users, for example radio and television stations, there are ADR provisions in the relevant agreements. Again it is rare for these to be needed and would be invoked only in the case of a high value dispute over the licence tariff.

44. Other than genuine disputes over the licence tariff, which are relatively rare, the only problem that arises with any regularity is users that believe they do not need a licence or resist obtaining a licence at all.

SOCIAL MEDIA

Issue 68:	**"Has a social media platform or other communication tool that you have used to upload, modify or create content undermined your ability to monetise that content? Please provide details."**
Issue 69:	**"What are the advantages of social media platform or other communication tools to disseminate and monetise their works? What are the disadvantages? What changes to the Copyright Act (if any) should be considered?"**

1. For many New Zealanders, social media is one of the main ways of interacting online. As outlined in other parts of our submission, musicians have embraced social media as a way to connect with their fans, and music companies have licensed social media platforms such as Facebook.

2. However it is clear that individual creators often face a dilemma when using platforms to disseminate their content, as exemplified by the quotes below:

> "The internet facilitates a digital Ātea – a space where people can come together. But I think the increasing power of internet platforms – to the extent that a creator's control over what happens to their work is completely overridden and left unacknowledged – has created an imbalance. The more that can be done to correct that imbalance, the better."
>
> Tama Waipara [Ruapani/Rongowhakaata/Ngāti Porou] – Artist, Songwriter & Festival Director

> "I don't think there's ever been a technology that didn't have a bright side and a dark side. But the explosion of opportunity provided by the huge online platforms like Google, YouTube and Facebook, is betrayed by the fact that it's so difficult for artists to make any money out of their work being used. The platforms simply do not make money without content – and it's disgraceful that they've managed to achieve so much without paying the people who create that content."
>
> Graeme Revell – Screen Composer [The Chronicles of Riddick, From Dusk Till Dawn, Gotham]

3. The Issues Paper asks about the open licences required by social media platforms over uploaded content [para 462]. But the problem extends well beyond the terms of these licences. There is a massive power imbalance between large US-based social media platforms and individual creators based in New Zealand. We have heard that these platforms are "unreachable", that there is no way to talk to a person, and individual creators feel powerless to resolve any issues.

4. The market power of platforms is being considered in Australia by the ACCC, which issued a report in November 2018.[139] The report recommended measures to address the market power of Google and Facebook, and to better inform consumers when dealing with digital platforms and improve their bargaining power.

5. Platform accountability is also being considered in Europe, where regulators are looking into a number of concerns including responsibility for offensive, terrorist and copyright infringing content,[140] and

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139 Digital Platforms Inquiry – Preliminary Report – available at https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/preliminary-report, visited on 27 March 2019.

140 https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1466514160026&uri=CELEX:52016DC0288

unfair business practices[141]. In the UK a select committee has been investigating actions of Facebook in connection with competition law, data privacy and interference with elections.[142]

6. Clearly these issues extend well beyond the transactions provisions of the Copyright Act, and the scope of this review, but they serve to illustrate the power imbalance that is felt by New Zealand creators. As set out in our response to **Issues 59-62**, we believe this power imbalance has been perpetuated by the safe harbour provisions which have enabled certain platforms to build a business without paying fairly for content.

7. We also address issues relevant to platforms elsewhere in our submission:

- Online piracy that proliferates on platforms (see **Music Piracy – Background** section)
- Notice and take down provisions that are ineffective in addressing large scale piracy (see **Issues 59-62**)

141 http://europa.eu/rapid/press-release_IP-19-1168_en.htm.
142 UK Culture, Media and Sport Select Committee "Disinformation and 'fake news'" (18 February 2019).

BLOCKCHAIN

Issue 70:	**"Do the transactions provisions of the Copyright Act support the development of new technologies like blockchain technology and other technologies that could provide new ways to disseminate and monetise copyright works? If not, in what way do the provisions hinder the development and use of new technologies?"**

1. As set out in our responses to other issues, the music industry has embraced new technology and is driving innovation in the digital space. This includes licensing music widely in relation to emerging technology, for example interactive games, AR and VR experiences and voice applications for smart speakers; and adopting technology developments such as AI applications for composition. In addition, there is a growing local music tech industry, with New Zealand DJ tech company Serato gaining recognition globally, and US company InMusic recently investing $10 million to contribute to a music tech hub in Auckland.

2. The music industry is looking into the viability of blockchain, as well as many other technologies.

3. We do not believe that the transactions provisions of the Copyright Act are hindering the development or use of blockchain or any other new technology and there are no changes needed to the Copyright Act to accommodate the exploration of blockchain as an emerging technology in the music industry.

ORPHAN WORKS

Issue 71:	**"Have you ever been impeded using, preserving or making available copies of old works because you could not identify or contact the copyright owners? Please provide as much detail as you can about what the problem was and its impact."**
Issue 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?"**
Issue 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?"**
Issue 74:	**"What were the problems or benefits of the system of using an overseas regime for orphan works?"**

(1) Summary of Music's Position

1. As the Issues Paper notes [465], orphan works are those for which their copyright owners (or appropriate licensors of the work) are not easily identifiable or contactable. In our experience, orphan works do not pose a significant issue in the music industry, and it is usually straightforward to identify the relevant right holders.

2. However, we understand that non-profit cultural institutions have raised problems relating to orphan works. We do not object to a properly scoped regime to enable these institutions to address orphan works, and we are open to discussing the details of such a regime. Any regime should include a threshold for a "diligent search" having been undertaken, and should provide a mechanism to deal with the situation where a copyright owner later comes forward.

3. This submission is made on behalf of music organisations that in general represent owners of copyright rather than users. Although Issues 71 to 74 are directed mainly to users we have included our comments below.

(2) Impediments to using old works (Issue 71)

4. As CMOs and licensing bodies we do not use works and have no comment on this issue.

(3) Approach to dealing with orphan works (Issue 72)

5. Recorded Music New Zealand and APRA AMCOS represent copyright owners rather than potential users. In this respect, there are three ways we interact with orphan works:

   - Maintaining databases of works and recordings assisting anyone in locating and identifying the copyright owner(s);

   - Determining whether we can offer a licence for a work; and

- Identifying a suitable party to distribute royalties to.

Recorded Music New Zealand

6. Recorded Music New Zealand is generally made aware of potential orphan sound recordings subsequent to their use by a user (for example, a radio station), particularly where the user keeps a detailed log of all sound recordings used. Recorded Music New Zealand will, for the purposes of paying out royalties to the appropriate owners, check ownership details for all sound recordings against their database which comprises their members' repertoire and is updated regularly.

7. For sound recordings where the copyright owner is initially unknown, Recorded Music New Zealand makes enquiries of its databases of its licensors from whom it has mandates, equivalent licensing bodies internationally such as the UK, US and Australia, and digital music retailers or services such as Spotify and iTunes.

8. The revenue attributable to sound recordings where, after searching and enquiries, Recorded Music New Zealand is still unable to track down the owner is very small, representing only 1 to 2% of total repertoire that is reported. Such sound recordings usually originate from a record company which is based overseas, and which has no New Zealand-based representative, and/or from a country with which Recorded Music New Zealand has no reciprocal agreement for royalty collection.

9. Recorded Music New Zealand has a team of employees whose task it is to identify copyright owners for the purpose of attributing royalties, collecting music usage data and answering queries from music users including streaming and download services, broadcasters and other users of music, and updating their extensive database with sound recording ownership details.

APRA/AMCOS

10. APRA AMCOS maintain a database of the owners of musical works. This database details the writers of works and their respective shares in a work together with, where relevant, the music publisher of a work in this particular territory. It records new works and works where copyright has expired and the work has fallen into the public domain. It also records new arrangements of public domain works created by composers to which fresh copyright attaches to new arrangements.

11. This database is updated regularly (with new works and with details of the deaths of relevant authors of works). The records of a death or an author commences the countdown of the expiration of copyright. These records are updated at regular intervals by the exchange of data from societies around the world so represent a vast majority of the world’s repertoire.

12. These records also include the ownership details of publishers of certain editions of published works or print music.

13. The database is available to the public. APRA AMCOS staff also actively answer questions and assist potential licensees with the identification of right owners. APRA AMCOS routinely connect potential licensees with right owners on request.

14. The primary purpose of the database is to inform and make its distribution of royalties collected accurate. It is necessary to match works used by streaming services, broadcasters and other users of

musical works with records in its database so that royalties collected can be distributed transparently and accurately.

(4) Owner of orphan works comes forward

Recorded Music New Zealand

15. Recorded Music New Zealand has never received any complaints from the owners of previously orphan works concerning their use without authorisation.

16. The nature of the mandates Recorded Music New Zealand has in place with users means that use of an orphan work often occurs *before* Recorded Music New Zealand is aware that it has been used. However, Recorded Music New Zealand pays out royalties on a yearly basis. Provided that the copyright owner of a sound recording comes forward before the pay-out period ends each year Recorded Music New Zealand can register the copyright owner and ensure all royalties earned within the relevant financial year are attributed to the owner.

APRA/AMCOS

17. APRA AMCOS seldom receive any complaints from the owners of previously orphan works concerning their use without authorisation.

18. Generally, in the case of blanket licences offered by it, APRA AMCOS will provide users an indemnity for any claim that a work used (perhaps a previously orphaned work) was not part of its repertoire (and therefore infringing). This provides users of music security. APRA AMCOS then deal with the resulting issue with any particular copyright owner. These scenarios are in the tiniest of minorities – almost non-existent and almost always in a non-commercial context.

(5) Problems or benefits of overseas regime for orphan works (Issue 74)

19. Both APRA AMCOS and Recorded Music New Zealand acknowledges that a properly scoped exception for orphan works may be desirable for non profit cultural institutions. For this reason we are open to discussions about a new scheme for dealing with orphan works, though given their high non-commercial nature they do not pose great difficulties for the music industry.

20. The EU Directive 2012/28/EU[143] sets out a scheme for orphan works. Certain institutions[144] are allowed to use certain orphan works (including sound recordings/phonograms), provided such use fulfils their public interest missions,[145] and only after a diligent search has been carried out (the Directive provides

143 Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works (25 October 2012).

144 Directive 2012/28/EU, art 1: “publicly accessible libraries, education establishments, museums, archives, film or audio heritage institutions and public-service broadcasting organisations”

145 Directive 2012/28/EU, art 6(2): “to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection.”

detailed guidance on conducting a "diligent search"). The scheme applies to the right of reproduction and the right of making available to the public.[146]

21. In order to confirm the status of an "orphan work" (defined as a work where all the right holders are not identified and located after a diligent search),[147] a diligent search must be carried out in good faith in the country of first publication or broadcast.[148] The search must be carried out for each work, and must consult the appropriate sources – at minimum those listed in the Annex of the Directive.[149]

22. The results of the diligent search and the use of the work must then be recorded and registered in a single publicly accessible online database, leaving it open for the right holder to claim his/her rights back.

23. Further, a right holder can at any moment claim his or her rights and put an end to the orphan work status and he or she should be fairly compensated for the past use of the work.

146 Directive 2012/28/EU, art 6(1).
147 Directive 2012/28/EU, art 2(a).
148 Directive 2012/28/EU, art 3.
149 These include, for phonograms, the databases of producers' associations, collecting societies of record producers, credits and other information appearing on the work's packaging and databases of relevant associations representing a specific category of right holders are included.

ENFORCEMENT OF COPYRIGHT (PART 7)

PROOF OF OWNERSHIP

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

(1) Summary of Music's Position

1. The presumptions in sections 126 and 128 are very important.

2. Increasingly in litigation against pirated copyright works, infringers seek to raise challenges to ownership and subsistence so as to delay proceedings and cause cost to plaintiffs, even though there is no question that illegal copies of the original sound recording and musical work embodied in it have been copied or communicated.

3. The presumptions in the Australian Copyright Act 1968 contain a series of more extensive presumptions which are suited to the current era. Detailed consideration of these and their adoption is warranted as part of the reform of the Act.

4. Further the current New Zealand presumptions and those in Australia pre-date both digital downloads and streaming services where digital copyright notices are now used. While the existing wording of the New Zealand presumption seems adequate to cover such notices, it would be sensible and desirable to update the presumptions for the avoidance of doubt.

(2) Issues Paper comments

5. At [481] the Issues Paper refers to the presumptions contained in the Act to facilitate copyright owners taking legal action to enforce their copyright.

6. The Issues Paper further notes that MBIE has heard that court action to enforce copyright often fails because the copyright owner is unable to prove copyright exists in the work, or if it does, that they own the copyright. "This task can be difficult for copyright owners because, unlike other forms of intellectual property rights ... there is no official register of copyright works to provide *prima facie* evidence that the work is protected by copyright and who owns it."

7. The Issues Paper floats the idea of a voluntary register at para [485].

(3) The Issues Concerning Proof

Musical Works

8. Musical works can exist in many forms and songs are often recorded and/or reproduced by multiple artists or record labels. CMOs (such as APRA AMCOS) maintain databases of owners of musical works and a well-established practice exists to ensure that each database (comprising many millions of individual works registrations) is updated by each CMO and that the databases are as accurate and up to date as possible. To prove ownership of a musical work either by or on behalf of the author of that

work and/or its publisher is generally a relatively simple exercise as these records generally currently exist.

9. Of greatest importance is clarity and certainty. To be effective, databases (or any form of voluntary register) need to be comprehensive and reliable. This is no easy or inexpensive matter. We are of the view that any voluntary registration scheme would not improve clarity or certainty from either the copyright owner's or user's perspective. We strongly favour enhanced presumptions as discussed below.

Sound Recordings

10. The experience of sound recording rights holders in many jurisdictions is that whenever infringement action is taken against illegal streaming, downloading or uploading of sound recordings, there is never any doubt that the sound recordings in issue are copies of the original sound recordings. After all it is the provision or obtaining of illegal copies of the original work that such websites and indeed consumers of their illegal services are seeking. So identity between the sound recording and illegal copy is never in doubt.

11. Yet when infringement action is taken in respect of such activities, the very first resort of the infringing websites or authorising parties is often to challenge copyright subsistence and ownership. This is just a delaying tactic designed to put up obstacles and to cause cost to the plaintiffs.

12. It is for this reason that presumptions and enhanced presumptions are a very important way of assisting copyright owners in overcoming such tactics. We would strongly favour enhanced presumptions as opposed to any voluntary registration scheme. This is because one of the enhanced presumptions we discuss below is tied to use of records from the existing US Copyright Register. Such a mechanism would avoid the need to duplicate a voluntary copyright register in New Zealand with all its attendant cost.

13. We turn then to discuss the existing presumptions in New Zealand, the position in Australia and then some suggested solutions.

(4) The Existing Presumptions

14. Our interest in this matter arises in respect of musical works and sound recordings.

15. As to *musical works*, s 126(2) provides a presumption when a name appears on the published work that the person whose name appeared is the author and made the work in circumstances not falling within s 21(2) and (3) (ie works made in the course of employment or under commission), s 26 (Crown Copyright) or s 28 (copyright vesting in international organisations). This presumption also applies in respect of works of joint authorship.[150] There are less used presumptions in s 126(4) and (5) in relation to where a name appeared on copies of the work as first published and where the author is dead or the identity of the author cannot be ascertained by reasonable inquiry.

16. In relation to *sound recordings*, s 128(2) provides that where copies of the recording as issued to the public:

[150] S 126(3).

"bear a label or other mark stating

(a) That a named person was the owner of copyright in the recording at the date of the issue of the copies; or

(b) That the recording was first published in a specified year or in a specified country,-

the label or mark shall be admissible as evidence of the facts stated and shall be presumed to be correct until the contrary is proved."

17. The presumptions in relation to sound recordings apply in proceedings relating to an infringement alleged to have occurred before the date on which the copies were issued to the public in the same manner as they apply in proceedings relating to an infringement alleged to have occurred after the date on which the copies were issued to the public.[151]

(5) Position in Australia

18. The Australian Copyright Act 1968 provides more extensive presumptions which are far more fit for purpose.

19. Section 126 of the Australian Copyright Act 1968 sets out some default provisions as to presumptions as to subsistence and ownership of copyright where the defendant does not put these in issue.

20. Sections 126A and B then provide for additional presumptions to operate where a defendant puts in issue the subsistence or ownership of copyright. Section 126A(2) provides that if a label or mark on a copy of the work or other subject matter in issue, or on its packaging or container, states the year and place of first publication or of the making of the copyright material, those matters are presumed to be as stated unless the contrary is established.

21. There is an extended presumption too that allows reliance of extracts from a copyright register such as the US Copyright Register. Section 126A(3) provides that a certificate or other document issued under the law of a qualifying country and stating the year and place of first publication or making of the copyright material is presumed to be as so stated unless the contrary is established. The Australian text *Ricketson*[152] notes that the Explanatory Memorandum to this provision makes it clear that the presumption is directed at certificates or other documents from countries such as the United States that have a registration system.

22. There are corresponding presumptions in s 126B where the plaintiff's ownership is put in issue – using the label or mark on a copy of the material or its packaging or container. Section 126B(3) again provides for presumptions based on certificates from qualifying countries that have a registration system such as the United States.

23. Where there is nothing about copyright ownership either on the copy of the copyright material or on its packaging or container or in any foreign registration certificate or document, then s 126B(6) provides that if the plaintiff produces "a document" stating the original and each subsequent owner (including the plaintiff) of the copyright in issue and from what date and describing each change of

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151 S 128(4).

152 The Law of Intellectual Property: Copyright Designs and Confidential Information (looseleaf) Law Book Company [13.1750].

ownership transaction, then those matters are presumed to be as stated in that document unless the contrary is established.[153]

24. This last presumption comes with a sanction. There are penalties provided for inaccurate documents.

25. Section 130 of the Australian Act (which was upgraded in 2006) contains certain presumptions in relation to sound recordings based on their label or mark including what are known as Ⓟ notices.

> "If the label or mark consisted of the letter 'P' in a circle accompanied by a specified year and the name of a person, it is presumed that:
>
> (a) The recording was first published in the year; and
>
> (b) The person was the owner of copyright in the recording where and where the records or containers were labelled or marked – unless the contrary is proved."

26. As can be seen these presumptions are more extensive than in New Zealand. The Australian presumptions were upgraded in 2006. Even then 2006 was just as digital downloads were being introduced and *before* any streaming services.

(6) Outcome Sought

27. In meeting the sort of delaying and cost-causing challenges described in Section (3), the presumptions in s128(2) are very helpful. However it is obvious from the Australian legislation that more extensive presumptions have been considered appropriate in that jurisdiction, where there are such challenges. The presumptions allowing use of US copyright registration data and also allowing the owner to produce and rely on (by way of presumption) a document stating each subsequent copyright owner (and from what date) are sensible provisions which we submit are needed.

28. A detailed look at the Australian provisions and their implementation in New Zealand is warranted as part of an upgrade of the New Zealand presumptions

29. Since digital downloads and streaming services have become available, Ⓟ notices and other forms of label are routinely provided on iTunes, other download services and on streaming sites such as Spotify, Apple Music and Tidal. We consider that such notices would fall within the scope of s128(2). Copies of the sound recording are, in the words of s128(2), 'issued to the public' via these websites and the electronic copies 'bear' or have associated with them Ⓟ notices and copyright data.

30. It would nonetheless be sensible and desirable for the avoidance of doubt to update the presumptions.

[153] Ricketson [13.1750].

COST OF ENFORCEMENT

Issue 79: "Does the cost of enforcement have an impact on copyright owners' enforcement decisions? Please be specific about how decisions are affected and the impact of those decisions. What changes (if any) should be considered?"

1. The Issues Paper at [488] notes that the most significant barrier for copyright owners taking legal action is cost so that copyright owners often limit their enforcement actions to large-scale or commercial infringements. The Paper notes too that cost can provide a strong incentive to settle infringement proceedings without resorting to the courts. It then poses the questions in Issue 79.

2. We would agree that cost is one of the determining factors limiting enforcement of rights. This is especially the case in a small market like New Zealand. The issues that may be litigated (for example the liability of certain online services or the process for website blocking) are no less serious than in other markets, and the cost of litigating them is comparable to the cost in larger markets. However the funds available for doing so are much smaller.

3. The cost of enforcement is generally a function of other aspects of copyright law and court procedural rules:

   (a) Having clearly defined legal rights and exceptions means that often litigation can be avoided. Importantly for Music, such rights facilitate and underpin the licensing of musical works and sound recordings which now provides the bulk of its income. The importance of this cannot be underestimated. The success of good legislation is not just judged by litigation.

   (b) Court procedural rules both in the High Court and District Court have a significant impact on the cost of enforcement, but these rules fall outside the scope of this review of the Copyright Act.

   (c) Proving ownership of copyright can be expensive and burdensome. Enhanced presumptions would assist in providing copyright, and in avoiding baseless challenges to ownership and subsistence, in circumstances where there is no genuine issue but the aim of the challenge is really to delay and cause cost to the right holder. See our response to **Issue 76**.

   (d) Enhancing the ability of CMOs to bring proceedings and also conferring rights to sue on non-exclusive licensees would be of great benefit in lowering the costs of litigation.

   (e) Just as important to copyright litigants is the obtaining of a timely decision. Where there are lengthy delays then this too can be a factor that forces copyright owners (and alleged infringers) to settle.

   (f) This factor applies equally to references that are brought before the Copyright Tribunal since these fall squarely within 'legal action' and can involve many millions of dollars in royalty payments. A critical factor for CMOs and rights holders is being able to obtain timely decisions and that there be efficient timetabling of the interlocutory steps in a reference so that these can reach an early determination. So the making of procedural rules for the Tribunal allowing timely and efficient timetabling of references *and* making provision for timely decisions are both critical reforms.

4. As noted above we believe that the cost of enforcement is mainly a function of court procedural rules and other procedural rules under copyright law. However the review may also wish to consider the present jurisdiction for copyright cases which is only the High Court or District Court. It is not currently possible to bring proceedings in the Disputes Tribunal, an option which could be considered by the review.

GROUNDLESS THREATS

Issue 80: "Are groundless threats of legal action for infringing copyright being made in New Zealand by copyright owners? If so, how widespread do you think the practice is and what impact is the practice having on recipients of such threats?"

1. The Issues Paper notes that where a copyright owner takes legal action alleging infringement then under s 130 the alleged infringer may apply the court for a declaration that *the proceedings* were unjustified. The paper notes[154] that there is no provision to address the situation where the copyright owner makes groundless threats of commencing legal proceedings. The Australian Copyright Act allows an alleged infringer to apply to court for a declaration that the threats were unjustified, an injunction against continuance of the threats and an order for recovery of any damages.[155]

2. Music is not aware of any situation where it or one of its licensors/rights holders has ever made groundless threats of infringement proceedings. Allegations of copyright infringement are not lightly made and there is no evidence of there being any practice of speculative claims being threatened. Counsel for Music has had over 30 years' experience in copyright litigation (including industrially applied copyright works) and has not encountered groundless threats of this nature nor been involved in making any such threats.

3. At a policy level it is instructive to note that s 74 of the former Patents Act 1953 contained a provision for groundless threats. However, when the Patents Act 2013 was enacted, the groundless threats provision was **not** re-enacted. Accordingly there is no such provision providing a remedy in respect of patents.

4. Similarly there is no cause of action for groundless threats in respect of registered trade marks, registered designs or plant variety rights.

5. Given that none of these intellectual property rights – particularly something as serious as the threat of patent infringement – carries any cause of action in New Zealand, we submit that no such provision is warranted under the Copyright Act.

[154] Para [491].
[155] Section 202 Australian Copyright Act 1968.

BORDER ENFORCEMENT

Issue 81:	**"Is the requirement to pay the $5,000 bond to Customs deterring right holders from using the border protection measures to prevent the importation of infringing works? Are the any issues with the border protection measures that should be addressed? Please describe these issues and their impact."**

1. Music's business today is largely digital and as a result we do not have direct experience of the customs border protection measures. However we are familiar with the serious issues faced by the New Zealand film and television industry in connection with the importation of Kodi boxes.

2. We support the submission from Sky that there should be a review of the border protection measures in Part 7 to explore ways in which devices that facilitate the infringement of copyright. This includes taking steps in relation to the means for making infringing copies as prohibited under s 37 of the Act.

P2P FILE SHARING

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

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

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

(1) Summary of Music's Position

1. There is good evidence from multiple sources that P2P file sharing technology is being used in New Zealand to infringe copyright on a substantial scale. The breadth of the infringement covers media files ranging from television, film and music to games and books. There is good evidence that this infringement is having a substantial impact on the revenues of New Zealand creators and investors as set out in other parts of Music's submission.

2. The Government's decision to introduce the infringing file sharing regime in 2011 was sound policy based on the evidence of the substantial economic impact of file sharing on content industries at the time. It was introduced at a time when other governments were considering or had enacted similar systems, for example the HADOPI system in France.

3. However, due to the manner in which the regime was enacted and implemented, it was burdensome, costly and ineffective. Music was the only industry to use the regime and the evidence of our practical experience is summarised the section below. We stopped using the regime in July 2015 for these reasons.

4. Recorded Music New Zealand has previously lobbied for changes to the file sharing regime in order to make it workable in practice to address BitTorrent piracy. In particular Recorded Music New Zealand requested a review of the costs charged to right holders. These changes would have significantly improved the effectiveness of the regime.

5. However, since that time the internet and nature of music piracy has evolved, and an alternative method of enforcement (website blocking) has become standard practice in at least countries around the world. In light of these developments, Music believes that there is no value in making changes to the existing file sharing regime.

6. The best alternative is a system of website blocking, a tool which is reasonable and proportionate, and has been shown to be effective in addressing online piracy. There are a number of advantages with website blocking over the P2P file sharing regime:

   (a) It is more technologically neutral and can be applied to any type of website or online location;

(b) It does not involve processing data relating to individuals; and

(c) Based on evidence from other countries, it has been proven to be more effective in causing a sustained reduction in piracy.

7. MBIE should also adopt other measures to assist right holders in effectively tackling piracy – these are set out in our answer to **Issue 85**.

(2) Background and Issues Paper

8. The Copyright (Infringing File Sharing) Amendment Act 2011 was enacted as sections 122A to 122U of the Copyright Act 1994. It passed into law in April 2011 and became operative in September 2011. The objective of the legislation as stated in the MBIE Regulatory Impact Statement relating to the Copyright (Infringing File Sharing) Amendment Bill was:

> "… to put in place a regime that effectively deters people illegally engaging in peer-to-peer (P2P) file sharing. A process to deter illegal P2P file sharing needs to be efficient to reflect the relatively low value of most music, movie and software files which are shared illegally. It is often uneconomic for a right holder to take legal action against individuals because of the cost of court action. However, the extent of downloading and uploading by individuals is so prolific that right holders claim that it is having a substantial economic effect on their businesses."

9. In summary, the purpose of the infringing file sharing regime was to deter individual P2P users through a system of warnings which, if not heeded, would result in a deterrent sanction. The principle, similar to the scheme enacted in France in October 2009 was that once warned, P2P users would be less likely to infringe especially if they knew there would be a negative consequence if they continued.

10. This is acknowledged in the Issues Paper where MBIE states that:

> "the regime aimed to act as a deterrent against the use of P2P file sharing technologies, educate the public about copyright and provide compensation to the affected copyright owners."[156]

11. The process commenced with the right holder identifying the IP address of a person it suspected of infringing copyright using an ISP's services. The right holder would then write to the ISP and require it to send a detection notice to the relevant user. If a further infringement was detected 28 days after the detection notice was sent, the right holder could then require the ISP to send a warning notice. If the right holder detected a third infringement subsequent to the warning notice by the same user, it could then require the ISP to send an enforcement notice.

12. Once an enforcement notice had been sent, the right holder could take enforcement action by seeking orders against the user of up to a $15,000 fine or suspending the user's internet access for up to six months. Those orders were obtained from the District Court. Each step in the above regime is subject to strict time limits.

13. MBIE notes at para [505] of the Issues Paper that despite several infringement cases being brought under the regime shortly after it came into effect, the regime is no longer being used by copyright

156 At [502].

owners. A summary of the reasons why copyright owners are no longer using the infringing file sharing regime is given at para [506].

(3) Scale, breadth and impact of P2P infringement

14. There is good evidence from multiple sources that P2P technology continues to be used on a substantial scale to infringe copyright in New Zealand, for multiple media types, including music:

- Consumer research indicates that 6% of New Zealanders aged 13 to 64 are using BitTorrent, the most prevalent type of P2P file sharing, to obtain music.[157]

- Website visitor data from Similarweb as at February 2019 indicates that (a) there were 636,000 unique New Zealand visitors to BitTorrent sites(this data does not record what content they were showing); (b) the most popular site, The Pirate Bay, had 197,514 unique visitors.

- A table showing the visitors to the most popular BitTorrent sites is included below.

TOP 10 BITTORRENT SITES – as at February 2019

SITE	VISITORS – SIMILARWEB FEB 2019	DOMAIN REGISTRANT	OPERATOR	HOST ISP
thepiratebay.org	197,514	Fredrik Neij, Sweden	Unknown	CloudFlare Inc., US
rarbg.to	73,920	Details Redacted	Unknown	S.A.& A Stroi Proekt Eood, (BIH)
1337x.to	52,385	Details Redacted	Unknown	CloudFlare Inc., US
torrents.org	31,496	Raimond Torrents, Atmosfera.net, Spain	Unknown	Microsoft Corp, US
torrentz2.eu	30,602	Details Redacted	Unknown	CloudFlare Inc., US
torrentdownloads.me	19,322	WhoisGuard, Inc. Panama	Unknown	CloudFlare Inc., US
torlock.com	15,862	Whois Privacy Corp., (BS)	Unknown	CloudFlare Inc., US
zoogle.com	14,475	Craig Hatkoff, Turtle Pond, (US)	Unknown	GoDaddy.com LLC, US
monova.to	13,650	Details Redacted	Unknown	CloudFlare Inc., US

- It is widely accepted that the vast majority of traffic on the BitTorrent network, other than pornography, consists of media files (film, television, music and games) that are unlicensed.[158]

157 Horizon consumer research November 2018, will be attached to submission cite commentary ie Horizon Music Consumer Study November 2018.

158 Reference to Netnames report – or leave out and assume all BT traffic is infringing.

- There is a wide range of New Zealand music available for download on The Pirate Bay and other BitTorrent sites. Examples are included in the "Music Piracy **Background**" section of our submission.

15. There is good evidence that this infringement is having a substantial impact on the revenues of New Zealand creators and investors, as outlined in the Music Piracy Background section of our submission.

16. For Music, while still substantial, the impact of BitTorrent infringement has lessened since 2011 for two reasons:

    (a) Web-based methods of infringement – such as stream ripping, cyberlockers, and social media platforms such as Facebook and YouTube – have become more prevalent; and

    (b) The consumer demand for BitTorrent piracy has lessened since licensed digital music services have developed (the introduction of licensed digital music services is outlined in The Zealand Music Industry, Section 11: How Music is Enjoyed).

(4) Why the regime is not being used (Issue 83 and 84 of the Issues Paper)

17. MBIE has already acknowledged at para [505] key reasons why copyright owners are not using the infringing file sharing regime. Recorded Music New Zealand used the infringing file sharing regime from 2012 to 2015, and what follows sets out its experience of the regime. References throughout this section are to Recorded Music New Zealand as the organisation using the regime but the views are those of all submitters.

(a) Cost of notices

18. As set out at para [503] of the Issues Paper, the infringing file sharing regime requires copyright owners to send up to three notices to an account holder who is alleged to have infringed copyright using P2P file sharing technologies before they can make a complaint to the Copyright Tribunal. Each notice costs the copyright holder NZ$25, which is a contribution to ISPs' costs. The $25 per notice cost is paid to the ISP (IPAP).

19. As noted above, one of the aims of the infringing file sharing regime was to provide a low-cost enforcement regime. However, the decision to set the fee at NZ$25 per notice meant that the regime was far from low-cost.

20. As a direct consequence, many rights holders did not participate in the regime at all, citing cost as the issue. Recorded Music New Zealand was the only stakeholder to ever use the infringing file sharing regime.

21. The cost of notices also meant that when Internet Service Providers (ISPs) made mistakes in sending non-complying notices (and there were many of these) all costs were borne by Recorded Music New Zealand with no recompense or ability to recover the wasted costs (at NZ$25 a notice).

22. Recorded Music New Zealand has also consistently submitted that the cost of the notice has meant that the intent to educate has been thwarted to a very considerable degree. The NZ$25 fee per notice

meant that Recorded Music New Zealand was severely restricted in the number of notices it could and would have sent. It follows that many P2P file sharing users would have been unaware of the illegality of their actions and so the 'deterrent effect' was likewise thwarted.

23. Ultimately, Recorded Music New Zealand ceased sending notices under the infringing file sharing regime in 2015 as the high cost of notices had become unsustainable.

(b) Contribution of costs awarded only

24. Even if Recorded Music New Zealand was successful in the Copyright Tribunal against an account holder, only a "contribution" to the total cost of all notices sent to an account holder was allowed to be recovered by rights holders.[159]

(c) No prescribed form

25. The Copyright Act provides for regulations to prescribe the form of the detection, warning and enforcement notices. Regulation 5(1) does prescribe *certain categories of information* which must be set out in every infringement notice. However, beyond that, notices can be issued in any form by the ISP. This has meant that ISP's were able to send the notices in whatever format the account holder usually received their monthly bill.

26. In Recorded Music New Zealand's experience, the absence of a standard prescribed form of infringement notice consistently caused problems in the accuracy of notices sent by ISP's to account holders. In particular:

    (i) The required information was not always included because there is no prescribed form;

    (ii) Most notices were sent out in e-mail format (see further discussion on e-mail correspondence below); and

    (iii) ISP's frequently sent infringement notices with no letterhead and just as a plain sheet, so account holders considered the notices a scam and ignored them.

(d) Incorrect notices, delays, invalidity and cost

27. The slightest non-compliance with the infringing file sharing regime when sending a notice (including a minor administrative error) immediately displaced the presumption that the notice was issued in accordance with the Act. This was enough to prevent the Copyright Tribunal ordering an account holder to pay compensation, in effect allowing file-sharers to avoid liability on as little as procedural technicalities.[160]

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159 Section 122O(3): If the Tribunal makes an order under subsection (1), it may also make an order requiring the account holder to pay to the right's owner either or both of the following:

> A sum representing a *contribution* towards the fee or fees paid by the rights holder to the IPAP under s 122U …"

160 Jared McIntosh, "Competing with Free: The New Zealand Response to the Proliferation of P2P File-Sharing", a dissertation submitted in partial fulfilment of the degree of Bachelor of Laws (with Honours), University of Otago, October 2012, at page 30.

28. There were various examples where delays or errors on the part of ISPs (IPAPs) resulted in the notices being invalidated with costs still being borne by Recorded Music New Zealand. Examples include:

(i) In *Recorded Music NZ Limited v Telecom NZ 2011* [2015] NZCOP 1, one of the initial enforcement notices issued was incorrect. Subsequently, upon identification of a further infringement by the same account holder, an enforcement notice in the *correct form* was then issued. Recorded Music New Zealand then filed an application with the Copyright Tribunal under s 122J.

Copyright Tribunal member Glover held that the non-conformity of the warning notice was "more than minor" and declined to make any award, noting:

> "The Tribunal appreciates the difficulty that this may cause for rights owners, who are of course not responsible for sending infringement notices, yet who bear the consequences of any errors in these notices that cause them to be invalidated.";

(ii) The use of historic or redundant email addresses for certain account holders such that the account holder never actually received the notice;

(iii) The invalidation of up to 10% of sent notices flowing from the use of legacy systems;

(iv) In one case, over 200 notices being thrown away by a disgruntled ISP staff member;

(v) The required information on warning and detection notices not being included for two months; and

(vi) In numerous cases, challenge notices not being sent by the ISP to rights holders *within the required time frame* resulting in subsequent invalidation of these notices.

(e) Sometimes only e-mail addresses available

29. Where only e-mail addresses were provided by the customer, this often meant that the notices were not opened by the account holders. This was often the refrain heard once matters progressed to the Copyright Tribunal. Additionally, the consequences to an account holder of ignoring an infringement notice were not spelled out by all ISP's in easy to understand language.

30. Physical communications appear more "official" so that when physical addresses were used, the account holders tended to take more notice of them (albeit that the lack of a letterhead often meant they were considered scam in any event).

(f) No mechanism within the regime for transparency as to compliance

31. The regulations do not provide for any formal accounting or other records to be kept by the ISP's in relation to *their* compliance under ss 122A to 122U. As such, most instances of non-compliance identified above were noted by Recorded Music New Zealand itself or were brought to its attention in an informal way. It seems likely there were many more instances that were not discovered.

(g) Low awards and no account of the impact of "uploading" on the market

32. Regulation 12(2)(d) provides that the Copyright Tribunal must determine "an amount that the Tribunal considers appropriate as a deterrent against further infringing." The regulations provide three broad categories of guidance on the exercise of that discretion:

    (i) The prescription of a maximum award of $15,000 under Regulation 12(1)(b);

    (ii) The express provision in Regulation 12(3) that the Tribunal may consider "any circumstances it considers relevant" which allows the Tribunal to take a very broad range of factors into account; and

    (iii) The provision in Regulations 12(3)(a) to (c) of certain specified mandatory considerations including the flagrancy of the infringement, the possible effect of the infringing activity on the market for the work and whether the sum of the amounts under Regulation 12(2)(a) to (c) would constitute a sufficient deterrent against further infringing.

33. Given that the maximum amount awardable (for *all* the heads of payment set out in Regulation 12 including deterrence) is $15,000, the Legislature clearly contemplated that, in certain situations, an award of that amount or close to it was required.

34. Further, given that under Regulation 12(2)(a) to (c) only modest amounts were practically awardable (these were in respect of the reasonable price of purchasing each of the copyrighted works, the notice fees paid to the ISP and the reimbursement for the application fee to the Copyright Tribunal), the Legislature must also have intended that the *majority* of that NZ$15,000 be awardable for deterrence (i.e. under Regulation 12(2)(d) and 12(3)).

35. However, the maximum deterrent sum awarded by the Tribunal in any case under Regulation 12(2)(d) was NZ$600 awarded on 19 February 2013 in respect of 6 instances of infringement (COP 002/13). This amounted to a deterrent of only NZ$100 per infringement. The total award in that case was NZ$914.35, being approximately 6% of the maximum amount awardable.

36. The Copyright Tribunal decision covering 97 infringements (COP 013/12; the largest number of individual infringements by a single account holder) resulted in a deterrent award of only NZ$540. This amounts to a deterrent of only NZ$5.57 per infringement. It is Recorded Music New Zealand's view that an award in the vicinity of NZ$9,700 would have been warranted in this case in order to be consistent with COP 002/13. Even an award of NZ$9,700 would have been comfortably below the statutory ceiling, leaving room for significant further uplift in even more serious cases.

37. The average deterrent fee per track across all the Copyright Tribunal awards was just NZ$70.36.

38. The amounts awarded by the Copyright Tribunal in exercise of its discretion under Regulations 12(2)(d) and 12(3):

    (i) Were clearly not in line with the regulator's intention as to the appropriate quantum of awards;

    (ii) Were inconsistent as between "like" situations; and

    (iii) Were insufficient to ensure the regime was having the intended deterrent effect.

39. Recorded Music New Zealand also believes that the quantum of awards was limited as the Copyright Tribunal only considered the impact of "downloading" whereas most damage is caused by "uploading" that occurs from an account holder's computer, often in their absence. Recorded Music New Zealand understands that the Copyright Tribunal considered it had little room in this regard to take a more expansive view on the impact of uploading on the market.

40. In summary, the awards presented were, in Recorded Music New Zealand's view, insufficient to ensure the infringing file sharing regime was having the full deterrent effect it hoped to have.

(h) Delays in decisions by the Copyright Tribunal

41. An important aspect of a deterrent system is for the timely issuing of decisions so that these are delivered a short time after the application to the Copyright Tribunal. Timely decisions then enable the rights holders to give publicity to them and in turn that acts as a deterrent.

42. The time taken on average for the Copyright Tribunal staff to *process* a complaint and assign it to the Copyright Tribunal members was 40 days, i.e. staff handled the administration and processing of complaints efficiently.

43. However, there were significant delays in the *issuing of final decisions or awards* by the Copyright Tribunal itself. A table showing the length of time for the issuing of decisions is set out below:

Reference:	Submitted:	Finalised:	Days:
COP 005/12	31/08/12	29/01/13	152
COP 004/12	05/09/12	05/02/13	154
COP 013/12	27/10/12	19/02/13	116
COP 009/12	08/10/12	21/02/13	137
COP 012/12	18/10/12	07/03/13	141
COP 017/12	22/12/12	16/04/13	116
COP 001/13	13/01/13	22/04/13	100
COP 002/13	17/02/13	27/06/13	131
COP 014/12	02/11/12	01/07/13	242
COP 008/13	03/05/13	16/07/13	75
COP 009/13	10/05/13	19/07/13	71
COP 015/12	23/11/12	23/07/13	243

Reference:	Submitted:	Finalised:	Days:
COP 005/12	07/09/12	01/08/13	329
COP 003/13	24/02/13	20/08/13	178
COP 012/13	31/05/13	02/09/13	95
COP 006/13	22/03/13	04/09/13	167
COP 010/13	21/05/13	04/09/13	107
COP 001/14	24/02/14	04/08/14	162
COP 010/14	25/06/14	18/11/14	147
COP 018/14	18/07/14	24/12/14	160
COP 022/14	18/08/14	20/02/15	187

44. As can be seen, one of the cases took 329 days for a decision to issue with many others taking 4 months or more.

(5) Changes to the infringing file sharing regime (Issue 84)

45. For an infringing file sharing regime to be considered effective, it must exist as a desirable alternative to copyright owners enforcing their own copyright over third parties. That is, it must give copyright owners an effective means of enforcing copyright while educating and deterring individual P2P users.

46. Any regime that imposes a significant burden (financial or otherwise) on those trying to enforce their rights will not be effective. As has already been seen, significant costs limit participation in the regime to those who can afford to sustain the costs.

47. There are a number of changes that could have been made to the P2P file sharing regime that would have significantly improved its effectiveness, namely:

(a) decreased notice fee costs;

(b) more deterrent penalties being awarded by the Copyright Tribunal - which could have been achieved through legislative changes

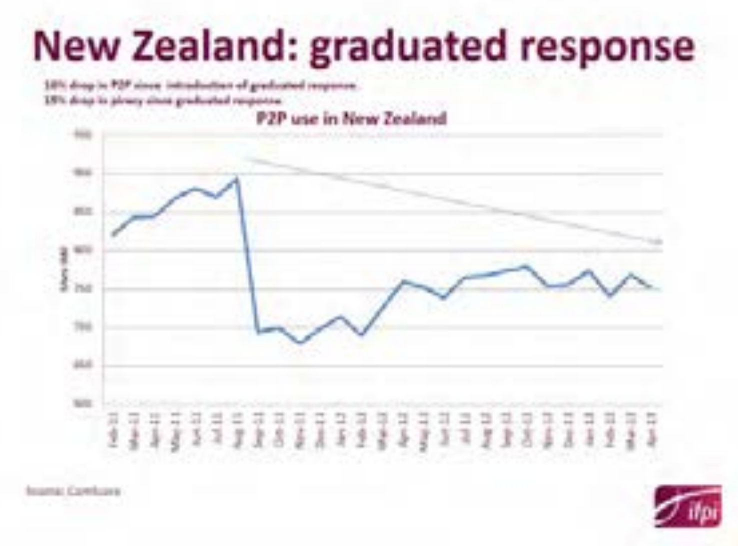
(c) faster decisions from the Copyright Tribunal – which could have been achieved by a legislated timeframe.

(a) Decreased notice fee costs

48. Given the scale of online piracy in New Zealand, at the time a large number of notices would need to have been sent to have a realistic impact on education and deterrence.

49. Evidence from France, where a similar regime is in place,[161] showed that 95% of people ceased their piracy activities on receipt of their first notice.[162] The IFPI also found that unauthorised P2P file-sharing declined by 26% after enactment of the regime in France.[163]

50. Likewise, evidence suggested that the P2P file sharing regime in New Zealand did have an effect despite it not reaching its full potential due (amongst other things) to high notice costs. In 2013, the impact of the regime could be seen on P2P file sharing, as per the diagram below based on the comScore site visitor data.



51. To the end of July 2015, Recorded Music New Zealand had requested 15,409 notices be sent to account holders via ISPs and had filed 51 cases with the Copyright Tribunal. Of these, 21 decisions were issued with a 95% success rate by the rights-holders.

52. Therefore, had a reasonable fee in the region of NZ$2 per notice been introduced, Recorded Music New Zealand would have sent up to 5,000 letters per month, thus potentially reaching a meaningful percentage of P2P users in a given year. The legislation could have achieved greater education and deterrent effect.

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161 The French HADOPI law - Haute Autorité pour la diffusion des œuvres et la protection des droits sur Internet 2009.

162 HADOPI "1 ½ Years After the Launch" (2012) HADOPI. The report was commissioned to evaluate the effectiveness of the law 17 months on from its implementation, at 3.

163 IFPI Digital Music Report 2012, (2012) IFPI, www.ifpi.org, at 17

(b) Increased awards against copyright infringers

53. The decisions of the Copyright Tribunal under the infringing file sharing regime were well publicised in the media with the quantum of damage awarded being clearly set out in each article.[164] Part of the rationale for this was to deter other P2P users from continuing.

54. However, survey evidence from March 2017[165] indicated that few P2P users were deterred by the publicised penalties. P2P users were asked *as an open-ended question:* "What would make you stop downloading music from illegal sources and change to downloading from legal sources?" Only 9.2% of respondents mentioned a large fine as something that would stop them from engaging in this conduct.

55. Commentary on internet discussion forums in New Zealand from 2009 to 2013 also indicated that the amounts being awarded as a deterrent were perceived by the public as insufficient to deter infringement. For example:

> "Awesome. The f[…]ing thousands of dollars spent creating this law and the guy got finds $616. What a waste." (www.reddit.com/r/newzealand; 2013).
>
> "To someone suggesting they should be like traffic fines, then people won't stop pirating. If I got fined $15k for a parking fine, I'd sure as **** not park there next time." (www.gpforums.co.nz; 17 December 2009).

56. A deterrent sum considerably beyond the amounts awarded would likely have more effectively served the purpose of changing people's behaviour to using the numerous legal services instead of illegal channels of music distribution. This could have been achieved via legislation to change the matters to be considered by the Copyright Tribunal.

(c) Timely issuance of decisions by Copyright Tribunal

57. An important aspect of a deterrent system is for the timely issuing of decisions so that these are provided a short time after the filing of an application to the Copyright Tribunal. Timely decisions would have enabled the rights holders to give proper publicity to a complaint which in turn acts as a further deterrent; and significantly increased the likelihood that the complainant would recover any penalty awarded. This could have been achieved via legislative changes to require the Copyright Tribunal to issue a decision within a set time period.

(6) Alternatives to the infringing file sharing regime (Issue 84)

58. Although changes could have been made to the P2P file sharing regime to make it more effective, Music's view is that there is no value now in making these changes.

59. First the file sharing regime only applies to P2P file sharing which is no longer the dominant method of piracy. Secondly, an alternative measure, website blocking, has emerged internationally as a

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164 For example, articles dating from 30 January 2013 to 13 August 2014 were reported on the www.nzherald.co.nz, www.nbr.co.nz and www.stuff.co.nz websites.

165 Horizon Research, Licensed and Unlicensed internet music sites, Tracking Survey, March 2017, at page 17.

reasonable and effective approach for addressing online piracy. There are a number of advantages of website blocking over the P2P file sharing approach:

(a) it is more technologically neutral and can be applied to any type of website or online location;

(b) it does not involve processing data relating to individuals; and

(c) based on evidence from other countries, it has been proven to be more effective in causing a sustained reduction in piracy.

60. As outlined in the following sections, Music's view is that the most effective tool to tackle commercial scale pirate sites is website blocking. If website blocking is well implemented in New Zealand there will be no need for the P2P file sharing regime and it could be repealed.

61. However there are a number of lessons to be drawn from the experience with the P2P file sharing regime in considering a website blocking scheme. Perhaps the most important is that the level of cost imposed on right holder will determine whether the regime is used, and whether it is effective.

ADDITIONAL ENFORCEMENT MEASURES / WEBSITE BLOCKING

Issue 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?**

(1) Summary of Music's Response

1. Despite the evolution in music industry business models over the past decade, online piracy is still a problem causing substantial harm to the music industry. Consumer research shows that 24% of New Zealanders have used a pirate site to obtain or listen to music in the past three months.[166] Stream ripping is the most prevalent form of music piracy with 18% of New Zealanders having used stream ripping sites to obtain music in the past three months. Evidence of the impact of piracy is included in the Music Piracy – Background section of our submission.

2. The music industry has taken a variety of actions to address these infringements, both in New Zealand and internationally. In addition to Music's previous use of the file sharing regime to address P2P piracy, the actions taken include notice and take down, cease and desist letters, civil litigation, criminal action, requesting the removal of infringing links from search engines, requesting the removal of apps and browser extensions from online stores and engaging with platforms such as Facebook, YouTube and Google.

3. The problems and advantages with the file sharing regime are set out in our answer to **Issues 82 to 84**. The problems and advantages with the other existing measures are outlined in the Music Piracy – Background section.

4. **Issue 85** also asks what changes should be considered. In order to provide effective tools for right holders to tackle online piracy, government should:

   (a) Amend the Act to enable right holders to seek orders requiring (a) internet access providers to block their subscribers' access to infringing websites and (b) other intermediaries to take steps within their power to stop or prevent infringements (addressed in our response below)

   (b) Ensure that there is a basis for liability for egregious pirate sites, whether link sites (see our response to **Issue 17**) or sites that host content;

   (c) Review and amend the safe harbour provisions to ensure that:

      (i) pirate sites are not able to take advantage of safe harbour provisions; and

      (ii) host providers that "take down" infringing content are required to take reasonable steps to ensure that content "stays down" (see our response to **Issues 59-62**)

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166 Horizon "Music Consumer Study 2018" (November 2018).

(d) Introduce a duty on intermediaries, eg search engines, payment providers, advertisers and app store operators, to take reasonable steps to ensure that their services are not used for online infringement (see below); and

(e) Amend the existing provisions relating to proof of copyright ownership (see our response to **Issue 76**) and standing for exclusive licensees (see our response to **Issues 77-78**).

5. In our response to this question we address the need for: a website blocking remedy and *a duty on other intermediaries to take reasonable steps to ensure that their services are not used in connection with infringement*.

(2) The need for website blocking

6. The characteristics of music piracy today clearly demonstrate the need for a website blocking remedy to enable New Zealand right holders to protect their market:

(a) With very few exceptions, music piracy sites are based outside New Zealand; and

(b) The operators of most music piracy sites are anonymous, and protect their identity using domain privacy services. This is a contrast from the trend 10-15 years ago when piracy sites were often operated by known individuals who were outspoken public figures.

7. These characteristics are evident when considering the most popular piracy sites in New Zealand today:[167]

DOMAIN	UNIQUE DESKTOP VISITORS FEB 19	DOMAIN REGISTRANT	OPERATOR	HOST ISP
thepiratebay.org	197,514	Fredrik Neij, Sweden	Unknown	CloudFlare Inc., US
ytmp3.cc	92,600	Global Domain Privacy Services Inc., Panama	Unknown	Servers-com-Mow1, Russia (Germany)
Openload.co	76,270	Contact Privacy Inc., Canada	Unknown	CloudFlare Inc., US
Rarbg.to	73,920	Details Redacted	Unknown	S.A. & A Stroi Proekt Eood, (BIH)
Onlinevideoconverter.com	70,506	Contact Privacy Inc., Canada	Unknown	Netrouting, Netherlands
1337x.to	52,385	Details Redacted	Unknown	CloudFlare Inc., US (Flokinet SC)
Zippyshare.com	41,867	Contact Privacy Inc., Canada		OVH SAS, France (Poland)
torrents.org	31,496	Raimond Torrents, Atmosfera.net, Spain	Unknown	Microsoft Corp, US
Torrentz2.eu	30,602	Details Redacted	Unknown	CloudFlare Inc., US
Savefrom.net	29,479	Domains By Proxy, LLC, USA	Unknown	Hosting Services Inc, UK (US)

167 More examples are included in Music Piracy Background.

8. New Zealand right holders have very few options for effectively addressing these sites. Direct civil action may be possible where operators are known, but, even assuming the NZ court finds jurisdiction over the defendant, there is little value in obtaining a judgment from a NZ court against a foreign website. New Zealand does not have the characteristics of some other markets where cross-border enforcement can be more effective. For example:

   (a) A judgment from an EU member state court can be enforced against a defendant operating in another EU member state via an expedited procedure, relying on EU rules under the Brussels Convention;

   (b) US right holders regularly file civil proceedings against overseas websites and can gain significant traction from them via related actions against intermediaries, such as host providers, which are often based in the US.

9. Other options for enforcement are also limited:

   (a) criminal action is not practical unless relevant individuals are resident in New Zealand – Kim Dotcom is the only example we are aware of in the past two decades of a major pirate site operator living in New Zealand;

   (b) notice and take down may be possible but not for sites that do not host infringing content (which includes stream ripping sites – see Annex: Music Piracy – Background); and in any case notice and take down is ineffective in stopping widespread infringement (see our response to **Issue 62**);

   (c) intermediaries such as search engines could in theory be enlisted to assist, but there is currently no legal duty on intermediaries to take steps in relation to piracy, and it is uncertain whether a court order would be available against an intermediary such as a search engine.

10. For all these reasons, New Zealand based rightsholders are effectively powerless to take effective action against piracy, in the absence of a website blocking regime.

(3) Website Blocking: an overview

11. One of the most important and effective measures to stop users from accessing and downloading from illegal websites is to require access providers (ISPs) to block their subscribers' access to these websites. Website blocking measures are of particular importance if the sites are located/operated from outside the jurisdiction, and particularly important for the New Zealand market for the reasons outlined above.

12. A number of countries around the world have established procedures whereby rights holders can request ISPs to block their subscribers from accessing specific copyright infringing websites, including websites based outside the jurisdiction.

13. The first website blocking orders we are aware of were obtained in Denmark in 2006 and there is now a legal basis for website blocking in around 40 countries around the world, including the UK, EU and Australia. The legal basis has been successfully tested and sites have been blocked in at least 31 countries. For more information we refer to IFPI's submission.

14. Globally more than 2,600 URLs to infringing websites containing music have been blocked. There are many more URLs blocked in connection with film, television and sports websites. The Pirate Bay, as well as high number of related mirror and proxy sites, have been ordered to be blocked in 20 countries.

Website Blocking is Effective

15. There is clear evidence that when implemented appropriately, website blocking is effective in addressing piracy. There is evidence that website blocking:

    (a) Leads to a reduction of usage of the blocked site.

    (b) If applied to multiple sites can result in a decrease overall piracy with a knock-on effect on sites that have not specifically been blocked; and

    (c) Can have a positive impact on the usage of legitimate services.

16. A study published by Incopro in Australia in February 2018[168] examining site blocking efficacy found that 11 months after the first blocking orders:

    - Usage of 374 blocked sites had decreased by 53.4%.
    - Usage of the top 50 infringing sites in Australia had decreased by 35.1%; and
    - Overall usage of the top 250 infringing sites had decreased by 25.4%.

17. A study published by Incopro in the UK in 2014[169] found:

    - ISP website blocks resulted in a significant decline in usage for all blocked sites analysed by the study.
    - Usage of blocked sites in the UK decreased by 73.2% on average, and maintained that level consistently over time, and
    - While global usage of sites blocked in the UK has had an overall increase of 7.8%, the UK has seen an overall decrease of 22.9%.

18. A study in the UK in 2016[170] found that the cumulative effect of a website blocks of 53 sites over time in the UK resulted in:

    - 90% drop of visitors to blocked sites.
    - 22% drop in overall piracy.
    - 6% increase in visits to paid legal sites; and

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168 Site Blocking Efficacy – Key Findings – Australia (February 2018) Incopro at 2.

169 Site blocking efficacy study – United Kingdom (13 November 2014) Incopro at 4.

170 Website Blocking Re-Visited: The Effect of the UK November 2014 Blocks on Consumer Behaviour (April 2016): Https://Techpolicyinstitute.org/wp/content/uploads/2016/04/uk-blocking-2-0-2016-04-06-mds.pdf.

- 10% increase in videos viewed on legal add-supported streaming sites (eg BBC).

There is no confirmed legal basis for website blocking in New Zealand law

19. The Issues Paper states that:

> *Whether copyright owners and their licensees are able to obtain website blocking injunctions in New Zealand is uncertain. Copyright owners may be able to apply for a website blocking injunction by relying on section 92B of the Copyright Act, Rules 2.1 and 1.6 of the High Court Rules and the High Court's inherent jurisdiction, but this is yet to be tested in court.*

20. We agree with that assessment – there is a good argument that such injunctions are available but it would take a test case in the High Court in order to obtain a ruling. Such a case would involve considerable cost and resources and could take a long time to resolve through multiple levels of courts. In the absence of a statutory provision, and even if the legal basis is confirmed, specific outcomes (for example relating to the scope of the order and costs) are at best uncertain.

21. For those reasons, a statutory basis for website blocking should be enacted.

(4) Website blocking - options

22. Since the Issues Paper asks "what changes should be considered" we take this opportunity to provide some material that may assist MBIE in developing options.

Insights from overseas experience

23. Unlike in 2011 when the government enacted the infringing file sharing regime, today in considering website blocking MBIE has the benefit of over ten years of experience from other countries implementing website blocking. Combined overseas experience has shown that the following aspects need to be considered in implementing a website blocking regime in order to make it effective:

    (a) Reasonable procedural requirements: Right holders will need to provide evidence of the infringement occurring via the pirate site. However the level of evidence needs to be set at a reasonable level so as not to constitute a barrier to bringing applications to block sites. A key learning from overseas is that blocking one or two sites will not have a substantial impact on overall piracy, because consumers will easily be able to move to other sites. It is when multiple sites are blocked that there is a meaningful impact on piracy. If the procedural and proof requirements are set too high it will not be possible to block multiple sites in one action.

    (b) Type of sites to be covered: The experience from overseas and from the P2P file sharing regime is that an enforcement mechanism should have the potential to cover all types of websites or online locations. It will also be important to define the site's conduct in a manner that does not unduly limit the application of the regime by including impractical proof requirements for example regarding knowledge of the site operator.

    (c) Provision for mirror and proxy sites: Where a pirate site has been blocked or taken down by court order, there are frequently determined operators or third parties who simply set up a proxy or mirror site as to evade court orders. These mirror or proxy sites host identical or near identical content as the original pirate website but have a different URL. The websites

https://piratebyproxy.info and www.themirrobay.com provide a full list of Pirate Bay mirror and proxy sites. Users are able to discover mirror and proxy sites via search engines. Overseas experience has shown that in countries where there is provision to efficiently block mirror and proxy sites (eg UK), blocking has been more effective than in countries where the process for blocking additional sites is burdensome or time consuming.

(d) "Dynamic" injunctions: Website blocking injunctions will typically require ISPs to block access to a specific site which is defined by way of URLs and/or IP addresses. However, websites often change their URL (and less often their IP address), an example is The Pirate Bay which operates at from multiple domains at any one time. In order to be effective, website blocks must be applied to all URLs as they change. This can most efficiently be done by way of notifications without returning to court.

(e) Costs of implementation: Costs to ISPs depend on the specific technical requirements and human resources needed to implement a block. The costs are however typically low. One question is whether right holders should have to bear or contribute to ISPs' incurred costs. The majority of cases on this issue have ordered that ISPs bear the costs of implementation and their own legal costs – even though it is acknowledged that they were not responsible for the copyright infringements.

(f) Due process for website owners. It is good practice to ensure that website owners have the ability to challenge blocking orders. Website owners very rarely do this.

Possible approaches to legal basis for website blocking

24. There are a number of possible options for enacting a legal basis for website blocking, including the three set out below:

(a) A general provision allowing right holders to apply for injunctions against ISPs to block access to infringing websites, leaving the details to be worked out through court cases (this is the approach taken in the UK and most of the EU)

(b) A more detailed and prescriptive statutory provision allowing right holders to apply for website blocking injunctions, setting out matters such as the test which should be applied to determine if a website can be blocked, matters to be established by the right holder, and the form and scope of injunctions (this approach was taken in Australia and Singapore)

(c) Empowering a government body to issue website blocking orders by way of an administrative process. (this is the approach taken in Italy for example).

UK-style injunction provision

25. One option is the enactment of a general statutory provision providing jurisdiction for the High Court to order website blocking injunctions.

26. For example, the operative provision for UK website blocking applications is s 97A of the Copyright Designs and Patents Act 1988 ("CDPA 1988") which provides that the High Court shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.

A more prescriptive statutory provision

27. Australia has a website blocking regime which is more detailed than the UK provision. The Australian provision is specifically aimed at website blocking, whereas the UK provision can be applied generally to other "service providers" whose services are used to infringe. The provision (s.115A of the Copyright Act) sets out:

    (a) The test for which websites can be blocked - those that infringe or facilitate an infringement, and have the primary purpose of the primary effect of infringing, or facilitating an infringement of copyright

    (b) What factors the court should take into account in determining whether to grant an injunction

    (c) Other procedural matters including notification to the website owner and the mechanism for blocking new URLs and IP addresses.

Administrative website blocking

28. A third possible solution would be to empower by Statute an administrative body to grant site blocking injunctions. Administrative bodies in the form of telecommunications regulators have been empowered to authorise site blocking orders in Italy, Greece and Spain.[171]

29. In Italy an administrative procedure (the AGCOM Regulation) came into force in March 2014. Under the Regulation AGCOM, the national communications regulatory authority, has the power to order ISPs to block access to infringing websites upon consideration of a complaint filed by a right holder. There is also a "fast-track" procedure for websites responsible for massive copyright infringements. A new version of the Regulation was implemented in November 2018, which allows blocking applications to be submitted in respect of all types of stream ripping sites, web radios and cyberlockers.[172]

30. Administrative website blocking can be efficient, however it may not suit New Zealand as there is no dedicated telecommunications regulator who could manage such a process. The body which has oversight over Telcos is the Commerce Commission.

(5) Other Changes: Other Intermediaries

31. Intermediaries such as search engines, advisors, payment providers and app stores amplify piracy and make it easier and less profitable. Examples are set out in Music Piracy Background. The review should consider the role of intermediaries in supporting piracy, and the reasonable steps they could take to prevent their services being used for piracy.

[171] See IFPI Website Blocking Update (February 2019).
[172] IFPI Website Blocking Update (February 2019).

ENFORCEMENT MEASURES: ISPs

Issue 86:	**Should ISPs be required to assist copyright owners [to] enforce their rights? Why/why not?**
Issue 87:	**Who should be required to pay ISPs' costs if they assist copyright owners to take action to prevent online infringements?**

(1) Summary of Music's Position

1. Our answer to Issue 86 is that legislation should be enacted to enable right holders to seek a court order against ISPs requiring them to block access to infringing websites. This has already been covered in our answer to Issue 85.

2. However, we do not agree with the way in which Issue 86 has been framed. Specifically, framing the issue as whether ISPs should "assist copyright owners to enforce their rights" is too narrow and suggests the only beneficiary of stopping piracy is the copyright owner. This is not the case for a number of reasons.

3. Website blocking should not be seen as ISPs assisting right holders with enforcement, it is best viewed as a pragmatic recognition that the most cost-effective solution to stopping ongoing mass infringement via pirate websites is to require the ISP (as the conduit) to take reasonable steps within its power to give effect to a court order.

4. As to Issue 87, again we do not agree with the way it has been framed. Nonetheless Music's position is that ISPs should bear the costs of implementing website blocks for the reasons set out below. This is the most fair and balanced outcome for the reasons set out below, and is the approach in the majority of the more than 30 countries the outcome most favoured around the world in the 31 countries where website blocking is underway.

(2) The Issues Paper

17. At [512] and [513] the Issues Paper notes as follows:

> "512. The current policy with respect to the cost of enforcing copyright is that:
>
> - copyright owners bear the cost of enforcing their property rights, as the principal beneficiaries of those rights
> - infringers should pay compensation for the injury to the copyright owner caused by their infringing actions and the copyright owner's expenses arising from taking legal action.
>
> 513. New Measures to address online infringements that require cooperation of the intermediaries like ISPs to implement are challenging this policy. The implementation of the infringing file sharing regime brought this issue into the spotlight. Website-blocking injunctions have also sparked debate overseas on who should pay ISPs' costs to implement the injunctions. Countries imposing website blocking injunctions have adopted a variety of rules regarding who pays to implement these injunctions."

(3) Context for website blocking

18. Our answer to Issue 86 is that legislation should be enacted to enable right holders to seek a court order against ISPs requiring them to block access to infringing websites. This has already been covered in our answer to **Issue 85**.

19. However, we do not agree with the way in which this issue has been framed in the Issues Paper. Specifically, framing the issue as whether ISPs should "assist copyright owners to enforce their rights" is too narrow and suggests the only beneficiary of stopping piracy is the copyright owner. This is not the case since:

    (a) Breaches of copyright, as with any other law, are negative for society as a whole – this is reflected by the fact that commercial scale copyright infringement is a criminal offence;

    (b) Allowing piracy to continue means reduced revenues to those who created and invested in creating the content, ultimately reducing the amount and diversity of new works available to the public;

    (c) Allowing piracy to continue means increased revenues to the operators of offshore pirate sites, which are often connected with other organised crime;

    (d) Internet users can be exposed to negative consequences as a result of using pirate sites – malware and viruses are common, as is the inclusion of other illicit content on sites that carry pirated music; and

    (e) There can be benefits to ISPs in stopping piracy – some ISPs are moving into their own content business and will have an interest in stopping unlicensed sites that are competing.

20. In our view it is important to see the remedy of website blocking in its overall context as outlined in our answer to Issue 85:

    (a) It is very difficult, if not impossible, for New Zealand-based right holders to take direct action against pirate sites based overseas, and complementary remedies such as notice and take down have only a limited impact;

    (b) The Issues Paper notes that infringers should pay compensation to right holders, but in reality this is extremely rare and virtually impossible to obtain from overseas pirate sites;

    (c) This is not a case of requiring ISPs to assist to share or take on a burden that could be borne by right holders - in many cases there is no other effective option than website blocking which can only be done by ISPs; and

    (d) ISPs are well placed to take action in the form of website blocking – Courts, Governments and ten years of experience from around the world has confirmed that this action is technically feasible for ISPs, as well as reasonable and proportionate.

21. In that context, website blocking provisions can be viewed as a pragmatic recognition that the most cost-effective solution to stopping ongoing mass infringement via pirate websites is to require the ISP (as the conduit) to take reasonable steps within its power to give effect to a court order.

(4) Costs of implementing website blocks

22. As per our comments above, we believe Issue 87 is not framed correctly. We believe that, as part of the overall process of website blocking when considered in context, ISPs should *bear their own* costs in connection with putting website blocks in place for the following reasons:

    (a) Right holders already bear considerable costs as a result of losses they suffer from piracy in the first place. In a website blocking regime right holders would continue to bear the cost of piracy monitoring and gathering evidence, legal costs in preparing to obtain a court order, following up court orders once made, and monitoring for mirror and proxy sites to update the list of sites to be blocked.

    (b) The implementation of a website block can only be done by ISPs, and ISPs would be responsible for managing their own infrastructure in order to implement the block. ISPs are the only ones who can select the technical method for blocking and make internal decision to make the blocking process more efficient. They would have little incentive to do this if costs were charged on to right holders.

    (c) Experience from around the world indicates that ISPs already have technical infrastructure in place that would enable them to block objectionable content

    (d) Right Holders are financially disadvantaged by the infringements carried out by ISPs, by the detection of those infringements and by the remedying of them. In contrast, as per the High Court judgment in the *Newzbin2* case,[173] ISPs receive sizeable revenue from their subscribers in return for providing them with access to the internet, without which subscribers could not engage in online copyright infringement. As ISPs benefit financially from their subscribers (and the operators of illegal sites) using their networks, they should bear the costs of preventing the infringements that they carry – which is a cost of business for the ISPs.

    (e) Experience from around the world is that the cost of implementing website blocks are modest. In Australia, the capital cost incurred by *Telstra* were AUD$10,261.00 and by TPG $21,195.00. The compliance costs were much less (see discussion in the next section).

    (f) In the vast majority of countries where website blocking has been implemented, ISPs are bearing their own costs in implementing the blocks. This includes all EU countries.[174] This is further evidence that the cost of implementing blocks is modest and entirely manageable for ISPs as part of running their business.

    (g) Numerous courts around the world have noted that the blocks are not difficult or costly to implement. For example:

[173] *Twentieth Century Fox Film Corporation & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch).

[174] ISPs in the UK have borne their own costs of implementing website blocks in copyright cases since the first blocks in 2012. The position may change following the Supreme Court decision in the Cartier case which related to website blocking for trade mark infringement, in circumstances where there was no explicit statutory provision allowing for a website blocking injunction.

- In Greece, the Athens First Instance Court described the cost of implementing blocking measures as "*negligible*".[175]

- In Norway, the Oslo City Court found that "the disadvantages and the costs that the ISPs incur with an order to block The Pirate Bay do not seem disproportionate or costly".[176]

- In Portugal, the Intellectual Property Court held "despite having been stated, it was not demonstrated that implementing such DNS blocking measures entails significant costs or resource allocations, but only the simple human resources to carry out the necessary technical action".

(h) We should be mindful of the experience with the P2P file sharing regime. Considerable time and resources was devoted to preparing and enacting the legislation, but the regime was used only by Recorded Music NZ and not other right holders for cost reasons. Recorded Music New Zealand was only able to use the regime until it became clear that the costs required to be paid to ISPs were too high for it to be sustainable or effective in reducing piracy.

23. If, contrary to this submission, Parliament decides that right holders should reimburse some of ISPs costs then we submit the following:

(a) The decision of where costs should lie should be addressed in the legislation, to avoid lengthy litigation on the issue; should be based on clear and transparent evidence from ISPs, subject to external audit if needed, as to what their actual costs are; and should be set at a level that will enable reasonable access to the regime by right holders (otherwise it will not be used).

(b) There is a clear distinction between ISPs' capital costs (ie the costs of setting up a system for website blocking, to the extent they do not already have one) and their marginal costs (ie the cost of adding a new website or domain to the block list).

(c) Although in Australia the Federal Court decided that right holders should reimburse ISPs the marginal cost for blocking (at AU$50 per URL per ISP), the Court did not agree that right holders should bear any of ISPs capital costs, noting that these are "a general cost of carrying on business"

(d) With respect to the P2P file sharing regime, right holders were not required to pay ISPs capital costs, only to make a contribution to marginal costs.

(e) Other than in the *Cartier*[177] case in the UK, which concerned the allocation of costs under equity rather than a specific statute, we are not aware of any country in the world where right holders have been required to ISPs' capital costs.

175 *Grammo Organisation et al v Vodafone et al* [2011] 4658 / 2012.

176 *Warner Bros. Entertainment Norge AS and others v Telenor Norge AS and others* 01/09/2015, case number 15-067093TVI-OTIR/05.

177 *Cartier International AG and others v British Telecommunications Plc and another* [2018] UKSC 28.

OTHER ISSUES (PART 8)

WAITANGI TRIBUNAL AND TAONGA WORKS

Issue 93:	**“Have we accurately characterised the Waitangi Tribunal’s analysis of the problems with the current protections provided for taonga works and mātauranga Māori? If not, please explain the inaccuracies.”**
Issue 94:	**“Do you agree with the Waitangi Tribunal’s use of the concepts ‘taonga works’ and ‘taonga-derived works’? If not, why not?”**
Issue 95:	**“The Waitangi Tribunal did not recommend any changes to the copyright regime, and instead recommended a new legal regime for taonga works and mātauranga Māori. Are there ways in which the copyright regime might conflict with any new protection of taonga works and mātauranga Māori?”**
Issue 96:	**“Do you agree with our proposed process to launch a new work stream on taonga works alongside the Copyright Act review? Are there any other Treaty of Waitangi considerations we should be aware of in the Copyright Act review?”**
Issue 97:	**“How should MBIE engage with Treaty partners and the broader community on the proposed work stream on taonga works?”**

1. While copyright is an important structure that supports and protects the musical works being created in our country and has done since our first truly New Zealand copyright law in 1913[178], it is also a Western framework that has been imposed on a musical tradition that existed in Aotearoa long before Pākehā arrived here. Our Tangata Whenua are the kaitiaki of music that our law was not conceived or equipped to adequately represent.

2. We support the Waitangi Tribunal’s recommendation that a new regime be established to protect taonga works and Mātauranga Māori on Māori terms. We believe that this is an incredible opportunity for Māori to lead the world in the creation of a mechanism that honours and protects their traditional indigenous creations.

3. Although we have included the perspectives of some of our Māori music creators in this submission, we ask you to note that in no way do we presume to speak for Māori on the larger, parallel issue of protecting Taonga and Mātauranga Māori creations.

4. We understand that any examination of this will be conducted separately with Māori alongside the Copyright Act review, on a different timeframe to this submission process. In the meantime however, for the purposes of this submission, we pledge our support to this process and will engage with it in whatever capacity Tangata Whenua invite.

178 The First Copyright Ordinance was in 1842.

ANNEX: MUSIC PIRACY – BACKGROUND

(1) Music Piracy – Overview

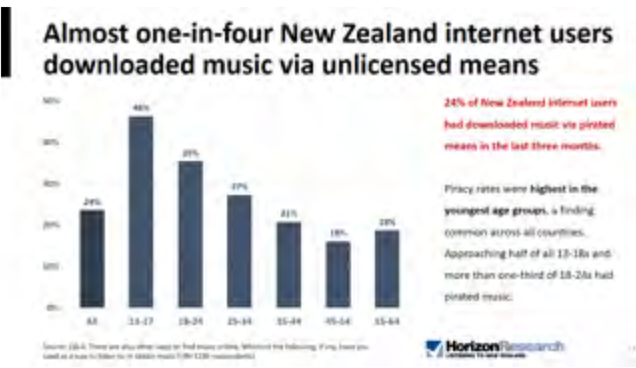
1. The information in this Annex is provided to assist the review:

   (a) as evidence of the piracy issues in New Zealand; and

   (b) as background for our responses to a number of issues raised in the Issues Paper.

2. Despite the evolution in music industry business models over the past decade, online piracy is still a problem causing substantial harm to the music industry.

3. Consumer research shows that 24% of New Zealanders had used a pirate site to obtain or listen to music in the preceding three month period.[179] The rates are higher among young people with nearly half of 13 to 17-year olds having used music piracy sites, and more than one third of 18 to 24-year olds.



   This is corroborated by site visitor data from comScore, which indicates that on average, 22% of New Zealand internet users visited piracy sites in 2018.[180]

4. In recent years, stream ripping has become the most popular music piracy method. Stream ripping is the process of creating or obtaining a downloadable file from music that is available to stream online. It is typically done by users to produce an MP3 file from a streamed music video, which can then be kept and listened to offline or on other devices without further payment.

5. Consumer research indicates that 20%of internet users in New Zealand (and 42% of 13 to 17-year olds) used stream ripping services to obtain music illegally at some point in the last three months.

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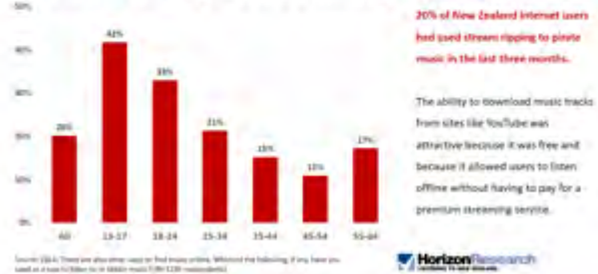
179 Horizon Music Consumer Study, November 2018.

180 comScore New Zealand Piracy Trends – average piracy rate across 2018. Recorded Music New Zealand has discontinued comScore for 2019 and going forward will use data provided by Similarweb.



6. While stream ripping is the most prevalent form of music piracy, more traditional piracy methods remain commonly used for music with 6% of people using BitTorrent, 5% using cyberlockers and 8% using infringing mobile apps.

7. These "traditional" piracy methods can be measured using consumer survey and site visitor data. However, increasingly piracy is occurring within "grey" sources such as social media platforms and services - Facebook YouTube and Twitter that are not dedicated to piracy but can act as piracy distribution platforms.

8. In our research, 20% of people reported accessing music via links in social media platforms – these could as equally be links to pirate services as links to licensed services such as YouTube. 8% of people said they downloaded or streamed music for free from the internet "without really being sure where it comes from". Neither of these categories have been included in our calculations of piracy.

9. The volumes involved in online music piracy are staggering, and it affects New Zealand artists as well as international.

10. In 2017, global record industry body IFPI sent notices to request takedown of 11,342,001 URLs containing pirated music content – an average of 31,074 each day. 32.3% of notices (3.66m) were sent to cyberlockers, 19.4% (2.20m) to sites that directly hosted MP3 files, and 7.3% (0.83m) to social networks such as Twitter and Facebook. 2.7% of notices (0.31m) were sent to video sites such as YouTube and Vimeo. This latter figure does not count videos which were identified on by IFPI as infringing on YouTube (therefore not caught by ContentID) and were subsequently claimed and monetised by the member companies.

11. 3388 notices have been sent relating to New Zealand repertoire of 51 artists, including Lorde, Crowded House, Aldous Harding, Gin Wigmore and Shihad. According to Google's transparency report, it has received over **4 billion** notices to remove infringing search results.[181]

12. The table below summarises the top 20 pirate sites in New Zealand ordered by the number of unique visitors in February 2019. As is evident from the table:

[181] See https://transparencyreport.google.com/copyright/overview?hl=en visited on 4 April 2019.

(a) with very few exceptions, music piracy sites are based outside New Zealand; and

(b) the operators of music piracy sites are anonymous and protect their identity using domain privacy services.

Top 20 Piracy Sites in New Zealand – Similarweb February 2019

DOMAIN	UNIQUE DESKTOP VISITORS FEB 19	DOMAIN REGISTRANT	OPERATOR	HOST ISP
thepiratebay.org	197,514	Fredrik Neij, Sweden	Unknown	CloudFlare Inc., US
ytmp3.cc	92,600	Global Domain Privacy Services Inc., Panama	Unknown	Servers-com-Mow1, Russia (Germany)
Openload.co	76,270	Contact Privacy Inc., Canada	Unknown	CloudFlare Inc., US
Rarbg.to	73,920	Details Redacted	Unknown	S.A. & A Stroi Proekt Eood, (BIH)
Onlinevideoconverter.com	70,506	Contact Privacy Inc., Canada	Unknown	Netrouting, Netherlands
1337x.to	52,385	Details Redacted	Unknown	CloudFlare Inc., US (Flokinet SC)
Zippyshare.com	41,867	Contact Privacy Inc., Canada		OVH SAS, France (Poland)
torrents.org	31,496	Raimond Torrents, Atmosfera.net, Spain	Unknown	Microsoft Corp, US
Torrentz2.eu	30,602	Details Redacted	Unknown	CloudFlare Inc., US
Savefrom.net	29,479	Domains By Proxy, LLC, USA	Unknown	Hosting Services Inc, UK (US)
Flvto.biz	27,165	Details Redacted	Unknown	Hetzner Online GmbH, Germany
Online-convert.com	25,890	Details Redacted	Unknown	QaamGo Media GmbH, Germany

DOMAIN	UNIQUE DESKTOP VISITORS FEB 19	DOMAIN REGISTRANT	OPERATOR	HOST ISP
Mp3juices.cc	25,346	Global Domain Privacy Services Inc., Panama	Unknown	Servers-com-Mow1, Russia (Germany)
Rapidgator.net	24,957	Whois Privacy Corp., Bahamas	Unknown	DDos Protection Ltd, Russia
Uploaded.net	23,286	Cyando AG, Switzerland	Unknown	CloudFlare Inc., US (Switzerland)
Easy-youtube-mp3.com	20,792	Details Redacted	Unknown	Vultr Holding LLC, UK (Austria)
Convert2mp3.net	20,143	Details Redacted	Unknown	OVH SAS, France (Germany)
Torrentdownloads.me	19,322	WhoisGuard, Inc. Panama	Unknown	CloudFlare Inc. US (ITL-AS, UA)
Uptobox.com	16,159	Whois Privacy Corp, Bahamas	Unknown	CloudFlare Inc. US
Torlock.com	15,862	Whois Privacy Corp, Bahamas	Unknown	CloudFlare Inc. US (Marosnet, RU)

Impact of Piracy

13. After some debate in the academic literature in the early days of piracy, today it can be said that the consensus of academic research is that music piracy impacts legitimate sales. Of the 26 peer-reviewed articles in existence on the impacts of piracy on music sales, 23 concluded that piracy causes significant harm to legal sales.[182]

14. The debate in this area has moved from *whether* piracy impacts legitimate sales to the *extent* of the negative impact.

15. There is good evidence of the economic impact of music piracy within New Zealand. An analysis completed in April 2019 by Stakeholder Strategies found that the losses to New Zealand music retail revenues (including from recorded music and music publishing) from piracy were between $48 million

182 At 68.

to $60 million per year.[183] This figure is conservative and addresses losses only from " traditional" piracy channels.

16. Other studies have taken a "top down" approach and sought to value the wider economic losses from piracy, across other factors such as employment and investment. For example the 2016 study by BASCAP on the Economic Impacts of Piracy noted the clear effects of "displaced activity" – that is, lost lawful sales of real or licensed product – on tax, employment, GDP and foreign investment. The BASCAP study concluded that the global losses from music piracy were US$29,000,000,000.

17. We are not aware of any such analysis in respect of the New Zealand market, however it is possible to derive some rough indications based on the BASCAP study. Analysis by IFPI of global piracy traffic estimated that activity from New Zealand comprised 0.448% of total global piracy visits. Applying this rough indicator across the BASCAP figure, the value of music piracy in New Zealand could be estimated at around US $130.0 million.

18. Both of these studies (Stakeholder Strategies and BASCAP) seek to estimate the total value of piracy, rather than what would actually be recoverable which would be a separate calculation.

19. In addition to the substitution effect, piracy drives down the value of music generally, and the availability of free music results in lower licence fees from legitimate services.

20. From the perspective of individual creators, piracy takes away the choice to make their work available or not.

21. Piracy also diverts revenues, including advertising revenue, away from New Zealand artists and creators and the companies that support them towards offshore companies that do not pay tax in New Zealand or anywhere else. These companies are often also vehicles for money laundering and other organised crime.[184]

22. There has also been empirical analysis of specific piracy methods and their associated commercial gain. For example, a study in 2015 found that the thirty most popular cyberlockers[185] generate US$96,200,000 in yearly revenue.[186] Of that revenue, 71.1% came from advertising and 23.1% came from "premium" account subscriptions for paid access.[187] 78.6% of the files on those cyberlockers was copyright infringing content.[188]

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183 Stakeholder Strategies methodology outline for MBIE (2018). Total losses from piracy were estimated by SHS as being between $49-58 million. This estimate represents the additional revenue generated by the music industry if all known pirates were to switch to paid audio streaming. Paid audio streaming is the most popular legal consumption channel in New Zealand and offers the functionality users can achieve through pirate channels. As such, paid audio streaming was deemed the best channel to price pirate users at.

184 BASCAP (2016) p 50–51.

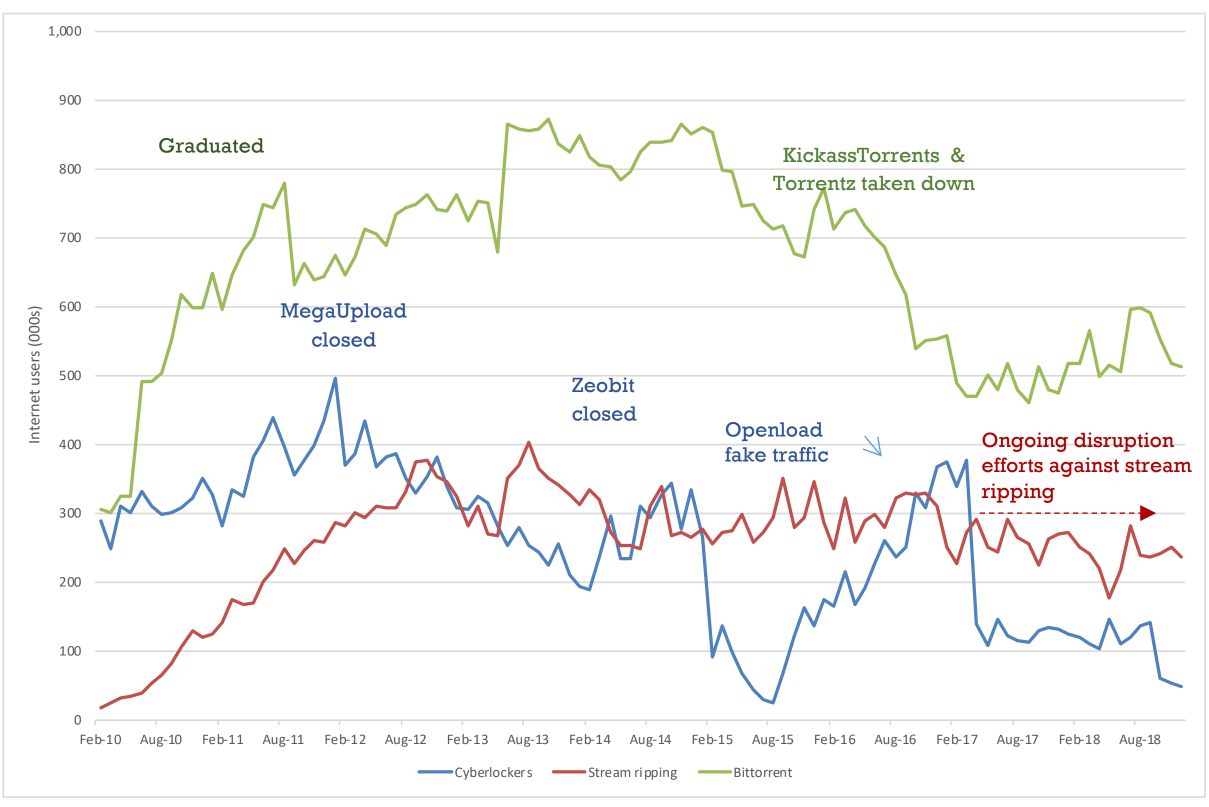
185 This method of infringement is discussed in detail below.

186 Netnames study "BEHIND THE CYBERLOCKER DOOR: A Report on How Shadowy Cyberlocker Businesses Use Credit Card Companies to Make Millions" at [1.1].

187 At [1.1].

188 At [1.1].

Evolution of Music Piracy in NZ[189]



23. The past ten years have seen an evolution in online piracy and piracy sources have diversified, however a number of challenges remain. The above graph plots the numbers of unique users of cyberlocker, stream ripping and BitTorrent sites since 2010. It does NOT take into account piracy on "grey" channels such as YouTube, Facebook and Twitter.

24. A decade ago when the Copyright Act was last reviewed, the most popular method of music piracy was **peer-to-peer (P2P) file sharing**. The defining characteristic of P2P is the sharing of content stored on one user's computer to another user's computer, rather than users downloading from a central server.

25. The earliest versions of P2P services such as Napster and Kazaa were standalone services operated by known companies. Both services were closed following extensive legal action and this type of service is virtually unknown today.

26. **BitTorrent** evolved and became popular partly because of its emphasis on decentralisation. BitTorrent is a non-proprietary technology and protocol which can be used for sharing any kind of content but rose to prominence as a way to download pirated material: a report by NetNames in 2013 found that 99.9% of the content shared on BitTorrent was unlicensed and the same is believed to be the case

[189] Custom research conducted for IFPI by Comscore, Jan 2010 – Dec 2018, New Zealand. Note: Bittorent, Streamripping and Cyberblockers are custom-defined lists and include but are not limited to thepiratebay.org, torrentz2.eu, uploaded.net, zippyshare.com, onlinevideoconverter.com, and flvto.biz. Comscore is unable to validate data prior to September 2011 because Comscore does not retain data prior to September 2011.

today. Web-based forms of piracy have grown in popularity since the introduction of **cyberlockers** in around 2005 and the rapid spread of stream ripping over the last decade. Cyberlockers reached a peak of popularity in 2011. The cyberlocker ecosystem was severely affected by the closure of MegaUpload in January 2012 after the arrest of Kim Dotcom. This has had significant disruptive effects on a number of remaining cyberlockers with many other sites closing or changing operations during 2012.

27. As the amount of music and its promotion on YouTube rose – and as people became more comfortable streaming music – the ability to extract and download a music track from a Youtube video has risen hugely in popularity. **Stream ripping** is now the music industry's primary piracy concern. Encouraged by YouTube's lax security around streams, stream ripping sites such as Flvto.biz, Y2mate, and Youtubemp3.to offer users a simple way to obtain a free – yet unlicensed – MP3 from a YouTube video. The process is similar for every site: the user provides the stream ripping site with a URL from a YouTube video and the site converts the audio track of the video into an MP3 for download.

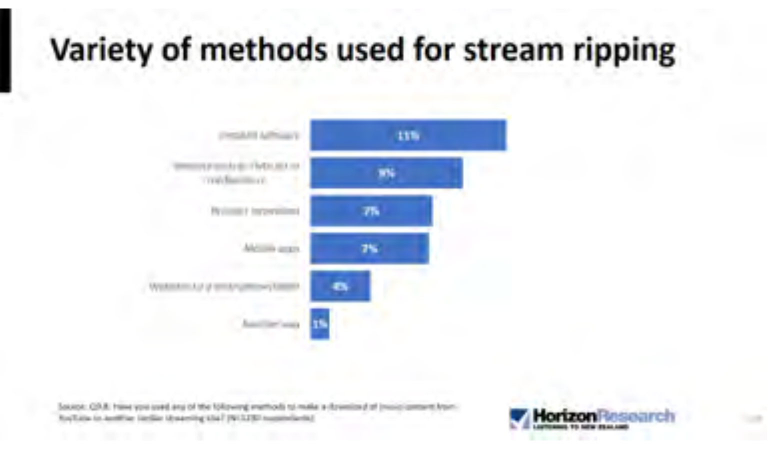
28. Stream ripping's ease of use and speed, together with the amount of content available on YouTube, means that stream ripping has risen quickly in popularity worldwide.

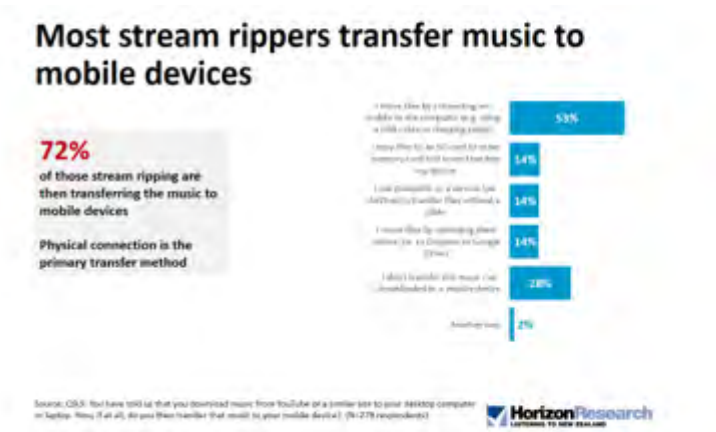
Types of Piracy and Examples

Stream Ripping

29. Stream ripping is the process of creating or obtaining a permanent, free, downloadable file from licensed content that is available to stream online. It is typically done by users to produce an mp3 file from a streamed music video, which can then be kept and listened to offline or on other devices. An estimated 90 per cent of stream ripping downloads are sourced from YouTube, although ripping can also take place from other streaming services such as SoundCloud.

30. Users typically obtain downloads using a stream ripping website, app or browser extension. Most users that download files to a computer then transfer them to a mobile device so they can listen to them offline.

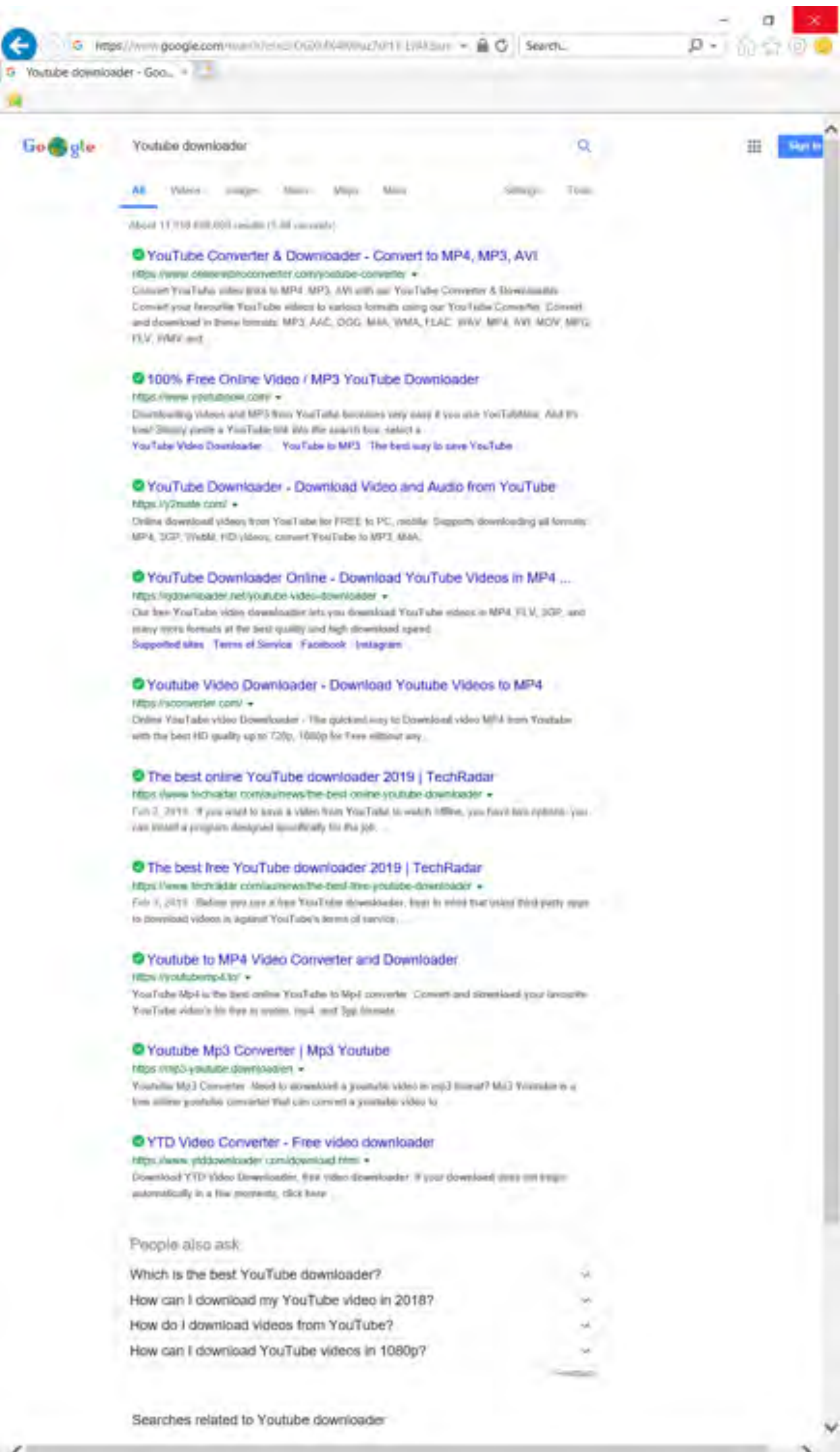




31. The main reasons users give for stream ripping are related to cost (it's free) and offline use. Stream ripping enables users to obtain one of the key benefits of a premium streaming subscription (offline downloads) for free:

32. There are many websites that offer downloads from streaming sites like YouTube, and these are easily located using a search engine. According to consumer research, one third of people using stream ripping sites in New Zealand discover the sites using Google or another search engine.

33. On 11th March 2019 we searched for "youtube converter" using Google and obtained the following results:



34. All of these results lead to popular stream ripping sites.

35. According to data obtained from Similarweb, Ytmp3.cc, the first result in the Google search, received more than 100,000 unique visitors from New Zealand in January 2019. These sites primarily make money by advertising to visitors. With sites like ytmp3.cc receiving tens of millions of visits each month, advertising revenues for the most popular stream ripping sites is estimated to run into millions of dollars each year.

36. The following table shows the 10 most popular stream ripping sites in New Zealand in February 2019:

SITE	VISITORS – SIMILARWEB FEB 2019	DOMAIN REGISTRANT	OPERATOR	HOST ISP (front end host)
ytmp3.cc	92,600	Global Domain Privacy Services Inc., Panama	Germany	Servers-com-Mow1, Russia
onlinevideoconverter.com	70,506	Contact Privacy, Canada	Unknown	Netrouting, Netherlands
savefrom.net	29,479	Domains By Proxy, LLC, USA	US	Hosting Services Inc, UK
flvto.biz	27,165	Details Redacted	Russia	Hetzner Online GmbH, Germany
online-convert.com	25,890	Details Redacted	Unknown	QaamGo Media GmbH, Germany
mp3juices.cc	25,346	Global Domain Privacy Services Inc., Panama	Germany	Servers-com-Mow1, Russia
easy-youtube-mp3.com	20,792	Details Redacted	Austria	Vultr Holdings LLC, UK
convert2mp3.net	20,143	Details Redacted	Germany	OVH SAS, France
2conv.com	12,204	Aleksej Kostunin, OHG, RU	Russia	IP Volume Netblock, Seychelles

SITE	VISITORS – SIMILARWEB FEB 2019	DOMAIN REGISTRANT	OPERATOR	HOST ISP (front end host)
y2mate.com	12,181	Whois Guard Protected, Panama	Unknown	CloudFlare Inc., US

37. Stream ripping sites compete unfairly with licensed music services, enabling users to permanently download music licensed only for ad-supported streaming on the site from which they download and then listen to it offline without advertisements and without paying.

38. The music that these websites make available has not been licensed for download or offline use, only for streaming. Services such as YouTube operate an ad-supported streaming model and users are prohibited in terms and conditions from downloading. In addition, the agreements between record companies and streaming services like YouTube prohibit downloading and require streaming services to apply measures to prevent it. The remuneration that record companies and artists receive for online ad-supported streaming is far lower than that received for a download or subscription streaming model.

39. As a result, we believe that stream ripping is causing substantial harm to the music industry by reducing traffic and interest in licensed music streaming platforms, reducing advertising revenues and importantly, reducing sales of premium subscription streaming services, which offer offline and mobile access as a benefit.

Case study: flvto.biz

40. **FLVTO.biz** is a popular stream ripping website in New Zealand, ranking fourth in the top 10 most-used stream ripping websites in New Zealand in February 2019.

41. As shown on the above screenshot, the site invites users to enter a URL that contains the music that the user wishes to copy. Once the "CONVERT TO MP3" button is pressed, after a short time the user will receive a direct download of the copied digital file. That digital file will contain the music from the originally provided URL.

42. FLVTO.biz has been blocked from access in Italy, Denmark and Spain. There is a pending blocking action against it in Australia. Recorded Music wrote to the owners of FLVTO.biz on 20 June 2018 and 2 October 2018 on behalf of its licensees. In that letter, Recorded Music alleged that the FLVTO.biz website and its owners were engaging in copyright infringement which was actionable in damage in New Zealand. A copy of the letter is included in the Schedule. No response has been received. The website continues to be operable by New Zealand users.

BitTorrent

43. The majority of use of bittorrent is for film and television, however music is also available and the network acts as a huge store of both new and catalogue material. One popular kind of music download via bittorrent is a discography covering everything released by a particular band: all albums from The Beatles or every track released by Lorde can be downloaded via a single click. IFPI estimates that around 10% of bittorrent downloads are music content.

44. There are different ways to access BitTorrent but most BitTorrent users rely on sites or portals – such as ThePirateBay – which index torrent files and enable users to download an enormous range of content. There are millions of pieces of content available to download through ThePirateBay.

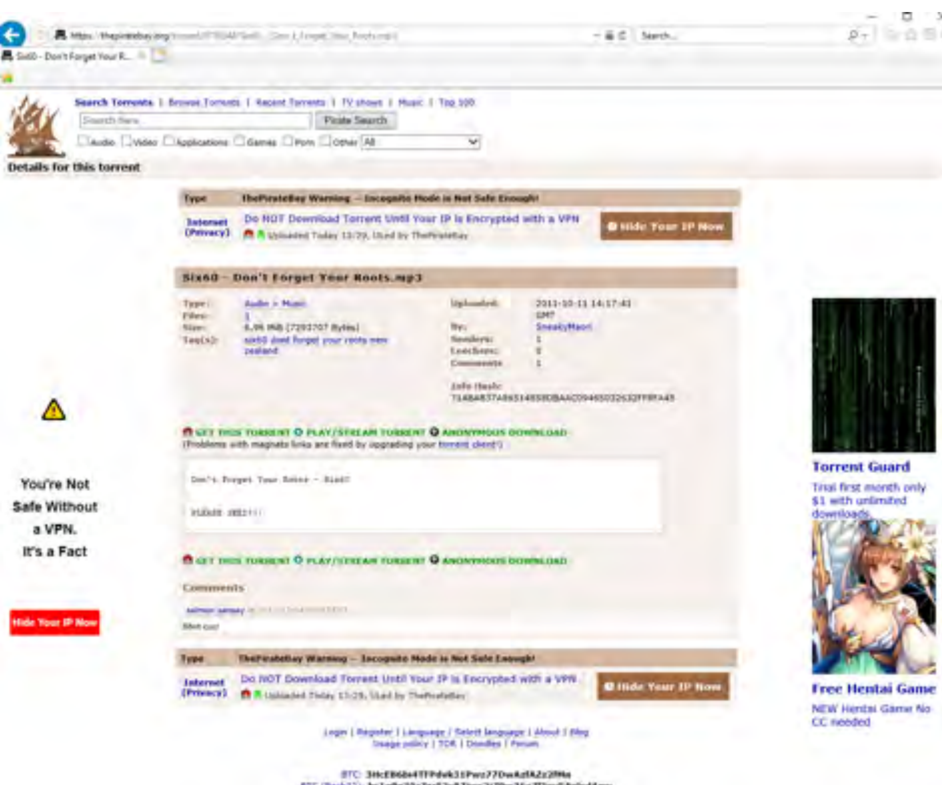
45. The following table shows the most popular BitTorrent websites in New Zealand as of February 2019:

SITE	VISITORS – SIMILARWEB FEB 2019	DOMAIN REGISTRANT	OPERATOR	HOST ISP AND JURISDICTION
thepiratebay.org	197,514	Fredrik Neij, Sweden	Unknown	CloudFlare Inc., US
rarbg.to	73,920	Details Redacted	Unknown	S.A.& A Stroi Proekt Eood, (BIH)
1337x.to	52,385	Details Redacted	Unknown	CloudFlare Inc., US (Flokinet, SC)
torrents.org	31,496	Raimond Torrents, Atmosfera.net, Spain	Unknown	Microsoft Corp, US
torrentz2.eu	30,602	Details Redacted	Unknown	CloudFlare Inc., US (Belcloud, BG)
torrentdownloads.me	19,322	WhoisGuard, Inc. Panama	Unknown	CloudFlare Inc., US (ITL-AS, UA)
torlock.com	15,862	Whois Privacy Corp., (BS)	Unknown	CloudFlare Inc., US (Marosnet, RU)

SITE	VISITORS – SIMILARWEB FEB 2019	DOMAIN REGISTRANT	OPERATOR	HOST ISP AND JURISDICTION
zoogle.com	14,475	Craig Hatkoff, Turtle Pond, (US)	Unknown	GoDaddy.com LLC, US
thepiratebay.se	14,112	**SITE OFFLINE**		
monova.to	13,650	Details Redacted	Unknown	CloudFlare Inc., US (Abelohost, NL)

46. On 17 December 2018, Recorded Music searched The Pirate Bay for popular NZ recording artists. Over 300 torrent files for New Zealand recordings were located, covering 40 different artists, including iconic artists such as Split Enz and Dave Dobbyn, and current artists including Lorde, Kimbra, Drax Project and Six60. These included ten unique copies of the album "The Best of Crowded House", fourteen copies of Lorde's album "Pure Heroine" and at least one copy of each album in Brooke Fraser's discography.

47. When a user goes to download such an album they are presented with the following page:



48. As can be seen in the above screenshots, rightsholders' content is frequently monetised by websites such as TPB with advertisements for pornographic content, VPN tools and links to other websites to access infringing content.

Cyberlockers

49. Cyberlockers are centralised online file storage services that are intentionally designed to support the massive distribution of files among strangers on a worldwide and unrestricted scale. The link to a user's file stored on a cyberlocker can be posted to any location for any user to access. For cyberlockers, the client is not the person who uploads files; indeed, people who post popular files are often paid by the cyberlocker through affiliate programs that reward users when their uploaded content is accessed. The cyberlocker's real client is the person who comes to the site to download or stream the content. Cyberlockers earn their money by selling advertising around these visitors, and/or by upselling them subscription services which allow unlimited simultaneous downloads at maximum download speeds.

50. The following tables shows the most popular cyberlockers in New Zealand as of February 2019:

SITE	VISITORS – SIMILARWEB FEB 2019	DOMAIN REGISTRANT	OPERATOR	HOST ISP
openload.co	76,270	Contact Privacy Inc., Canada	Unknown	CloudFlare Inc., US
zippyshare.com	41,867	Contact Privacy Inc., Canada	Poland	OVH SAS, France
rapidgator.net	24,957	Whois Privacy Corp., Bahamas	Unknown	DDos Protection Ltd, Russia
uploaded.net	23,286	Cyando AG, Switzerland	Switzerland	Cyando AG, Switzerland
uptobox.com	16,159	Whois Privacy Corp., Bahamas	Unknown	CloudFlare Inc., US
1fichier.com	15,240	Details Redacted	Unknown	Liquid Web, LLC, US
k2s.cc	14,803	PROTECTSERVICE LTD, Cyprus	Unknown	CloudFlare Inc., US
nitroflare.com	12,581	WhoisGuard, Inc., Panama	Unknown	CloudFlare Inc., US
userscloud.com	9,936	Domains By Proxy, LLC, US	Unknown	M247 Europe SRL, Romania
4shared.com	8,803	New IT Solutions Ltd, British Virgin Islands	Unknown	New IT Solutions Ltd, British Virgin Islands

51. Superficially, cyberlockers bear some similarities with legitimate cloud storage services, like DropBox and Amazon Cloud Drive. Both types of services allow files to be uploaded to servers (the cloud) and then accessed by the uploader and shared with others.

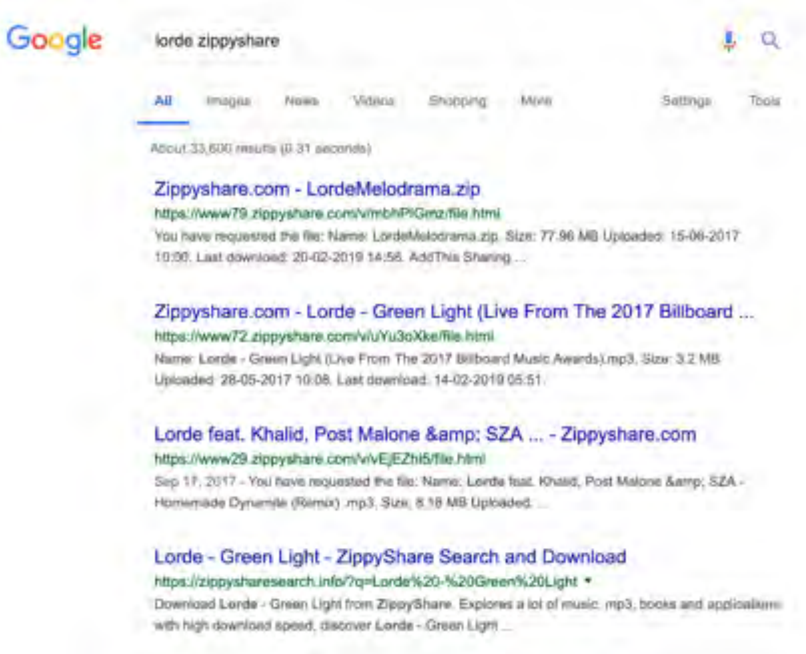
52. However, this is where the similarity ends: legitimate cloud-based storage providers such as Dropbox commercialise the service by targeting the person seeking *storage*. The focus is on backup and syncing with sharing of material to a limited audience one feature amongst many. In contrast, cyberlockers generate revenues from the downloader: first, by selling subscriptions offering unlimited downloads and second, by showing advertisements to those downloading without a subscription. Cyberlockers then encourage uploaders to add popular content to their site, typically by offering to *pay* uploaders according to the number of downloads or by offering a commission when downloaders buy subscriptions when seeking one of the uploader's files.

53. As a result, cyberlockers are frequently used to distributed infringing content – after all, free pirated content is some of the most popular content online. The bulk of files found on cyberlockers are infringing.

54. With most cyberlockers, users cannot search for and access content directly on the website. Instead, cyberlockers use search engines, and link and aggregator sites, to distribute content. It is common for the operators of cyberlockers to have commercial arrangements with the operators of link sites to ensure that content is spread widely. For example, MegaUpload created financial incentives for users to post links to infringing content on third party websites. Users would access links to content hosted on MegaUpload on websites such as ninjavideo.net, megaupload.net, megarelease.net, surfthechannel.com and taringa.net. Posting links on these websites would result in premium users being rewarded with bonuses on their premium accounts. In addition some cyberlockers allow their content to be directly indexed by Google – one example is Zippyshare.

Case study: Zippyshare

55. Zippyshare is the second most used cyberlocker in New Zealand as at November 2018. A Google search for "lorde zippyshare" easily brings up several links to various mp3 files stored on zippyshare's servers.



56. Clicking on the first result shows the following display, leading to a link to download the file.

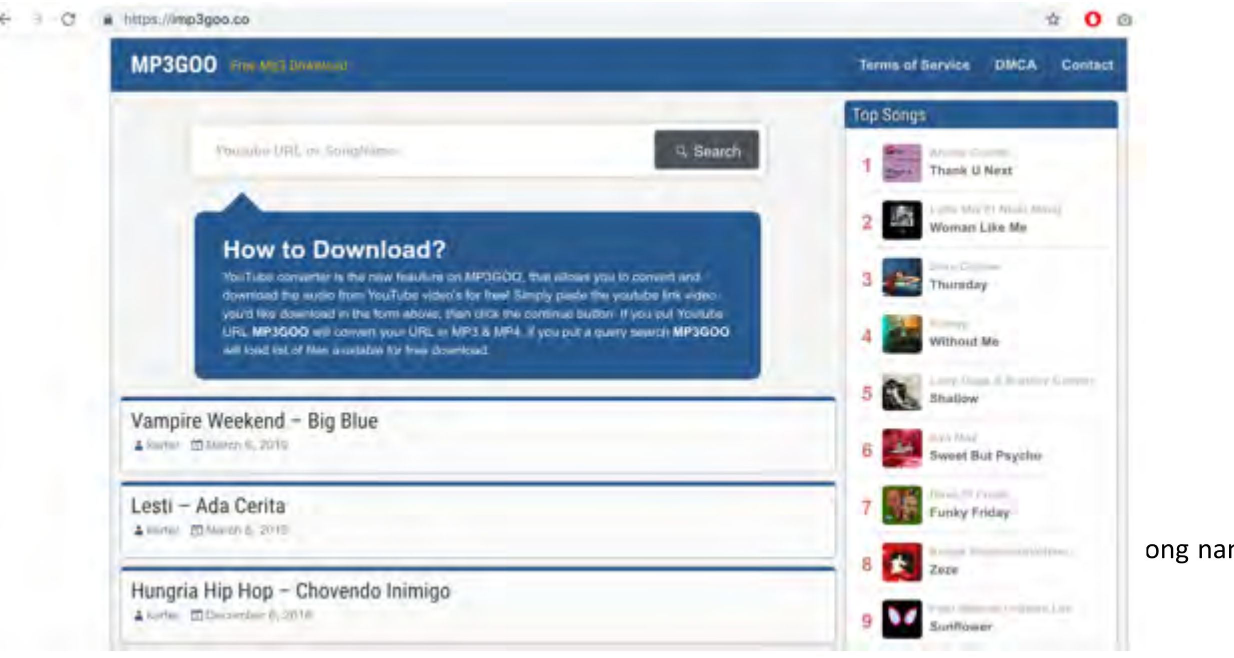
To date, Recorded Music has recorded 30,613 takedowns of New Zealand licensed repertoire tracks from cyberlockers. Lorde's album "Pure Heroine" was the subject of 2,926 takedowns alone.

Link and aggregator sites

57. There are a number of egregious piracy linking sites that act as distribution engines for infringing content. Link and aggregator sites are especially important because they act as distribution mechanisms for cyberlockers.

58. One egregious example is NewAlbumReleases - a long-running and well-known linking site focused on music. New albums and tracks are featured on the site as soon as they are available to download through pirated means, typically days before they are released through licensed services. The site typically uses cyberlockers to host the music content that it uploads, providing links to two or three different cyberlockers for each release. The screenshot below shows the available content with the name of the cyberlocker in the link – Rapidgator and Turbobit.

59. Mp3 link sites like imp3goo aggregate links to infringing music files from elsewhere on the internet.



ong name: a

Video streaming - YouTube

61. Along with sites essentially dedicated to the business of piracy such as cyberlockers and stream ripping sites, there are a range of largely legitimate websites that are utilised by users to provide access to unlicensed material. YouTube is a common source of unlicensed video material.

Social Media

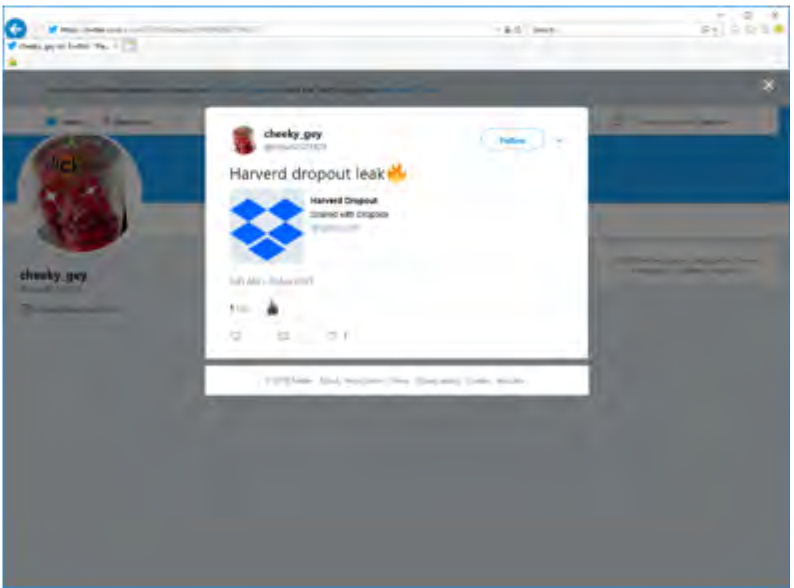
62. Social media is an important source for internet users to be linked to licensed and unlicensed music. According to consumer research 20% of people have accessed music via a link on Facebook, Twitter, Instagram or Snapchat, which may be infringing or non-infringing.

63. Facebook has licensed features, see further *The New Zealand Music Industry*.

64. Despite these licensed features, Facebook is regularly used by Facebook users as a source of infringing content, including infringing videos uploaded to the video area, and links to pirate sites, often cyberlockers. For example, the following screenshot shows a video uploaded to Facebook described as a "lyric video", containing the sound recording and lyrics to an Ariana Grande song:

65. These videos can be uploaded either by pages (such as the "E.M Music" page in the above example) or individual users. Content uploaded by users can be distributed among a small number of the user's friends, or made available more generally. These kinds of copyright infringement are frequent and extremely difficult for copyright holders to individually address.

66. Twitter is also regularly used to distribute links to infringing content. In 2017, IFPI sent For example, in the below screenshot a Twitter user has posted a link to a Dropbox account containing a pre-release (or "leaked") version of Lil Pump's album "Harverd Dropout".



67. Users who clicked through to the Dropbox page would be provided access to the digital files for download.

Role of Intermediaries

68. Digital intermediaries such as search engines, advertisers, payment providers and app store operators amplify piracy and make it easier and more profitable.

69. Consumer research shows that over a third of people used a search engine to find ways to download free music from piracy services.[190]

70. It is possible for right holders to send a request to search engines to "de-list" specific infringing search results, however this is extremely labour intensive and largely ineffective as the statistics at the start of this paper demonstrate (4 billion requests to remove infringing search results have been sent to Google).

71. In addition, this action only works if there is a link to de-list. It is not possible for stream ripping sites where content is not indexed by search engines. And yet many popular stream ripping sites are suggested by a search for " YouTube converter".

72. The majority of online piracy is financed via advertising. Given the huge volume of internet traffic that is attracted to websites involved in copyright infringement, there is a significant market for advertising on such websites. Such advertising is typically not from mainstream brands or reputable aggregators.

73. Instead, advertisements on websites involving copyright infringement are frequently placed by pornographic websites, other pirate websites, "phishing" scams and malware websites. This monetisation of unlawful access to a copyright owner's works further degrades the copyright owner's control over access to its works. There are steps that advertisers and advertising aggregators should take to ensure their services are not used in connection with piracy.

Case Study – Stream Ripping

74. The problems facing right holders seeking to enforce their copyright against digital piracy are shown by Recorded Music's recent efforts to contact the operators of stream ripping websites accessible by New Zealand users. In 2018, Recorded Music identified a number of leading stream ripping websites that offered stream ripping services to New Zealand users. These websites were:

(a) Youzik.com;

(b) Telecharger-youtube-mp3.com;

(c) Telechargerunevideo.com;

(d) Yout.com;

(e) Peggo.tv;

(f) Savefrom.net;

190 Horizon (2018) – powerpoint breakdown.

(g) 2conv.com;

(h) Flvto.biz;

(i) Convert2mp3.net; and

(j) Onlineconverter.com.

75. Recorded Music first sent a letter written by in-house counsel to each of these websites, followed by a second letter written by external counsel. Both letters noted that each of the websites' conduct in offering stream ripping services amounts to unauthorised making available and transmitting copies of sound recordings. The letters required the website operators to cease offering their services to New Zealand users. Two of the websites reacted by ceasing to offer downloads to New Zealand users. The others did not react or respond.

76. Further letters were sent by Recorded Music to a further 11 stream ripping sites in March 2019. Seven responses were received. The responses were:

(a) An assertion that the recipient of the email was only providing registration services for the domain name (in six instances); and

(b) A request for greater information as to what Recorded Music required the recipient to do, from Peggo.tv. The actual response received was:

> "Hi, Sory me english no good, mee no understand. Peggo is new owner now. Please fill DMCA. Thanks."

77. None of the recipients acted on any of Recorded Music's requests. An example of the letters is attached.

2 October 2018

By Post and By Email: tofigkurb@gmail.com

Mr Tofig Kurbanof
Bolshaya Sadovaya st 25
Apt 2
Rostov-on-Don Rostov 344001
RUSSIAN FEDERATION

Dear Mr Kurbanof

flvto.biz – **COPYRIGHT INFRINGEMENT - PROCEEDINGS**

1. We are writing on behalf of our client, Recorded Music New Zealand Limited (**Recorded Music**).

Our client's letter

2. On 20 June 2018, in-house counsel for Recorded Music wrote to you in relation to your website www.flvto.biz (**the infringing website**). The letter put you on notice that the activities and operations of the infringing website, in making available and transmitting copies of copyright sound recordings, infringe the New Zealand Copyright Act 1994. A further copy of that letter is **enclosed.**

3. That letter detailed the fact that your conduct in making available and transmitting copies of sound recordings for download via the internet constitutes a breach of section 33 of the Copyright Act 1994. Our client also noted that, as a result of these infringing activities, you are liable to injunctions and damages.

4. Our client's letter required you to provide a written undertaking by 29 June 2018 that you would cease all such infringing activities in New Zealand. You have failed to do so. The infringing website continues to make available and transmit copies of copyright sound recordings when accessed by a New Zealand user as of the date of this letter.

5. It has since come to our attention that you are also the operator and/or administrator of another website named 2conv.com. The allegations from our client's letter of 20 June 2018 in relation to the infringing website apply equally to 2conv.com (together the **infringing websites**).

6. We note that the above allegations are consistent with those contained in a complaint filed against you by Universal Music, Sony Music and Warner Music in the United States District Court for the Eastern District of Virginia. That complaint also concerns your unlawful use of the infringing websites to commit copyright infringement.

Proceedings

7. As a result of your failure to comply with Recorded Music's demands, we have been instructed to consider bringing proceedings against you and any other individuals involved with or responsible for the infringing websites. A continued failure to comply with Recorded Music's request for a written undertaking will result in such proceedings being filed in the New Zealand High Court for copyright infringement.

Undertaking

8. Our client continues to be willing to resolve this dispute. It will do so on the basis that you provide a written undertaking that you will cease making available and transmitting copies of copyright sound recordings via the infringing websites in New Zealand. In order to avoid continued legal action, please provide that undertaking by **5.00 pm on Friday 12th October 2018**.

Yours faithfully
JACKSON RUSSELL

Caroline Harris
Partner

Email: caroline.harris@jacksonrussell.co.nz
DDI: (09) 300 6930
Fax: (09) 309 0902

cc Andrew Brown QC

22 March 2019

DMCA Complaints
Artem Otstavnov
Rostov-on-don, Mechnikova str., 65/40, apt 5
Russian Federation
344012

By Email only: 4otstavnov.a@gmail.com;
info@offshorehosting.name

Dear Sir or Madam

2conv.com – COPYRIGHT INFRINGEMENT

1. Recorded Music New Zealand is a non-profit organisation representing the interests of record companies and recording artists in New Zealand. Our members include the NZ branches of the three major record companies Universal Music NZ, Sony Music NZ and Warner Music NZ, as well as a multitude of independent record companies and distributors, including Flying Nun, Rhythmethod and DRM and nearly 3000 registered individual recording artists. Through our membership Recorded Music NZ represents 98% of all sound recordings in New Zealand.

2. We are writing to you in connection with your website www.2conv.com (**the Website**). Publicly available information confirms that you are the owner/operator/administrator of the Website. The Website makes available downloads of copyright-protected sound recordings.

3. Users of the Website are able to copy a URL from a video streaming site into the input field on your site. The site then delivers to the user an audio file containing a copy of the sound recording embodied in the video, in at least MP3 format. The recording can then be freely used, including offline and on mobile devices, without the need for the user to visit the streaming site again or to purchase a premium streaming subscription.

4. The Website is popular in New Zealand and we believe it is widely used to obtain unauthorised copies of copyright sound recordings. We are writing to put you on notice that the activities and operations of your website infringe the New Zealand Copyright Act 1994 and are entirely without authority from the owners of the copyright in the sound recordings that you are making available.

   (a) Infringement of Section 33

5. Your actions in making available and transmitting copies of sound recordings for download via the internet constitute a breach of section 33 of the Copyright Act 1994. The communication and downloading takes place *in New Zealand* and constitutes an infringing act in New Zealand.

(b) Criminal Offence under Section 131

6. It is likely your actions also constitute a criminal offence under section 131(1) of the Copyright Act 1994 in that you are, in the course of a business, distributing infringing copies of sound recordings. We put you on notice that all the commercially released sound recordings which you are making available, communicating and distributing electronically from your website are infringing copies.

(c) Criminal Offences under Section 226C

7. YouTube and other streaming services apply technical protections to the content they stream with the objective of preventing unauthorised downloading. Your actions also involve providing a service that enables or assists users in New Zealand to circumvent these technological protection measures. We again expressly put you on notice that your service is being used to infringe copyright in TPM works being the sound recordings.

8. As a result of these infringing and illegal activities you are liable to injunctions, damages and also penalties for any criminal offences.

Undertakings Required

9. We are therefore writing to seek your immediate written undertaking that you will cease all such infringing activities in New Zealand.

10. Please let us have a response to this letter with your undertaking **by 5:00pm on Wednesday 3 April 2019**. In the event that this undertaking is not received Recorded Music and its members reserve all their rights to take further action against you, your employees and directors.

Yours faithfully
Recorded Music New Zealand Limited

P.P.

Jo Oliver
General Counsel

ANNEX: EXAMPLES OF OUT OF COPYRIGHT RECORDINGS

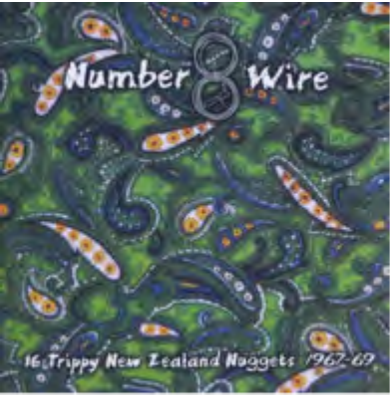
1. As we have submitted, the current 50-year term for copyright in sound recordings allows for the exploitation of New Zealand artists and copyright owners by overseas companies. The bundling of New Zealand works into compilation albums is a clear example of this.

2. Overseas companies are routinely targeting New Zealand sound recordings for which copyright has expired and selling these as compilation albums of New Zealand works, or making these albums available for streaming. In some cases entire albums are being made available in the same manner. This provides no benefit to New Zealand since the commercial benefits flow overseas.

3. This annexure provides evidence of the practice described above. It shows original New Zealand works, now in the public domain, which are being exploited by overseas companies.

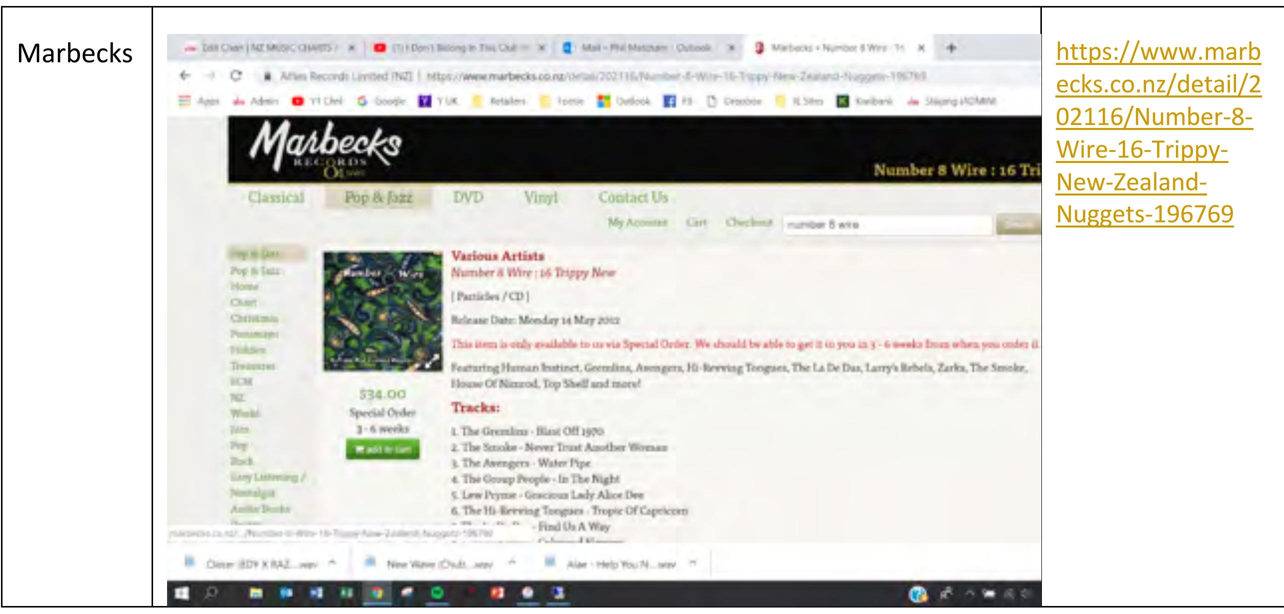
A. Number 8 Wire: 16 Trippy New Zealand Nuggets 1967-69

Label: Particles – PARTCD4011
Format: CD, Compilation, Reissue, Unofficial Release
Country: UK
Released: 2012
Evidence of Above:
https://www.discogs.com/Various-Number-8-Wire-16-Trippy-New-Zealand-Nuggets-1967-69/release/6774909



Evidence of Public Availability in New Zealand

Retailer	Screenshot	Link

Marbecks		https://www.marbecks.co.nz/detail/202116/Number-8-Wire-16-Trippy-New-Zealand-Nuggets-196769

Original sound recordings by New Zealand Artists (Pre-1969) contained on compilation:

Title	Artist/Band Name	Release Date	External Reference
Never Trust Another Woman	The Smoke	1967	https://www.discogs.com/composition/235a063d-eb17-4535-891e-3b8c5e52966b-Never-Trust-Another-Woman
Water Pipe	The Avengers	1967	https://www.discogs.com/composition/46d03c64-8c63-4581-be72-aac573cdb383-Water-Pipe
Tropic of Capricorn	Hi Revving Tongues	1968	https://www.discogs.com/composition/4d65882d-2828-4763-accd-f399ea51dffd-Tropic-Of-Capricorn
Find Us A Way	The La De Das	1967	https://www.discogs.com/composition/2df61ca9-1271-4122-ae95-2829616756c3-Find-Us-A-Way
Coloured Flowers	Larry's Rebels	1968	https://www.discogs.com/composition/0cda3426-da72-4b51-afc2-a990a752700d-Coloured-Flowers
Slightly-Delic	The House of Nimrod	1967	https://www.discogs.com/composition/9803caaf-8ffe-4215-90e0-53d85886a05c-Slightly-delic

Bengal Tiger	The Brew	1967	https://www.discogs.com/composition/5bcd3d04-cf6f-47bf-bcf1-926c47a76d7b-Bengal-Tiger
A Day in My Mind's Mind	The Human Instinct	1967	https://www.discogs.com/composition/8c35318b-9827-4f37-8261-0fc2cd0f72cf-A-Day-In-My-Minds-Mind
I'm Allergic to Flowers	Vicky & Dicky	1968	https://www.discogs.com/composition/326b5aaa-9fe6-404e-a991-83178ca57dc3-Im-Allergic-To-Flowers

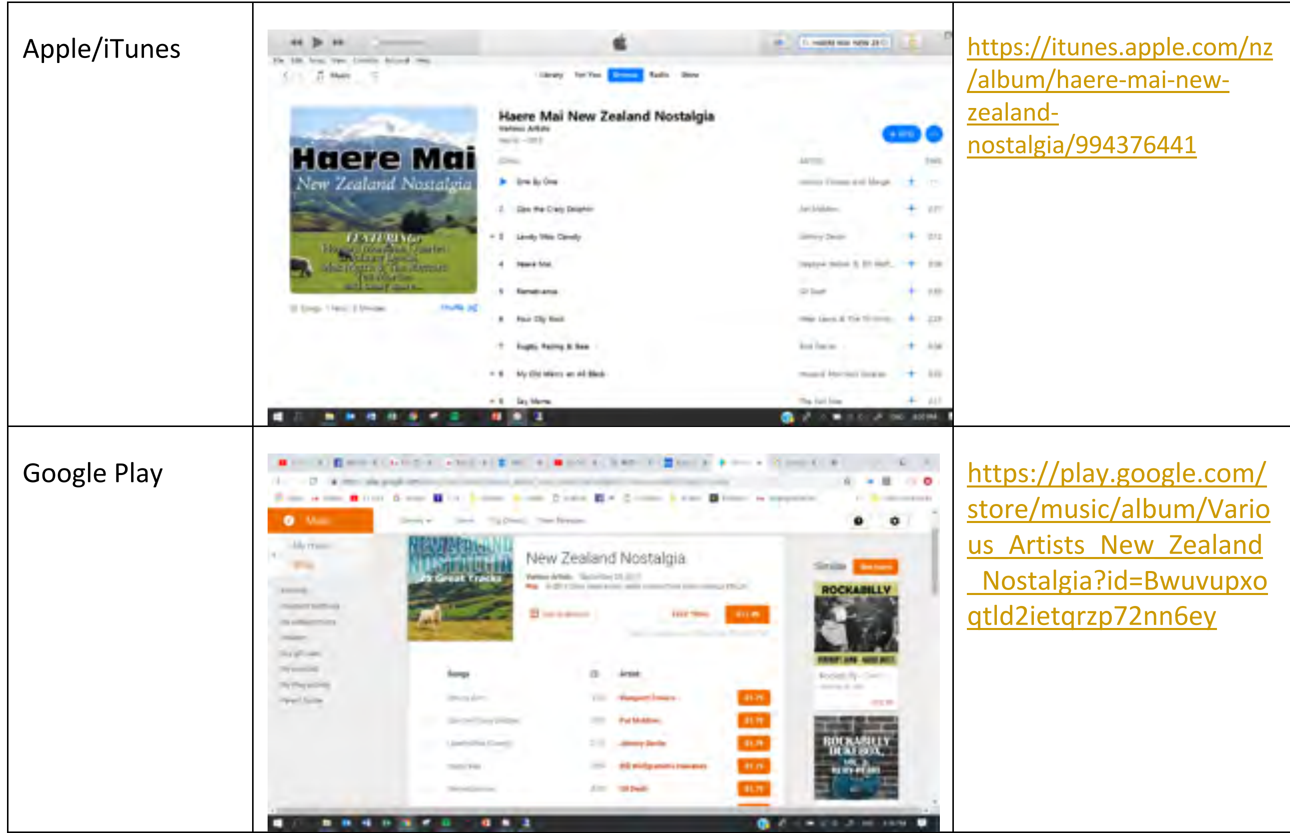
B. Haere Mai New Zealand Nostalgia

Label: Glory Days Music (under license from V&H Holdings)
Release: 2015
Evidence of Above:
https://open.spotify.com/album/6LcLkjOjOhI9ZIyPHkyttu

V&H Holdings appear to be an Australian Private Company:
https://abr.business.gov.au/ABN/View?abn=60080262988

Evidence of Public Availability in New Zealand

Streaming Service	Screenshot	Link
Spotify		https://open.spotify.com/album/28IzzYAw1wvlFkiCKZ4Kfi?si=mOFdb47KT5aqMqvaSrPM0A



Apple/iTunes		https://itunes.apple.com/nz/album/haere-mai-new-zealand-nostalgia/994376441
Google Play		https://play.google.com/store/music/album/Various_Artists_New_Zealand_Nostalgia?id=Bwuvupxoqtld2ietqrzp72nn6ey

Original sound recordings by New Zealand Artists (Pre-1969) contained on compilation:

Title	Artist/Band Name	Release Date	External Reference
One by One	Johnny Cooper & Margaret Francis	1955	https://www.discogs.com/Johnny-Cooper-And-Margaret-Francis-Accompanied-By-Ranger-Riders-One-By-One/master/475253
Opo the Crazy Dolphin	Pat McMinn	1956	https://www.discogs.com/Pat-McMinn-With-Crombie-Murdochs-Nickelodeons-Pat-McMinn-And-Bill-Langford-With-The-Stardusters-Danc/release/10040655
Lawdy Miss Clawdy	Johnny Delvin	1958	https://www.discogs.com/Johnny-Devlin-Lawdy-Miss-Clawdy/release/989913
Harae Mai	Daphne Walker	1960	https://www.discogs.com/Daphne-Walker-And-George-Tumahai-With-Bill-Sevesi-And-His-Islanders-Maori-Favourites/release/4828938

Remembrance	Gil Dech	1961	http://www.45cat.com/record/dnz116
Four City Rock	Peter Lewis & The Tri-Sonic Beat	1959	http://www.45cat.com/record/ok109
Rugby, Racing & Beer	Rod Derret	1965	https://www.discogs.com/Rod-Derrett-Chorus-And-Orchestra-Rugby-Racing-And-Beer/master/534100
My Old Man's an All Black	Howard Morrison Quartet	1960	https://www.discogs.com/Howard-Morrison-Quartet-My-Old-Mans-An-All-Black/release/5191229
Say Mama	The Keli Isles	1959	https://www.discogs.com/The-Keil-Isles-Say-Mama/master/1124649
Maple on the Hill	Cole Wilson & The Tumbleweeds	1958	https://www.discogs.com/Cole-Wilson-And-His-Tumbleweeds-Western-Song-Hits/release/7447707
She'll Be Right	Peter Cape	1962	https://www.discogs.com/Peter-Cape-With-Don-Toms-Shell-Be-Right/master/1163000
Get a Haircut	Max Merritt & The Meteors	1959	https://www.discogs.com/Max-Merritt-And-The-Meteors-Get-A-Haircut/release/1027689
Tea at Te Kuiti	Ash Burton & the Nightcaps	1963	https://www.discogs.com/Ash-Burton-And-The-Nightcaps-Tea-At-Te-Kuiti/master/1192710
Pie Cart Rock 'n' Roll	Johnny Cooper	1957	http://www.45cat.com/record/45hr88
Battle of the Waikato	Howard Morrison Quartet	1960	https://www.discogs.com/Howard-Morrison-Quartet-With-Toni-Williams-Tremellos-Battle-Of-Waikato/release/5411677
Ukulele Lady	Daphne Walker	1959	https://www.discogs.com/Daphne-Walker-And-George-Tumahai-With-Bill-Sevesi-And-His-Islanders-Polynesian-Favourites/release/4683855
The Twist	The Keli Isles	1962	https://www.discogs.com/Herma-Keil-With-Keil-Isles-The-Twist/master/689315
The Huhu Bag	Bas Tubert & The Tubes	1961	http://www.45cat.com/record/hr146

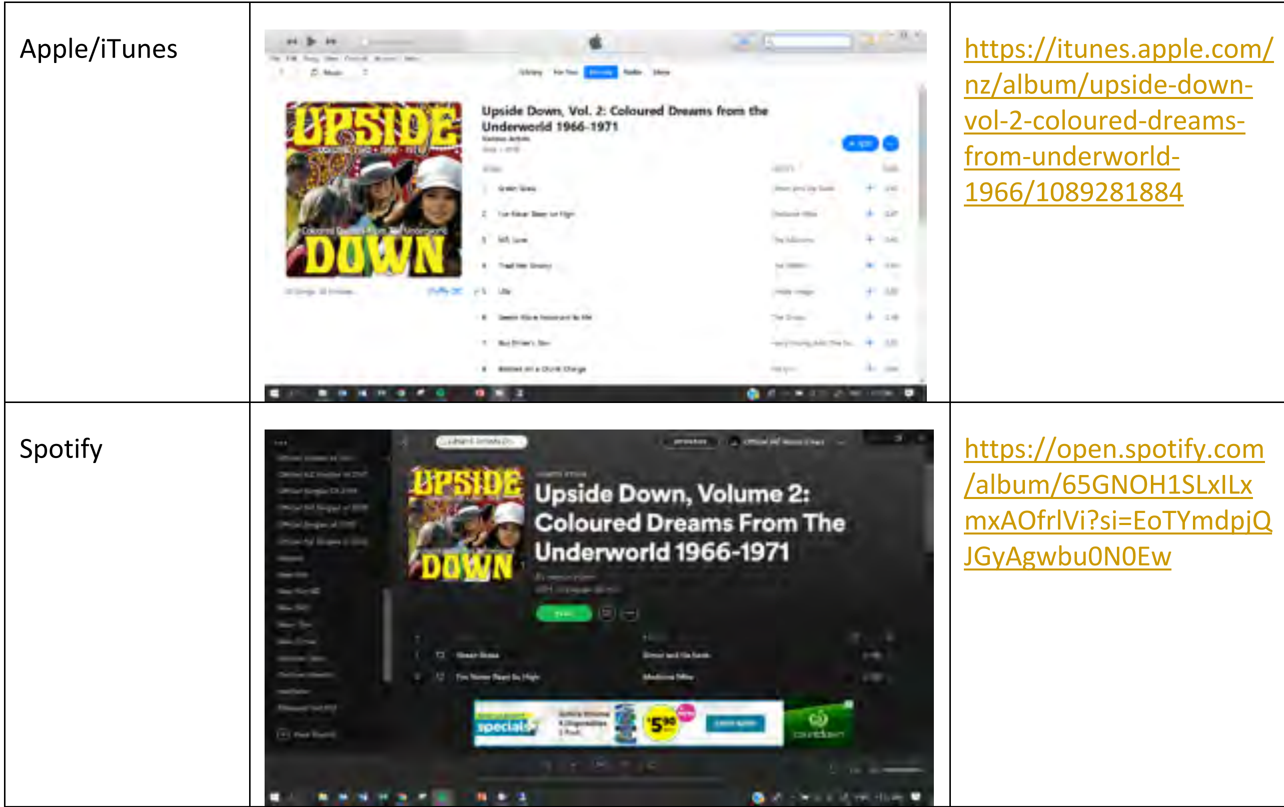
Straight Skirt	Johnny Devlin	1958	https://www.discogs.com/Johnny-Devlin-How-Would-Ya-Be/release/4815036
Mandrake	Tex Morton	1941	https://www.discogs.com/Tex-Morton-And-His-Roughriders-Tex-Morton-2-Sister-Dorrie-With-Tex-Mortons-Roughriders-Mandrake-Dont/release/12498730
Clap Your Hands	Teddy Bennett	1960	https://www.discogs.com/Teddy-Bennett-Wimoweh/release/5142034

C. Upside Down Volume Two

Label: Particles – PARTCD4049
Series: Upside Down – Volume Two
Format: CD, Compilation
Country: UK
Released: 2014
Evidence of Above:
https://www.discogs.com/Various-Upside-Down-Volume-Two/release/6084864

Evidence of Public Availability in New Zealand

Streaming Service	Screenshot	Link
Google Play		https://play.google.com/store/music/album/Various_Artists_Upside_Down_Volume_2_Coloured_Drea?id=Bflq2mzokkczhaxrqiqnwmivln4



Apple/iTunes		https://itunes.apple.com/nz/album/upside-down-vol-2-coloured-dreams-from-underworld-1966/1089281884
Spotify		https://open.spotify.com/album/65GNOH1SLxILxmxAOfrlVi?si=EoTYmdpjQJGyAgwbu0N0Ew

Original sound recordings by New Zealand Artists (Pre-1969) contained on compilation:

Title	Artist/Band Name	Release Date	External Reference
Ulla	The Simple Image	1968	https://www.discogs.com/composition/86e0ae12-7721-4dd0-bd47-621de83e9f0c-Ulla
Don’t Just Stand There	The Gremlins	1968	https://www.discogs.com/composition/dc2fc737-f452-47b9-b4c6-2c6117f8ade0-Dont-Just-Stand-There
Kingsforth Hemmingseen	The Gremlins	1968	https://www.discogs.com/composition/8f7e97f3-c786-4be4-a725-21587e2da4d3-Kingsforth-Hemmingseen

D. Upside Down Volume Three

Label: Particles – PARTCD4050
Series: Upside Down – Volume Three
Format: CD, Compilation
Country: UK
Released: 2014
Evidence of Above:
https://www.discogs.com/Various-Upside-Down-Volume-Three/release/6582964?ev=rr

Evidence of Public Availability in New Zealand

Streaming Service	Screenshot	Link
Google Play		https://play.google.com/store/music/album/Various_Artists_Upside_Down_Volume_3_Coloured_Dreams?id=Bc5zlb6wko5jaf4oezk2ebzim5i
Apple/iTunes		https://itunes.apple.com/nz/album/upside-down-vol-3-coloured-dreams-from-underworld-1966/1089661160

Spotify		https://open.spotify.com/album/4H4uuWZybXKKNm51DsYaSM?si=sIUBmQ36QfSM-EZLWI2uVA

Original sound recordings by New Zealand Artists (Pre-1969) contained on compilation:

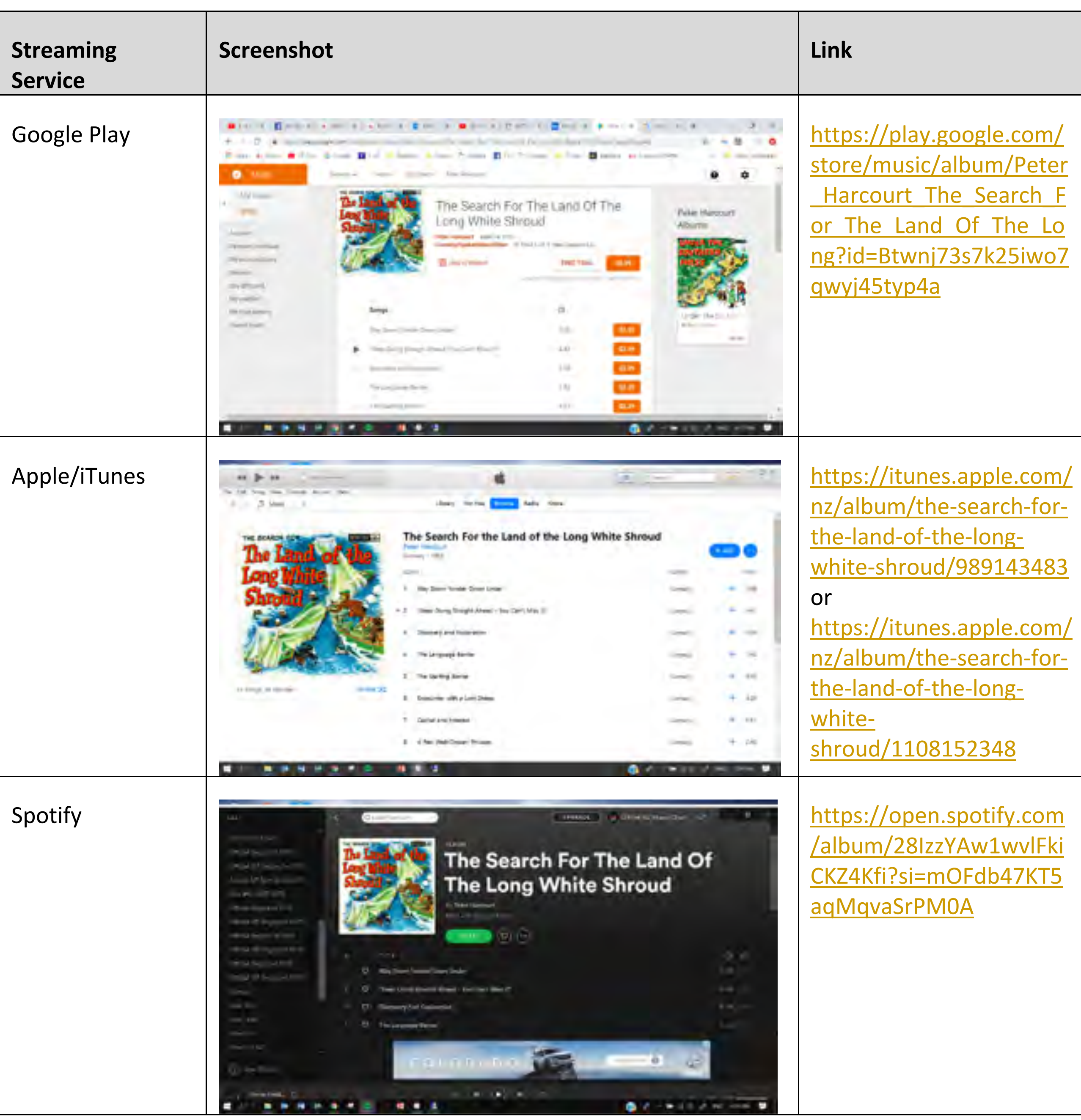
Title	Artist/Band Name	Release Date	External Reference
Let's Think of Something	Larry's Rebels	1967	https://www.discogs.com/composition/b60fa585-5d7d-4984-a038-87a21ef2487f-Lets-Think-Of-Something

E. The Search for the Land of the Long White Shroud

Label : His Master's Voice
Author : Peter Harcourt
Country: New Zealand
Released : 1963

This is an original New Zealand album, now in the public domain, which is being made available for streaming in New Zealand by overseas companies.

Evidence of Public Availability in New Zealand



Streaming Service	Screenshot	Link
Google Play		https://play.google.com/store/music/album/Peter_Harcourt_The_Search_For_The_Land_Of_The_Long?id=Btwnj73s7k25iwo7qwyj45typ4a
Apple/iTunes		https://itunes.apple.com/nz/album/the-search-for-the-land-of-the-long-white-shroud/989143483 or https://itunes.apple.com/nz/album/the-search-for-the-land-of-the-long-white-shroud/1108152348
Spotify		https://open.spotify.com/album/28IzzYAw1wvlFkiCKZ4Kfi?si=mOFdb47KT5aqMqvaSrPM0A

ANNEX: TERM OF PROTECTION OF SOUND RECORDINGS

January 2019[191]

Term protection of 70 years or longer for sound recordings has become the international standard:

- Currently 67 countries already protect sound recordings for 70 years or longer.
- 17 out of the top 20 music markets (by total revenue in 2016) have already committed to protecting sound recordings for 70 years or longer (from publication).[192]
- 33 out of the 35 OECD member countries protect sound recordings for 70 years or longer.

	Countries with 70 years or more			Countries with less than 70 years	
1.	Albania	70	1.	Algeria	50
2.	Argentina	70	2.	Andorra	50
3.	Australia	70	3.	Antigua and Barbuda	50
4.	Austria	70	4.	Armenia	50
5.	Bahamas	70/100	5.	Azerbaijan	50
6.	Bahrain	70	6.	Bangladesh	60
7.	Belgium	70	7.	Barbados	50
8.	Brazil	70	8.	Belarus	50
9.	Bulgaria	70	9.	Belize	50
10.	Burkina Faso	70	10.	Benin	50
11.	Canada	70	11.	Bhutan	50
12.	Chile	70	12.	Bolivia	50
13.	Colombia	80 or 50	13.	Bosnia and Herzegovina	50
14.	Costa Rica	70	14.	Botswana	50
15.	Croatia	70	15.	Brunei	50
16.	Cyprus	70	16.	Cambodia	50
17.	Czech Republic	70	17.	Cameroon	50
18.	Denmark	70	18.	Cape Verde	50
19.	Dominican Republic	70	19.	China	50
20.	Ecuador	70	20.	Congo, Democratic Republic of	20
21.	El Salvador	70	21.	Dominica	50
22.	Estonia	70	22.	Egypt	50

191 This table is based on both official and unofficial translations of laws held by IFPI or other institutions (e.g. WIPO). For some countries, it was impossible to verify whether the translation reflected the most recent version of the law.

192 16 of the top 20 markets already provide a term of protection of at least 70 years. Of the outstanding 4 countries, in Switzerland a Bill being debated by parliament would also extend the term of protection to 70 years.

23.	Finland	70	23.	Fiji	50
24.	France	70	24.	Georgia	50
25.	Germany	70	25.	Grenada	50
26.	Ghana	70	26.	Hong Kong	50
27.	Greece	70	27.	India	60
28.	Guatemala	75	28.	Indonesia	50
29.	Honduras	75	29.	Iraq	50
30.	Hungary	70	30.	Jordan	70
31.	Iceland	70	31.	Kenya	50
32.	Ireland	70	32.	Kyrgyzstan	50
33.	Israel	70	33.	Lebanon	50
34.	Italy	70	34.	Lesotho	50
35.	Ivory Coast	99	35.	Kenya	20
36.	Jamaica	95	36.	Macao	50
37.	Japan	70	37.	Macedonia	50
38.	Kazakhstan	70	38.	Malawi	50
39.	Korea, South	70	39.	Malaysia	20
40.	Latvia	70	40.	Mauritius	50
41.	Lithuania	70	41.	Moldova[193]	50
42.	Liechtenstein	70	42.	Mozambique	50
43.	Luxembourg	70	43.	Myanmar	50
44.	Malta	70	44.	Nepal	50
45.	Mexico	75	45.	New Zealand	50
46.	Micronesia	75 or 100	46.	Nigeria	50
47.	Morocco	70	47.	Pakistan	50
48.	Netherlands	70	48.	Papua New Guinea	50
49.	Nicaragua	70	49.	Philippines	50
50.	Norway	70	50.	Qatar	50
51.	Oman	95 or 120	51.	Russian Federation	50
52.	Palau	75 or 100	52.	Rwanda	50
53.	Panama	70	53.	Saint Lucia	50
54.	Paraguay	70	54.	Saint Vincent and the Grenadines	50
55.	Peru	70	55.	Saudi Arabia	50 or 75
56.	Poland	70	56.	Serbia	50
57.	Portugal	70	57.	Seychelles	50
58.	Romania	70	58.	Solomon Islands	25
59.	Samoa	75	59.	South Africa	50
60.	Singapore	70	60.	Sri Lanka	50
61.	Slovakia	70	61.	Sudan	50
62.	Slovenia	70	62.	Switzerland[194]	50
63.	Spain	70	63.	Taiwan	50

[193] Moldova has committed to extend the term of protection to 70 years under a trade agreement, but has not yet implemented the extension.

[194] A current Bill proposes to extend term to 70 years.

64.	Sweden	70	64.	Tajikistan	50
65.	Turkey	70	65.	Tanzania	50
66.	United Kingdom	70	66.	Thailand	50
67.	United States	70 or 95 or 120	67.	Togo	50
			68.	Trinidad and Tobago	25
			69.	Uganda	50
			70.	Ukraine	50
			71.	United Arab Emirates	50
			72.	Uruguay	50
			73.	Uzbekistan	50
			74.	Venezuela	50
			75.	Vietnam	60
			76.	Zambia	50
			77.	Zimbabwe	50
			78.		50
			79.		
			80.		

SECTION 3
THE NEW ZEALAND MUSIC INDUSTRY
TE AHUMAHI PUORO AOTEAROA

THE NEW ZEALAND MUSIC INDUSTRY

TE AHUMAHI PUORO O AOTEAROA

APRIL 2019
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1.

SETTING THE SCENE

"I think copyright is an amazing thing. Somewhere back in history, someone created legislation that allowed artists to get paid. Copyright makes me feel that my work's not for nothing. It's hard enough to be a musician. If we didn't have mechanisms to protect our work it would be almost impossible."

BIC RUNGA

Artist & Songwriter

"I would say that protecting the integrity of copyright should be our number one priority, so that the work of music creators continues to be valued."

NEIL FINN

SPLIT ENZ, CROWDED HOUSE, FLEETWOOD MAC

Artist & Songwriter

"The internet changed things so quickly and there's so much still to be revealed about its nature. It scares me that big tech companies are determining so much of the future for artists – and for the world in general. So much has been made possible for us by sharing – but far more has been made possible for them by what we share."

SALINA FISHER

Composer, Performer & Fulbright Scholar

"Protecting the value of what people compose, write and create is fundamental. If we were to lose sight of that, we would disadvantage the next generation of composers, writers and creators. And if they couldn't make all the work that's in them, what a terrible loss that would be."

DON MCGLASHAN

BLAM BLAM BLAM, FROM SCRATCH,
THE FRONT LAWN, THE MUTTON BIRDS

Artist, Songwriter & Screen Composer

MUSIC MATTERS

IT INSPIRES US

IT TELLS OUR STORIES

IT ENTERTAINS AND UPLIFTS US

IT SUPPORTS AND UNITES US

IT IS THE SOUNDTRACK TO OUR LIVES

Our musical tradition is rich and deep. From The Chills to Split Enz… Moana Maniapoto to Shona Laing… Lorde to Six60… Te Vaka to Shapeshifter… Scribe to Rei… King Kapisi to JessB… John Rowles to Daphne Walker… Alien Weaponry to Aldous Harding… music is a defining element of our culture that tells our many stories in our many voices. Music contributes to our physical, mental and social wellbeing. As New Zealanders we are lucky to have a rich history of musical taonga that stretches back hundreds of years, combining with and existing alongside a vibrant contemporary music scene that encompasses tangata whenua, Pākehā, and the rich diversity of our society.

The authors of this document are united in their vision to protect and support New Zealand music, and achieve a thriving and sustainable music industry for the benefit of all New Zealanders.

A key pillar of this is a robust framework for copyright law. This document forms a fundamental part of our submission to MBIE's review of the Copyright Act 1994. It explains who we are and what we do, and how our contribution to Aotearoa New Zealand is enabled and sustained by copyright law.

In preparing this document we have consulted within the music industry - with artists, songwriters and composers, record companies and digital aggregators, music publishers, music managers and many others, for their views on the state of the industry, the opportunities and challenges, and the importance of copyright to what they do. We cannot claim to speak for all of them, but their views have helped to shape this document.

Embracing a digital environment

In a few short years, the way we listen to music has changed beyond recognition. In 2012, most of us bought our music on CDs. Today, streaming services such as Spotify and Apple Music have become the preferred way to enjoy music. New Zealand consumers can now enjoy music in more ways than ever before, in different formats and at affordable prices.

As a result of embracing the digital transformation, the music industry has enjoyed four consecutive years of recorded music revenue growth since 2014, after 14 years of decline due to online piracy and technology disruption. As an industry we are continuing to invest, innovate and celebrate the new opportunities offered by the internet and the myriad of new ways to reach our audience.

The music industry contributed over half a billion dollars to New Zealand's GDP in 2017 and supported 2,500 full time equivalent jobs for Kiwis. New Zealand artists and their music contribute to our economy and our culture in ways that are both tangible and priceless. We remain committed to investing in New Zealand music creators, just as they continue to invest in and benefit us.

As well as preserving and celebrating our sense of identity through music, we want to see our artists succeed on the world stage. With the rise of streaming services, the market for music has become truly global and the tyranny of distance is no longer a barrier to global success.

The New Zealand music industry is focussing on export now more than ever before, with good reason. Digital music is a weightless export. There is no need to ship product around the world and enjoyment of music is a low emission activity that does not consume scarce resources.

In the past New Zealand has been a "net importer" of music but there is no reason why this has to remain the case in the future. Our local industry has the drive and ambition to become a net exporter of music, and government supports this goal. We welcome the Ministry for Culture and Heritage initiative to form a working group of government agencies and industry experts to look into enhancing the international potential of the New Zealand music industry.

We are aligned with the wider creative sector in our ambition to grow. We are proud members of WeCreate, the alliance of the creative sector, in seeking a concerted industry-led partnership with government to grow our sector's contribution to Aotearoa New Zealand's wellbeing.

New challenges

Despite the good news about digital transformation, increasing revenues and export opportunity, our creative ecosystem is facing new challenges.

With the rise of streaming services, the market for music has become truly global and the tyranny of distance is no longer a barrier to global success.

"I want our anthems to go abroad… in and of themselves as our ambassadors for New Zealand and our creativity… But what is it going to take for us to be a net exporter of music?

JACINDA ARDERN
Going Global Music Summit 2018

The streaming economy is fragile, with each licensed stream delivering only a fraction of a cent to creators and investors. Now more than ever before, imbalance in the digital marketplace has a profound effect.

There are serious concerns about the accountability of global platforms that monetise music uploaded by their users. The legal framework of safe harbours in copyright law has created a culture of appropriation and a digital Wild West where paying for music is optional. Even when platforms are licensed to make music available, it hasn't been a fair negotiation due to the safe harbours which give user upload platforms an unfair advantage.

In addition, and despite the proliferation of legal choices for consumers, 24% of New Zealanders are still using pirate sites to obtain or listen to music. We estimate that the losses to the New Zealand music industry from piracy in 2018 were around $50 million. These forgone revenues could be directed to investment in new artists and music, but instead are being channelled to offshore pirate sites.

In the face of these challenges, work is needed to ensure that our music ecosystem remains sustainable.

Priorities for copyright review

New Zealanders all benefit from a thriving music ecosystem: culturally, socially and economically. A robust copyright framework is an essential element of that ecosystem both to ensure sustainable growth, and to allow the freedom to explore, experiment and take the creative risks that allow us to lead, express our uniqueness, and drive our artform forwards.

The Copyright Act provides a sound framework, however in light of the rapid digital transformation of the music industry and the related challenges, there are some key issues that must be addressed to ensure that it continues to foster sustainable growth into the future. This is essential both to preserve New Zealand's national and cultural identity, and to develop our position as exporters on the world stage.

Our detailed priorities for the copyright review are set out in the summary that follows. At a principle level we would like to see a copyright framework that:

- Recognises the **value of music**, for its contribution to our social and cultural wellbeing as well as to the economy and employment
- Enables creators and investors to **obtain fair value** for their work through **being able to choose** who can use their music and on what terms
- Provides effective tools to enable creators and investors to **safeguard music against unauthorised uses**
- Is clear and **provides for legal certainty**, respects market solutions and recognises that licensing fuels innovation, not exceptions
- **Harmonises New Zealand's laws** in line with those of our trading partners, to maximise export success
- Reflects Aotearoa New Zealand's **rich cultural diversity** and contributes to ensuring that all our voices, including those of Tangata Whenua and our diverse communities, can be valued and heard.

The legal framework of safe harbours has created a culture of appropriation and a digital Wild West where paying for music is optional.

Taonga works need a separate regime

While copyright is an important structure that supports and protects the works being created in our country and has done since our first copyright law in 1842, it is also a Western framework that has been imposed on a musical tradition that existed in Aotearoa long before Pākehā arrived here.

Our tangata whenua are the kaitiaki of music that our law was not conceived or equipped to adequately represent.

We support the Waitangi Tribunal's recommendation that a new regime be established to protect taonga works and Mātauranga Māori on Māori terms. We believe that this is an incredible opportunity for Māori to lead the world in the creation of a mechanism that honours and protects their traditional indigenous creations.

Although we have included the perspectives of some of our Māori music creators in this document, we do not in any way presume to speak for Māori on the larger, parallel issue of protecting taonga and Mātauranga Māori creations. We understand that any examination of this will be conducted separately with Māori alongside the Copyright Act review, on a different timeframe to that submission process. In the meantime we pledge our support to the process and will engage with it in whatever capacity tangata whenua invite.

We look forward to working with government and other stakeholders throughout the review.

Recorded Music New Zealand, representing recording artists and record companies

APRA AMCOS, representing songwriters, composers and music publishers

Independent Music New Zealand (IMNZ), representing independent music rights holders

Music Managers Forum New Zealand (MMF NZ), representing music managers and self-managed artists

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.

Copyright Review and the Issues Paper – Music's Key Priorities

- New Zealanders all benefit from a thriving creative ecosystem – culturally, socially and economically. In the new world of music streaming services, there is a huge opportunity for New Zealand music to grow and to reach a global audience – enhancing both our sense of national identity and our growing international reputation.
- But this opportunity can only benefit our country if we can properly capture and manage the value of our creative endeavour. We need to maintain clear exclusive rights and liability principles that underpin and support our licensing of the digital services that deliver music to New Zealanders. We also need to protect the right of creators and investors to choose who can use their music and how.

Fair Market Conditions

- The current safe harbour provisions are hampering development of the digital market by giving an unfair advantage to platforms that rely on user uploaded content. This has resulted in an unfair value gap, as demonstrated by the graphic below.

- The safe harbours have also enabled a culture of appropriation and a digital Wild West, where paying for music is optional. It is time for platforms to be accountable. The safe harbour provisions should be reviewed to ensure that they are only available to passive intermediaries and not to platforms that actively engage with and monetise content **[Issues 59-62]**.

Safeguarding creativity

- Despite the proliferation of legal choices for consumers, 24% of New Zealanders are still using pirate sites to obtain or listen to music. We conservatively estimate that the losses to the music industry from piracy in 2018 were around $50 million. These forgone revenues could be directed to investment in new artists and music, but instead are being channelled to offshore pirate sites.
- We need effective tools to assist us in taking enforcement action – in particular a streamlined process to enable right holders to seek an order for ISPs to block access to pirate sites **[Issues 85-87]**
- We also need to improve the process of notice and take down so it means notice and stay down **[Issues 59-62]** and improve the prohibitions on circumventing technical measures that protect streaming services **[Issues 28-29]**
- Intermediaries such as search engines and advertisers are providing services that amplify piracy and make it easier and more profitable. We need a duty on intermediaries to take reasonable steps to ensure their services are not used in connection with piracy **[Issue 62, Issue 85]**
- The current law contains unreasonable procedural hurdles for right holders seeking to enforce their rights. Changes are needed with respect to proof of copyright ownership and the application of the law of authorisation to linked sites based overseas **[Issue 17]**

Legal certainty and evidence-based approach to exceptions

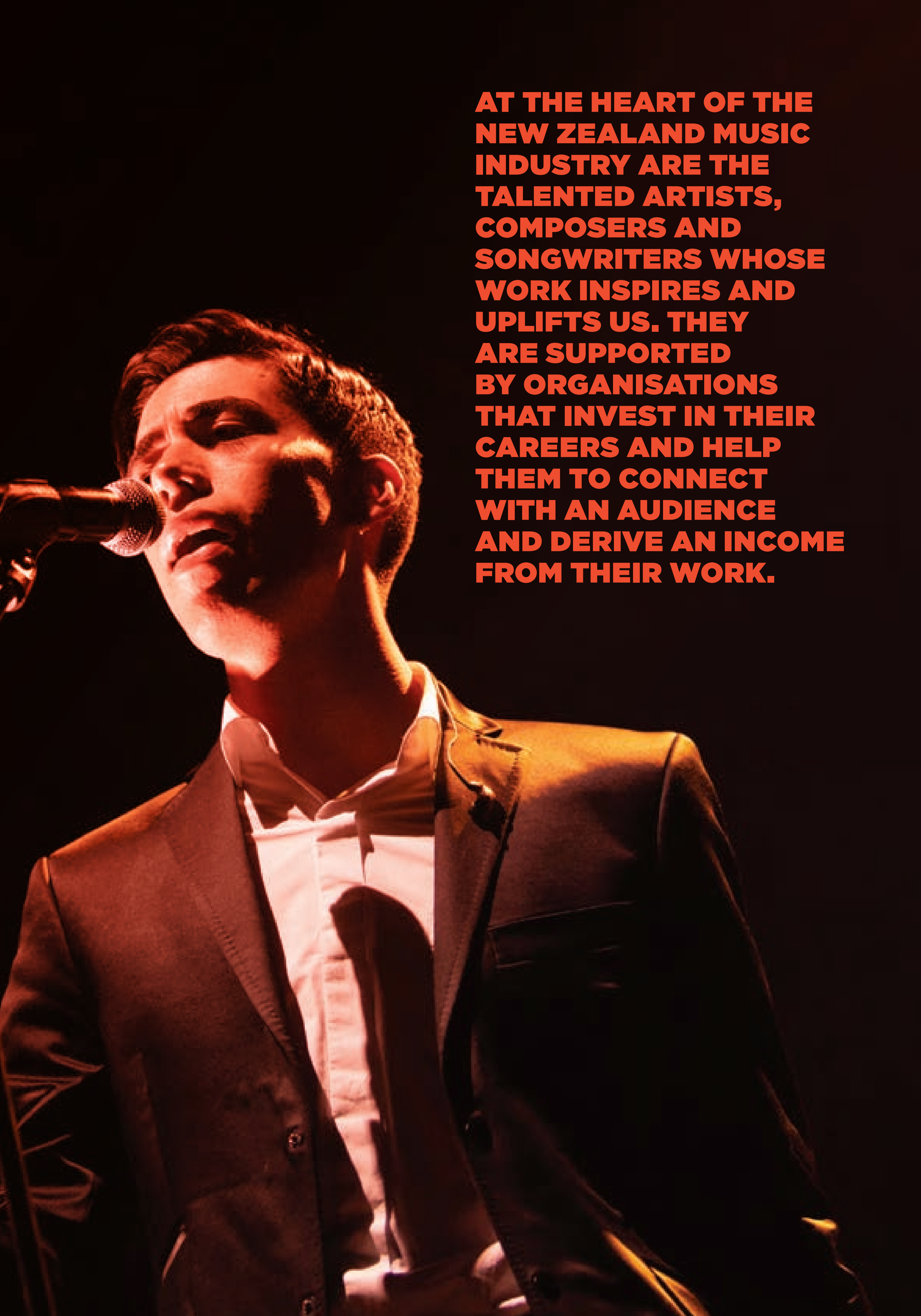
- Licensing fuels innovation, not exceptions, and the market should be the first port of call to enable uses of music.
- We support the existing approach to fair dealing and believe a more flexible fair use approach would undermine business certainty.
- Any discussion of exceptions should involve examining the evidence that the exception is needed either for a non-profit social benefit, or as a result of market failure.
- With regard to cloud computing and format shifting, there is no need for further exceptions and market solutions should be respected **[Issue 36, Issue 52].**
- We recognise the important work of non-profit cultural institutions such as archives and stand ready to discuss the issues they experience with cataloguing and preserving music **[Issues 41-45]**, and orphan works **[Issues 71-74].**

Copyright term equality

- It's time to stop penalising New Zealand artists, songwriters, composers, record companies and music publishers and harmonise term of copyright protection to 70 years, in line with other OECD countries.

2.

INTRODUCING THE NEW ZEALAND MUSIC INDUSTRY



AT THE HEART OF THE NEW ZEALAND MUSIC INDUSTRY ARE THE TALENTED ARTISTS, COMPOSERS AND SONGWRITERS WHOSE WORK INSPIRES AND UPLIFTS US. THEY ARE SUPPORTED BY ORGANISATIONS THAT INVEST IN THEIR CAREERS AND HELP THEM TO CONNECT WITH AN AUDIENCE AND DERIVE AN INCOME FROM THEIR WORK.

Copyright in the Music Industry

The "Music Rights Map" on the following page shows how copyright works in practice in the music industry.

Recording artists, composers and songwriters are the creative talent that is the lifeblood of the industry. The other organisations on the Music Rights Map are dedicated to nurturing and investing in that creative talent, partnering with creators to distribute music to the widest possible audience, while ensuring that creators and investors get paid for their work. All of this is enabled by copyright law.

The Music Rights Map is split into two halves to demonstrate the two separate sets of rights under copyright law, attaching to:

- The song, composition and its lyrics, called "musical works". Under the Copyright Act, songwriters and composers own copyright in the musical works they produce.
- The recorded performances of the songs, called "sound recordings". Under the Copyright Act, the owner of copyright in a sound recording is the person who made the arrangements necessary for the recording. This could be a record company or individual recording artist, if the artist arranges and finances the recording themselves.

Musical works are created and owned by Songwriters or Composers. To increase the reach of their songs, **songwriters and composers** can sign deals with **Music Publishers** which actively promote the work of their writers (e.g. incorporating songs into advertisements, television/film – called "synchronising" - or selling sheet music) in return for a share of the ownership of their songs for a set period of time. Examples of music publishers are Native Tongue and Sony/ATV. For more on Music Publishers see Section 6.

In New Zealand songwriters, composers and music publishers can assign their performing and reproduction rights to collective management organisation ("CMO") **APRA AMCOS**. APRA AMCOS then licenses those works and collects royalties on behalf of songwriters and composers when the work is reproduced or performed live, or a recording of it is played in public, reproduced, broadcast or communicated in New Zealand or overseas. For more on APRA AMCOS see Section 9.

When an artist performs their songs live they receive performance fees and/or income from sums paid for admission when performing at concerts, festivals or events. Artists will sometimes interact with, or engage the services of concert promoters, venue owners, booking and ticketing agencies, tour management and road crew. For more on live performance and touring see Section 12.

Sound Recordings are created when a performance of a musical work is recorded. Copyright in a sound recording is owned by the entity who made the arrangements for the recording, which may be the artist or a **Record Company**. If an artist has signed a recording contract with a record company, typically the record company pays the cost of making the recording, and promoting marketing and distributing the recording. Independent and self-released artists will often have relationships with independent **physical and digital distributors**. In return, the record company (and/or distributor) will pay the recording artist a portion of the income from the sale/consumption of the recording when it is streamed on a service like Spotify, downloaded from a service like iTunes or physically purchased as a CD or vinyl. Examples of record companies are Universal Music New Zealand and Flying Nun Records, an example of a physical distributor is Rhythmethod and digital distributor/aggregator is DRM NZ. For more on the recorded music sector see Section 5.

In New Zealand record companies and recording artists can assign their performing rights to CMO Recorded Music New Zealand which can license those recordings and collect royalties on their behalf when the recording is publicly performed, broadcast or communicated in New Zealand (and in some cases overseas). For more on Recorded Music New Zealand see Section 8.

In addition to the entities that own or licence copyright and appear on the Music Rights Map, there are other key players in the music industry. Key to the creation of sound recordings are **Producers**, who have creative, practical and technical input, and **Engineers**, who help to produce the recording technically.

For more on producers, engineers and the recording process see Section 5. **Music managers** act as advisers to artists, assisting them with business arrangements. For more on music managers see Section 10.

Other important music industry organisations and roles that assist the career of a musician in New Zealand are:

Independent Music New Zealand (IMNZ) is a non-profit trade association for independent labels and distributors and their artists providing collective benefits and exclusive opportunities to independent music rights holders in NZ and advocating on their behalf. IMNZ produces the annual Taite Music Prize, the Going Global event, independent music charts as well as various showcases and workshops across the year. The organisation is a member of the World Wide Independent Music Network (WIN). IMNZ and its members number 181 independent artists, labels and distributors in 2019.

The **Music Managers Forum NZ** (MMF NZ) is a non-profit trade association representing music managers and self-managed artists supporting their work through education, networking and advocacy. The MMF hosts regular series of workshops and upskilling sessions nationwide through the year, and produces the annual Music Managers Awards and New Zealand Music Month Summit event. The MMF New Zealand is part of the International Music Managers' Forum (IMMF) and its local members number 264 managers in 2019. For more on the role of the music manager, see Section 10.

The **New Zealand Music Commission Te Reo Reka O Aotearoa** is a government funded organisation that promotes music from New Zealand and supports the growth of New Zealand music businesses. The Music Commission is behind the nationwide NZ Music Month promotion, delivers contemporary music programmes in schools, including the Musicians Mentoring in Schools Programme; provides music upskilling tools, resources and the Industry Internship programme nationwide; and runs the international market development & trade show programme Outward Sound; and represents New Zealand music at offshore trade events. The Music Commission reports to the Minister for Arts, Culture and Heritage via the Ministry for Culture and Heritage.

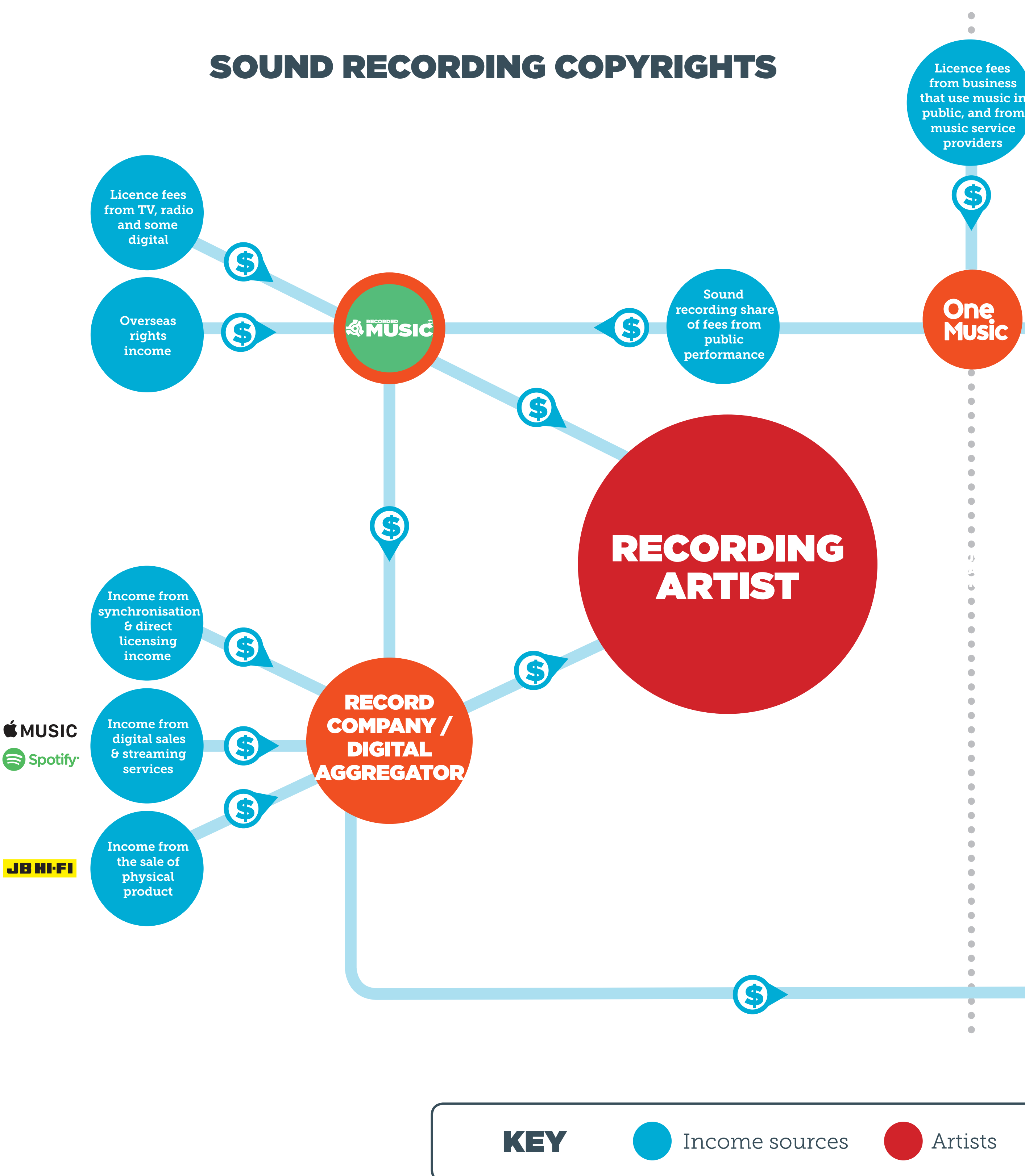
NZ On Air is an independent New Zealand broadcast funding agency. It is an autonomous Crown entity separate from central Government and governed by a Board of six appointed by the Minister of Broadcasting, Communications and Digital Media. NZ On Air is responsible for the funding of public-good broadcasting content across television, radio and new media platforms. In the music sector, NZ On Air offers contestable funding and co-invests with artists and their music companies in the creation of new sound recordings: single songs and multi-song projects and music videos. It also assists in music promotion to help New Zealand songs connect with the widest audience possible.

NZ On Air has funded music since 1991, initially focusing on maintaining a reasonable percentage of local music on mainstream radio stations, however in 2019 it places equal emphasis on providing local songs to the major streaming platforms for worldwide audiences. NZ On Air also sponsors awards and special music events to celebrate success in the music industry and provides operational funding to the Student Radio Network.

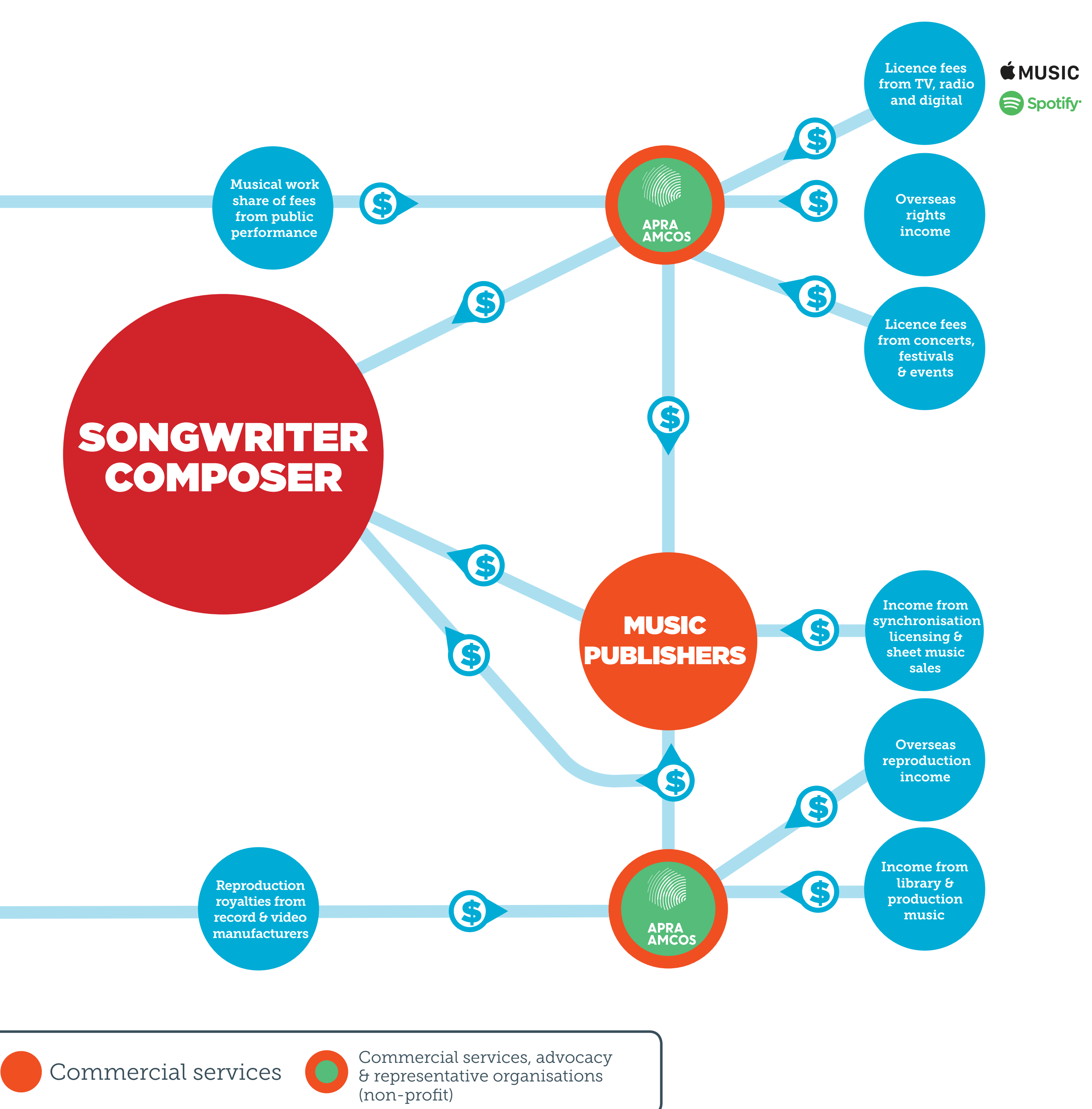
Te Māngai Pāho is the New Zealand Crown entity responsible for the promotion of the Māori language and Māori culture by providing funding for Māori-language programming on radio, and television. Te Māngai Pāho also provides contestable funding for the production of Māori Music and funds the creation of sound recordings and music videos that promote Māori language and culture. Te Māngai Pāho also provides funding for 21 iwi radio stations throughout New Zealand as well as funding for Māori Television and sister channel Te Reo.

Creative New Zealand is the national arts development agency of the New Zealand government, investing in artists and arts organisations, offering capability building programmes and developing markets and audiences for New Zealand arts domestically and internationally. Funding is available for artists, community groups and arts organisations including music, however they do not fund the creation of content for television, radio or film and/or projects and activities that are able to be funded by other government agencies or local authorities.

MUSIC RIGHTS MAP



MUSICAL WORK COPYRIGHTS



3.

HOMEGROWN: MUSIC'S CONTRIBUTION TO AOTEAROA

MUSIC IS THE SOUNDTRACK TO OUR LIVES. IT IS A DEFINING ELEMENT OF OUR CULTURE AND NATIONAL IDENTITY, AND CONTRIBUTES TO OUR SOCIAL AND CULTURAL WELLBEING. THE MUSIC INDUSTRY IS A SUBSTANTIAL CONTRIBUTOR TO GDP AND EMPLOYMENT, A SOURCE OF EXPORT GROWTH AND A DRIVER OF TECH INNOVATION IN NEW ZEALAND.

ICONIC MOMENTS IN NEW ZEALAND'S MUSIC HISTORY

1. 'BLUE SMOKE' (1949)

Ruru Karaitiana's hit single "Blue Smoke", sung by Pixie Williams, marks the start of New Zealand's indigenous record industry. It was the first song written by a New Zealander to be recorded and manufactured here, and released on a local label.

2. DINAH LEE (1964)

Kiwi "Queen of the mods" Dinah Lee's infectious ska single "Do the Blue Beat" was a huge hit on both sides of the Tasman. Backed by Max Merritt & the Meteors, Lee's song became her calling card in a career that has lasted over 50 years in Australia.

3. SHONA LAING (1973)

Spotted on TV talent show "New Faces", Shona Laing was a teenager when "1905" became a hit single in 1973. She went on to win respect internationally and worked with Manfred Mann's Earth Band. Her 1987 single "(Glad I'm) Not a Kennedy" revived her career.

4. SPLIT ENZ (1980)

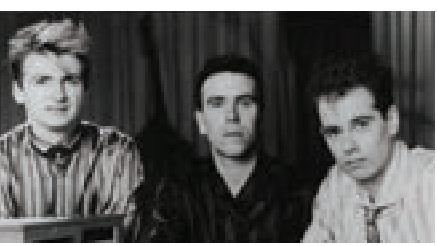
Top ambassadors for New Zealand pop music in the Eighties, Split Enz began in 1972 mixing progressive rock with psychedelic sounds. From 1980, with "I Got You", the band was creating radio-friendly pop hits, written by Tim and Neil Finn, that still resonate today.

5. THE CLEAN (1981)

The post-punk, DIY recordings of the Clean's "Tally Ho" and "Boodle Boodle Boodle" EPs introduced the much-vaunted Dunedin Sound through the fledgling Flying Nun label. The band was an inspiration to a generation of musicians not just from Dunedin, but internationally.

6. 'POI E' (1984)

This No.1 hit combines kapa haka with breakbeats. Written by Dalvanius Maui Prime and Ngoi Pēwhairangi, "Poi E" encouraged young Māori to take pride in te reo. A 2016 documentary, "Poi E: the Story of Our Song", charts how it became a much-loved anthem despite the odds.



7. CROWDED HOUSE (1987)

Formed by Neil Finn in 1985 from the ashes of Split Enz, Crowded House won an international audience with Finn's beautifully crafted songs. In 1987 the wistful "Don't Dream It's Over" went to No.2 in the US while 1991's 'Woodface' album broke through in Britain and Europe.

8. UPPER HUTT POSSE (1988)

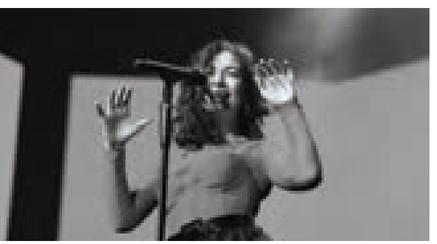
The first local group to record a rap song, Upper Hutt Posse's debut single "E tu" (1988) was a bilingual, political track with a haka-like chorus, continuing the tradition of Māori musicians converting US music into something indigenous. It was also a precursor of 30 years of music challenging mainstream society.

9. BIC RUNGA (1996)

The 1993 Smokefreerockquest introduced a talented Christchurch teenager whose delicate songs – including 1996's "Drive" and 1997's "Sway" – seduced the world, including the US where 'Sway' was used on two soundtracks. Runga's success opened the door for many female artists to enter the music industry.

10. 'HOW BIZARRE' (1996)

"How Bizarre" was the first Kiwi song to reach No. 1 in the US and was a worldwide hit. Pauly Fuemana and Alan Jansson – aka the OMC (Otara Millionaires Club) – used an infectious mix of singalong rap, mariachi trumpet and 'Māori strum'.



11. LORDE (2013)

Lorde – Takapuna teenager Ella Yelich-O'Connor – was still at high school when "Royals" rocketed her to global stardom – both as a viral hit and as an international chart-topper. Lorde was the youngest solo artist to reach No. 1 on the Billboard Hot 100 since 1987.

12. SIX60 (2019)

Dunedin five-piece Six60 has converted the bubbling popularity of reggae, dubstep and drum'n'bass into a soul and rock informed sound to attain gargantuan levels of commercial success here and in Europe. In 2019 they sold out Auckland's Western Springs Stadium – an unprecedented achievement.

Thanks to Chris Bourke and AudioCulture for compiling this. AUDIOCULTURE

FIGURE 1:
GDP IMPACT OF NZ MUSIC (2017)

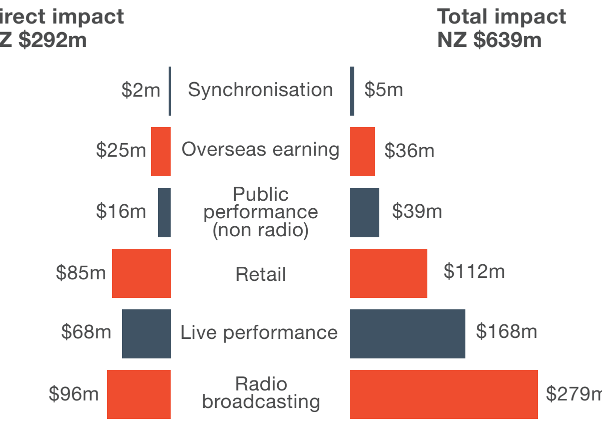
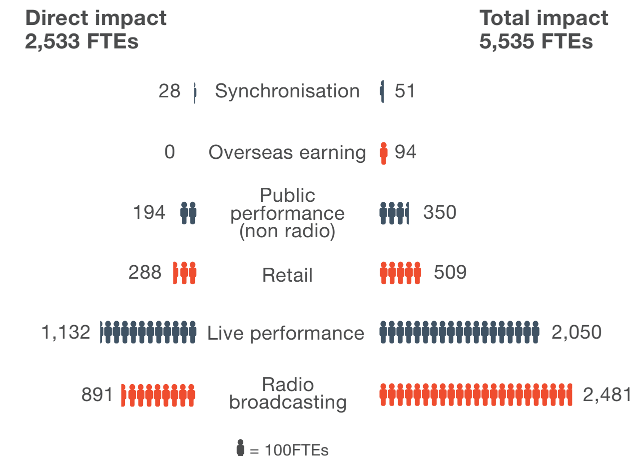


FIGURE 2:
EMPLOYMENT IMPACT OF NZ MUSIC (FTES)



Music is a Substantial Contributor to GDP and Employment

In 2017 the New Zealand music industry contributed:

- $292 million to New Zealand's GDP directly
- $639 million to GDP via indirect effects (this includes upstream impacts such as business interactions between the music sector and other industries), induced impacts when wages and salaries paid out by the music industry are spent on goods and services, as well as direct impacts
- the equivalent of 2533 full-time jobs directly
- the equivalent of 5535 full-time jobs indirectly.

This assessment is based on the PWC report commissioned each year by Recorded Music New Zealand, APRA AMCOS and the New Zealand Music Commission[2].

The PWC report focuses on GDP impact, using methods commonly used by Stats NZ and others when reporting on the economic impact of New Zealand and other individual industries.

However it is a conservative measure that doesn't take into account the full economic value of music across New Zealand's economy and society.

The assessment excludes certain important areas such as musical instrument manufacture and retailing, music teaching and other related industries such as music recording and performance software.

The PWC assessment also does not attempt to value or include the non-economic, or broader cultural and social impact of the industry on the enjoyment and utility of music for Kiwis.

Although this report focuses on estimating the contribution of the music industry in New Zealand to employment and GDP, we emphasise that the industry has a broader cultural and social role to play. Music contributes to New Zealand in a number of ways that are not measured in GDP. The enjoyment, or utility, that New Zealanders derive from consuming and producing music is likely to be considerable but is not easily quantified.

[2] Economic contribution of the music industry in New Zealand'.

A Source of Export Growth

New Zealand music has a well-established export market. Over the period from 2012 to 2016, New Zealand music produced an estimated average of $25 million in export earnings each year[3].

NZ musicians generating overseas earnings of

2014 - 2016 avg

This figure looks set to grow as in the digital environment, music is a weightless export. There is no need to ship product around the world, and the production and enjoyment of music does not consume any scarce resources. With the advent of global digital music platforms and streaming in particular, there is no barrier to New Zealand music reaching overseas audiences.

In addition, New Zealand already has a stellar international reputation for its creators – from Lorde to Flight of the Conchords and Gin Wigmore, to Weta Workshop's world-class post production.

In the past New Zealand has been a 'net importer' of music, ie New Zealanders consume more overseas music than international audiences consume of New Zealand music; but there is no reason why this has to remain the case in the future. The local industry has the drive and ambition to make New Zealand a net exporter of music.

It's essential that our regulatory framework, including our copyright laws, position New Zealand music for export growth.

> *"The market for music is now truly global; hits and successful, creative artists can now originate from anywhere around the world. Historically, the creative drivers were out of the UK and US, with acts such as The Beatles, Rolling Stones, Led Zeppelin, Fleetwood Mac and Elvis acting as beacons to other artists who took their cues from those artists and markets. Now that music can easily be marketed globally, and audiences engage with streaming services from almost anywhere, there is a more level playing field. People are less derivative in their approach and New Zealand's artists have as much currency as anyone else in the world and can inspire the development of the next generation of artists right here. They can be as successful as their peers from the larger markets.*
>
> **SCOTT MACLACHLAN**
> Senior Vice President, A&R,
> Warner Music Australasia

I hear New Zealand described as a net importer of music and think, "let's have some more ambition for our artists!" Universal Music's goal is to increase our strike rate of global success with our domestic artists and become a net exporter of music year in and year out, as we were at the height of Lorde's success with "Pure Heroine".

ADAM HOLT
UNIVERSAL MUSIC NEW ZEALAND
Chairman

[3] 'Overseas Earnings for NZ Musicians 2012-2016', PWC 2017 https://www.recordedmusic.co.nz/wp-content/uploads/2019/03/2012-2016-EXPORT-report-FINAL.pdf

Driving a Wider Digital Economy

Music also drives a wider digital economy in ways that are not captured in a GDP analysis.

For example music is a key driver of audiences on digital platforms:

- Of the 10 most-watched videos on YouTube since its launch in 2005, nine are music videos. The top music video 'Despacito' currently holds the YouTube record for most views in the platform's history (more than six billion views in March 2019)[4]. Of the top 30 most watched videos on YouTube, only two are not music videos.
- Four out of the 10 most followed celebrities on Instagram are singers or recording artists[5]
- Six out of the top 10 most followed Twitter accounts are recording artists[6].

Music and Technological Innovation

For a long time now, music companies have partnered with technology companies to innovate and bring music to consumers in new and increasingly immersive ways.

New Zealanders are already embracing the personalised experience offered by music streaming, which uses algorithms to deliver playlists, music and recommendations for new music.

> *There are now several global players in music tech on or around K Road. The bigger picture is that if we can help more students who are studying computer science or engineering think that there's a career in music technology locally, then there'll be more people coming out of university with the skills we need.*
>
> **MORGAN DONOGHUE**
> Managing Director, inMusic New Zealand

While it has not become mainstream in New Zealand, voice recognition is growing as the new way for consumers to conveniently find the music they want. 'Smart speakers' like Amazon's Echo, Google Home and Apple Homepod are increasingly popular in the US, and enable consumers to use voice activation to play specific tracks or to find music of the genre or type they want to listen to. Nielsen reported in 2018 that nearly a quarter of US households now have smart speaker devices,[7] and numbers are growing.

Amazon Echo devices can be purchased in New Zealand and run with a set of New Zealand-focussed apps – including Spotify, Sky TV, Radio New Zealand (RNZ) and Stuff.

The music industry is also partnering with technology companies to license music into interactive games, and develop virtual reality (VR) and augmented reality (AR) music experiences. An example is the virtual reality 360 degree video created for Villette's track 'Money' which allows viewers to change the direction of the camera and 'look around' within the video[8].

The industry is experimenting with artificial intelligence (AI) techniques: some musicians are choosing to use AI to assist in composition and Warner Music has signed an output deal with tech start-up Endel which uses AI[10] and algorithms to produce music.

There is also a growing New Zealand industry based on music tech.

In early 2019 global music company inMusic launched a new software development office in Auckland for some of its global DJ product lines[11] – Rane, Denon DJ, Akai and NuMark. The company has committed $10 million to investment in New Zealand and employs 22 people.

inMusic New Zealand is joining other Auckland-based music tech companies: Melodics which makes a popular teaching app for MIDI

[4] https://en.wikipedia.org/wiki/List_of_most-viewed_YouTube_videos, visited on 7 March 2019.
[5] https://www.businessinsider.com/instagram-top-50-people/?r=AU&IR=T/#11-justin-bieber-40, visited on 10 March 2019
[6] https://en.wikipedia.org/wiki/List_of_most-followed_Twitter_accounts, visited on 10 March 2019
[7] https://www.nielsen.com/us/en/insights/news/2018/smart-speaking-my-language-despite-their-vast-capabilities-smart-speakers-all-about-the-music.html
[8] See https://www.youtube.com/watch?v=CCTI_NwM6ig, visited on 29th March 2019.
[9] https://futurism.com/the-worlds-first-album-composed-and-produced-by-an-ai-has-been-unveiled
[10] https://www.theverge.com/2019/3/27/18283084/warner-music-algorithm-signed-ambient-music-endel
[11] http://www.scoop.co.nz/stories/BU1903/S00097/music-magic-for-k-road.htm

instruments, Algonaut which has created an AI-driven drum sampler and world-leading music software company Serato. Founded in 1999 and headquartered in Auckland, Serato audio software is used by millions of producers, engineers and musicians across 190 countries, and is the pre-eminent interface used by DJs worldwide.

Music's Contribution to New Zealanders' Wellbeing

Music is a valuable contributor to our physical, mental and social wellbeing and a powerful tool for positive change.

The following are just some examples of where music is making an impact on the lives of Kiwis.

MusicHelps was established in 2012 and has invested in 66 projects with 42 partners across the country, all using the power of music to help and heal New Zealanders in need.

To date, the charity has changed the lives of more than 60,000 people through their initiatives with at risk and vulnerable people, with disabled people and with people experiencing a range of health issues. Their work spans music therapy in hospices and hospitals, through to projects that use music to address the problems faced by youth from troubled backgrounds and are facing exclusion from employment, education and training, as well as initiatives that help develop and enhance the physical, cognitive and life experience of disabled people.

MusicHelps also assists those in the New Zealand music community who are experiencing illness, distress and hardship and have nowhere else to turn.

MusicHelps provides caring, confidential and practical emergency assistance to Kiwi music people via their Benevolent Fund and operates a world-first professional wellbeing and counselling service specifically tailored to those making their way in music.

Since 2001, the New Zealand Music Commission has run the **Musicians Mentoring in Schools Programme**, connecting New Zealand's top musical artists with emerging young talent in schools from Kaitaia to Invercargill. The programme focuses on increasing NCEA achievement for students across all decile schools, including young Pasifika and Māori priority learners. More than 150 artists have shared their expertise in songwriting, instrumental and vocal technique, recording technology, and music industry insight – including artists such as Jon Toogood, Maisey Rika, Anonymouz, Louis Baker, Julia Deans and Troy Kingi.

He comes from this area and could relate to the students from a whānau perspective, and an understanding of the lifestyle, land and people ... Experiencing a wananga like this, working with someone whom they could relate to as whanau and who is an experienced and successful musician, gave them a sense of knowing that there can be a future in music, that it is a viable career and that it is something they should continue to practise in their lives.

DELIA HARRISON

TEACHER AT TOLAGA BAY AREA SCHOOL, SPEAKING OF MUSIC COMMISSION MENTOR TAINA KEELAN

Smokefreerockquest is New Zealand's only nationwide, live, original music, youth event. Now in its 31st year, the series of more than 40 events reaches audience numbers in excess of 10,000 every year. Founded in 1989 by music teachers Glenn Common and Pete Rainey, Smokefreerockquest is a New Zealand institution and aims to motivate young musicians to prove their ability and realise the heights they can reach in their music careers, and to encourage their peers to support original New Zealand music. Rockquest alumni include Kimbra, Alien Weaponry, Broods, Bic Runga, Anika Moa, OpShop, Aaradhna, The Black Seeds and many more well-known Kiwi artists.

Play It Strange was established in 2003 and provides young New Zealanders with pathways of creativity through songwriting, enabling songs to be recorded, performed and celebrated. It does so through songwriting competitions from which those judged as finalists get to record their songs in professional studios to be released on a digital album. It strives to provide secondary students with a platform they can use to pursue their musical adventures. Through concerts, workshops and competitions, all with the intentions to provide the right environment from which students can gain confidence, self-belief and an impetus for a career path they would like to follow.

"Songs written by young New Zealanders forge a communal strand, a national voice, a summation of who they are and with that, it's clear that they are telling us who we are. Listening to the hundreds of songs that we receive at Play It Strange is like opening a window into the hearts and minds of our youth. And there is much to learn.

MIKE CHUNN

CEO Play it Strange

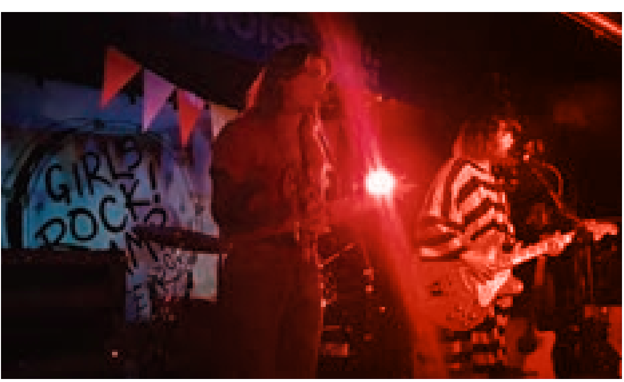
The Crescendo Trust of Aotearoa is an organisation offering mentoring programmes for at-risk young people, such as those referred from Youth Justice and Custody, to directly engage and connect with people working in the creative industries. Young participants benefit from exposure to real-world industry experience and training, including employment opportunities and access to further education pathways. The trust provides opportunities for young people to creatively express themselves, and raise self-awareness and confidence using music and other creative fields.

"For me, growing up, I had many pathways available to me. Some good, some not so good. As a young teen in a successful band I didn't always make good choices. I was fortunate enough to have certain adult role models in my life who stood out and supported me so that now when I reflect back to those years, I can see those choices and hope to inspire positive change in our young people. Music is a powerful medium in which we creatively express ourselves as individuals. It is a universal language that binds us all. We are privileged to be part of a community that recognises this and is available to create pathways for our young people to expand confidently into employment, further training and education.

MARCUS POWELL

CEO Crescendo Trust of Aotearoa and Musician, Blindspott, City of Souls

Girls Rock Camp Aotearoa was established in 2017 and is based on the American movement of the same name. GRC aims to assist and guide the advancement and empowerment of young women (including transgender, intersexual and non-binary youth) in the music community of Aotearoa through a music-based school holiday programme providing opportunities to write and perform songs, learn instruments and interact with musical peers, inspiring self-esteem and mutual support. To date it has held three events, attended by approximately 50 participants aged 11-17 years old from all around New Zealand.



In 2018 **OMAC (Ōtara Music and Arts Centre)** celebrated 30 years of making, developing and inspiring music in South Auckland. OMAC fosters a creative environment that allows aspiring artists to focus on their musical dreams. It is home to Sistema Aotearoa, a youth development programme and the annual Stand Up Stand Out (SUSO) music and dance competition for Auckland secondary schools. OMAC is one of only two local government-funded community facilities in New Zealand to boast an industry-standard professional recording studio. OMAC is an Auckland Council arts facility supported by the Ōtara-Papatoetoe Local Board.

The facilities at OMAC include the Sound Lab Suite which allows a maximum of 30 students to book a computer suite for daytime or weekend sessions; the Village Recording Studio which is open to community groups, choirs, school groups, bands and individual musicians; as well as OMAC's experienced music tutors who offer group and one-on-one lessons (any genre of music) in guitar, bass, drums, singing, and piano/keyboard.

Massey University's Te Rewa O Puanga - the School of Music and Creative Media Production has recently been established to respond to New Zealand's growth and internationally recognised reputation for innovation and creativity in music and media production. The school offers the only Bachelor of Commercial Music in the country and offers three majors in music practice, music technology and music industry. The programme is designed for those who wish to study popular-music-based genres, digital-based music technologies and music industry practice. The degree is taught by experienced academics, technical staff and visiting artists, producers and entrepreneurs and focuses on connecting students with emerging technologies and creative practice relevant to social, economic and cultural enterprise.

Massey has built a world-class music facility in Wellington and offers multiple recording studios, laboratories and rehearsal spaces. Together with Recorded Music New Zealand, the Artisan Awards (as part of the New Zealand Music Awards) were held at Massey's School of Music in 2018 where awards were presented for the best Producer, Engineer, Music Video and Album Artwork and the inaugural award for Music Teacher of the Year (see page 30).

Elizabeth Sneyd, the first **Music Teacher of the Year/Kaiārahi Puoro o te Tau**, has provided free music lessons to more than 200 disadvantaged children in East Porirua since setting up the Virtuoso Strings Charitable Trust in 2013. The trust's youth orchestra, which she formed with her husband, piano teacher Craig Utting, has also become one of the best in New Zealand.

Sneyd's work ensures music lessons and instruments of all types are available to everyone in the community. She inspires kids to give music a go and to work hard to succeed.

Last November Sneyd was announced the first winner of the Tui Music Teacher of the Year/ Kaiārahi Puoro o te Tau at the Vodafone New Zealand Music Awards. Sneyd was one of three finalists chosen from 220 submissions across the country.

The award was established by Recorded Music New Zealand in conjunction with the New Zealand Music Commission. It recognises the exceptional influence music teachers have on our children, not only in establishing the foundations of careers in music, but in general ensuring a positive and long lasting impact on their lives.

The **Raukatauri Music Therapy Centre** was established in March 2004 to provide music therapy services to individuals with special needs and has just celebrated its 15th birthday. Founded by New Zealand singer Hinewehi Mohi, along with other local music industry figures, the Centre is named for Hinewehi's daughter Hineraukatauri who has severe cerebral palsy. The name Raukatauri comes from the legend of Hine Raukatauri, the goddess of flutes, who is the personification of music. In Māori legend, Hine Raukatauri is the case-moth who lives in her elongated cocoon that hangs from many native trees. Māori make a unique flute, the pūtōrino, in the shape of the case-moth's home.

When Hinewehi came to name her daughter, Hineraukatauri's severe cerebral palsy reminded her of the goddess trapped in her case, since she is trapped in her body and incapable of much independent movement. Music has been the means of communication and connection between mother and daughter. Hineraukatauri, and many others, have found a way to express themselves through music therapy at the Centre named after her and the ancestress Raukatauri.

Music therapy is still a relatively young practice in New Zealand, but has increased in recent years and is now used in hospitals, hospices, schools, rest homes, mental health treatment facilities and prisons. The benefits and effectiveness of music therapy are thoroughly supported by research, both in New Zealand and internationally. The centre sees almost 3000 people each week and offers quality, accessible music therapy services to all people, whatever their needs. They also deliver outreach programmes in partnership with over 15 schools and organisations, allowing children and adults to receive music therapy directly in their classrooms, group homes and rehabilitation units.

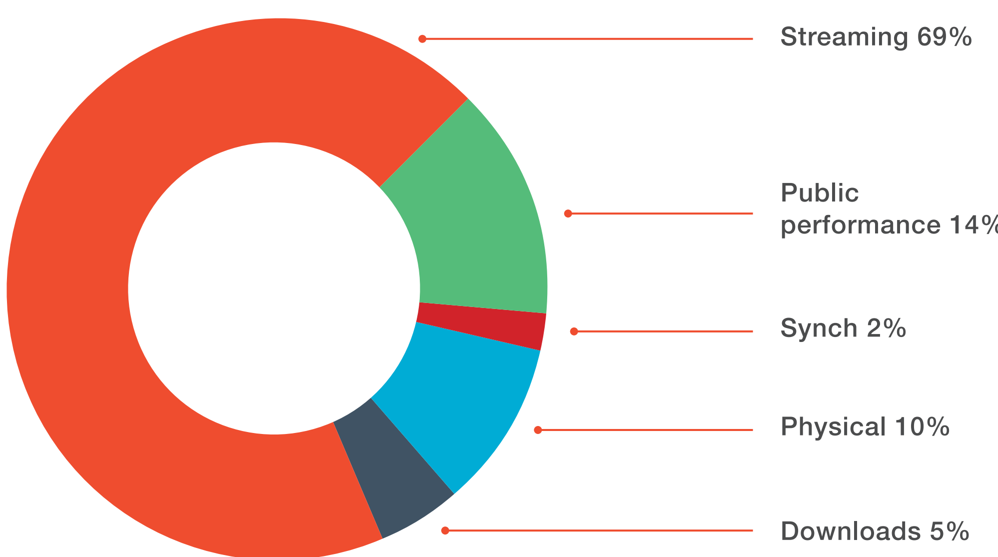
4. EMBRACING A DIGITAL ENVIRONMENT

WE'VE COME A LONG WAY IN THE LAST TWO DECADES SINCE THE INTERNET WAS IN ITS INFANCY, AND ESPECIALLY IN THE LAST DECADE SINCE THE COPYRIGHT ACT WAS REVIEWED.

Today, for many Kiwis, the internet is their main method of enjoying content, including music. On-demand streaming is the choice of New Zealanders, who have enthusiastically adopted services like Spotify and Apple Music. 61% of New Zealanders report using audio streaming in the past three months, and 63% report using video streaming to watch or listen to music. Many do so using a mobile device or tablet, and other mobile music devices.

From an industry perspective, music is truly a digital business. In 2018 revenues from digital sources represented almost 74% of overall recorded music revenues, well above the global average of 58%. From 2014 when streaming represented only 19% of revenues, it is now the dominant format.

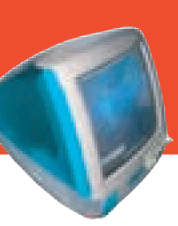
RECORDED MUSIC REVENUES IN 2018



THE PACE OF CHANGE HAS BEEN BREATH TAKING.

2000

TWO DECADES AGO



- Dial-up internet was standard, first broadband introduced 1999
- Recorded music industry revenue peaked at $125 million
- In 2001, 97% of recorded music revenues were from the sale of physical product
- Safe harbour privileges introduced into copyright law internationally (1998 US, 2001 EU)
- Music piracy services become popular overseas: Napster closed in 2001

2009

A DECADE AGO

- Broadband internet reached 63% of New Zealand homes
- Legal digital music services available – iTunes opened in NZ in 2006, YouTube in 2007
- Internet music piracy became prevalent: by 2011 there were nearly 800,000 New Zealanders using BitTorrent
- Recorded music industry revenue experienced sharp declines to two-thirds of their peak in 2000, and by 2014 the revenues were halved
- In 2009, 80% of recorded music revenues were from the sale of physical product
- First website blocking actions in 2007
- iPhones became available in New Zealand
- Government reviewed Copyright Act and introduced ISP safe harbours, and format shifting exception (2007-2012)

2019

TODAY

- Broadband standard in NZ homes – 94% broadband penetration
- Most Kiwis have mobile phones with internet access – smartphone penetration at least 80%
- In 2018, 10% of recorded music revenues were from the sale of physical product
- Streaming dominant method of enjoying music: Spotify launched in NZ in 2012
- Website blocking actions available in 31 countries, over 2600 URLs blocked globally

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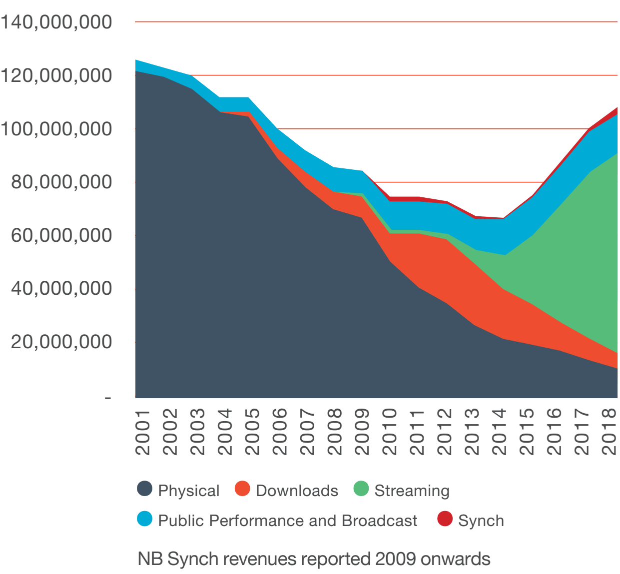
ORG

RECORDED MUSIC REVENUES IN NZ - 2001-2018



The future – a sustainable music industry in New Zealand

Recent growth in the industry has to be seen against the backdrop of what came before: recorded music industry revenues were in decline for 14 successive years up to 2014, due to online piracy, technology disruption and changing consumer preferences. During this time music companies downsized, cutting costs and shedding staff. This impacted the ability of music companies to invest in new artists and repertoire, while resources were diverted to transforming the business.

Since 2014, the New Zealand recorded music market has seen growth each year, driven mainly by growth in streaming revenues. Now that revenues are improving there is a renewed optimism and increased investment in new artists. It's an exciting time for the recorded music sector in New Zealand – the industry has been through an evolution and the future is bright.

However ongoing investment in songwriting, composing and artists' careers and bringing their music to the public depends on having a revenue base to work from, and commercial certainty about returns on investment. In the global market created by streaming, consistent regulation across New Zealand's trading partners is also a key factor.

We are looking to government to create the right conditions to support and foster sustainable growth into the future, both in preserving New Zealand's national identity for Kiwis, and cementing our position as exporters on the world stage. A robust copyright framework is one of the key pillars of this.

> *"It is an exciting time for New Zealand music, there's so much happening. A few years ago everyone was just trying to keep their heads above water and survive. Last year Sony Music New Zealand signed 11 new local artists, double the number we signed in 2013 and 2014"*
>
> **KIM BOSHIER**
>
> Managing Director,
> Sony Music Entertainment New Zealand

This country has the same population as Ireland and there is no reason we can't have the same level of output. It's nothing to do with proximity to New York or London. We need to have an infrastructure and a culture and a belief that it's possible. Which all takes vision and investment"

SIMON BANKS

UNIVERSAL MUSIC NEW ZEALAND

A&R

5.

THE RECORDED MUSIC SECTOR

THE RECORDING INDUSTRY HAS EVOLVED TO OFFER ARTISTS A DIVERSE RANGE OF CHOICES FOR BRINGING THEIR MUSIC TO LIFE AND CONNECTING FANS WITH THEIR WORK. FROM RECORD COMPANIES TO DIGITAL DISTRIBUTION TO SELF-MANAGEMENT, OUR ARTISTS HAVE MORE OPTIONS THAN EVER BEFORE TO GROW AND DIVERSIFY THEIR FOLLOWING.

CASE STUDY:
KINGS

Kingdon Chapple-Wilson is one of the most prolific recorded music artists in New Zealand at the moment. Kings, as he is better known – is a rapper, music producer, singer, songwriter, owner of Arch Angel Records music label, "and all-round nice guy".

Between 2010 and 2016 Kings developed a reputation as a successful producer and collaborator with singles 'Promise to You' being picked up by Ministry of Sound's SESSIONZ compilation and 'Sipping Yak' going viral online. In 2016, while performing at Bluesky Fiji music festival in Mana Island, Kings made an impromptu music video of his first solo single 'Don't Worry 'bout It' on his iPhone and edited it on the flight home. The video was put on YouTube and quickly went viral. Warner Music signed Kings for his self-titled EP, 'Kings', and by the end of 2016, 'Don't Worry 'Bout It' had become the biggest New Zealand single release spending 33 consecutive weeks at number one on the New Zealand Singles chart (surpassing the record previously held by Lorde's 'Royals'). He received the Breakthrough Artist Award at the Vodafone NZ Music Awards that year.

"I released that single independently. When I started everyone told me 'you need to do a video professionally for it to get picked up' but I stuck to my guns and did the iPhone video and on YouTube it really took off. I started getting phone calls from record labels. I had Capitol Records in America calling me, and Warners, and I didn't really know how to handle that. [Fellow New Zealand artist] Jay Bulletproof mentioned a potential manager and he came on board and hashed out the Warner deal and made the process easy," says Kings.

Kings went on to produce three albums independently through his Arch Angel Records label. His most recent album Lov3 & 3Go celebrated one million streams on Spotify in its first week of release, and 8 million streams within four months. The lead single '6 Figures' achieved Gold status in early March.

"In terms of income, you have to be active everywhere you can. It can come from a variety of sources including Spotify, YouTube and the like, radio play and live performance of course, but also in other areas such as partnerships with brands like Huawei and Air New Zealand. I have been lucky to work with those brands on some of their campaigns," he says.

Kings has continued the approach of using mobile devices to record music videos and uses iTunes, Spotify, YouTube, Facebook, and Instagram to distribute and promote his music. In addition to these revenue streams he has his own line of merchandise, again sold online.

The recorded music business in New Zealand

The recorded music business in New Zealand is diverse and reflects our relatively small population.

The three major multinational record companies Universal Music, Sony Music and Warner Music all have businesses in New Zealand. These are each New Zealand companies, employing Kiwis and generating economic activity here.

There are also local independent record companies, including the iconic Flying Nun and Loop. Unlike in larger markets such as the UK or US, both with a large number of independent record companies, scale is an issue in the New Zealand market. This has especially been the case through the digital transition where record company revenues were in decline for 14 years.

Record companies offer a full suite of services to artists. They invest in finding and developing new artists and repertoire ('A&R'), distribute and market their recordings, monetising them via licence deals and other revenue opportunities.

In New Zealand, independent digital aggregators are another important part of the business. Auckland-based DRM is the largest of these. Aggregators such as DRM step in at the point where an independent artist or label has a recording ready for release and assist with distribution and marketing. They supply recordings to a large number of global digital platforms including Spotify, Apple Music and YouTube, and monetise these recordings on behalf of the artist or label.

'WE WANT ARTISTS TO REACH THE WIDEST AUDIENCE POSSIBLE'

With hundreds of thousands of songs uploaded daily, and over 400 hours of video uploaded to YouTube each minute, ensuring New Zealand artists' music is heard is a daunting task. This is where digital distributors come to the fore.

DRM New Zealand is a digital distributor and YouTube Multi-Channel Network (MCN) that provides digital distribution services to help Kiwi music artists and record companies get their music onto digital music platforms, maximising audience reach, maintaining security of the content and achieving a financial return.

Auckland-based DRM has been in operation for 12 years. Its primary function is digital music distribution online but it also provides analytics, and advice/coaching for artists in terms of getting the best traction on a variety of digital platforms.

"We are very hands on and very proactive with our catalogue," says DRM's General Manager Andy Low.

'We want artists to reach the widest audience possible', and pitching and presenting the music to the digital platforms is a combination of release logistics and being creative.

"We pay close attention to trends including genre specific material. We keep our finger on the pulse of what is popular in hip hop, country, indie, pop, and just about every genre under the sun. If something in our catalogue has a style and corresponding activities that makes it likely to be effective in another territory, then we will aim to help it succeed internationally – be it in the US, Europe, Asia or otherwise. We have a variety of arrangements across different territories to help boost things overseas.

"There has definitely been a cultural shift as the adoption of streaming has become more widespread. Artists are certainly excited about streaming music platforms when they see their contemporaries get results. When we work with artists it is almost entirely around streaming and downloads but overall, we want to complement their plans and activities in other areas such as live performance, touring, radio, television, etc. Digital is just one part of the artists revenue mix."

[8] NZ copyright law provides that the owner of copyright in a sound recording is the "person by whom the arrangements necessary for the making of the recording … are undertaken".

HEAVENLY POP HITS:

'THE DUNEDIN SOUND' GOES DIGITAL

Flying Nun is synonymous with New Zealand music. Founded by Christchurch-based record store manager Roger Shepherd in 1981 in a bid to record local bands, the independent record label launched the careers of dozens of South Island music groups. While the bands varied in genre, collectively Flying Nun music was referred to as 'the Dunedin sound' – a reference to the city where most of the bands hailed from.

During the Eighties and Nineties, several of its artists gained significant attention overseas including Straitjacket Fits, the Chills, the 3Ds, The Bats, and The Clean. In 1994 the Flying Nun-signed Headless Chickens had a New Zealand number one with 'George'.

The 2000s, however, were a period of flux for the company with various ownership changes (including Festival Records, Mushroom Records, and Warner Music) overshadowing its music catalogue. Flying Nun returned to its Kiwi-based roots in 2009 when Roger Shepherd and a consortium of New Zealand artists and music industry representatives bought back the company and brought on Ben Howe (of Flying Nun-signed band Superette, and founder of Arch Hill Recordings) as Director/General Manager and Matthew Davis (General Manager from 2018).

Under Howe and Davis, Flying Nun has signed new artists (including Fazerdaze, Aldous Harding, Tiny Ruins), re-issued albums, managed significant international tours (including the Chills' recent sold-out US tour), established an online music mail order and download store (Flying Out), and partnered with the Alexander Turnbull Library to digitise its substantial catalogue.

"We take a dual approach – protecting and promoting our back catalogue and signing new artists to keep things fresh," says Ben Howe.

"Flying Nun has been rebuilt and is now in a very strong position with very good distribution partnerships internationally. Flying Nun has very strong international recognition and we harness this for our artists.

"We now have a number of international artists signed with Flying Nun as well as New Zealand artists, and we're now able to make generous deals and compete on the international stage as a brand. We have a quite a different business structure to other companies. Our deals are often profit-share models."

Howe has a unique understanding of the recorded music process with his background as a musician signed with a label, record company director, event promoter and manager (he brought the Laneway Festival to New Zealand), and university lecturer of commercial music.

Maintaining the independent record label ethos, and protection and promotion of New Zealand music is a crucial for Flying Nun, and the industry as a whole, he says.

"The new digital era is both good news and bad news for New Zealand music. The globalised influence of streaming means Kiwis are listening to less local music and we need to fight harder to give New Zealand music the profile it deserves and to maintain and enhance our distinctive local identity, the things that make us unique and different."

"Meanwhile globally, overseas markets are more accessible to New Zealand artists than ever before, and there is big demand for unique artists and music. There is no doubt that export is key to the future of New Zealand music."

The enduring value of record companies

The primary role of record companies is to invest in artists' careers and connect them with an audience. This has remained constant throughout changes in technology and methods of consumption of music.

Record companies **discover, develop and nurture artistic talent**. This involves significant up-front investment in money, resources and expertise, which is often not recouped. The investment made by record companies can often be the difference between an artist sustaining a career in music or not.

Record companies also **connect artists with an audience**. Historically, record companies were the only realistic route to market for artists. The digital environment has created new opportunities and choices for artists to reach an audience directly, through a multitude of channels such as Spotify, Soundcloud and YouTube. Today's artists have a real choice of whether to work with a record company, manage the process themselves, or work with a distributor.

At the same time, this democratisation of distribution has made so much content available in so many different ways that it can be difficult for artists to be heard above the noise. Artists in New Zealand and around the world are continuing to partner with record companies to harness the benefits of their investment and resources, creative input and partnerships, contacts and global networks, marketing expertise and data analytics.

We love our partnership we have with our label Warner Music New Zealand, they really understand us, and what we want to achieve as artists with our music. Their expertise and depth of connections locally and internationally is invaluable.

NEILL FRASER

VILLAINY

Musician

" *The backbone of the music industry is the conduit between artists being discovered and then introduced to their audience. That process has changed in the past five years with the advent of streaming. Record companies used to be the sole avenue to the audience, but nowadays it's also possible for artists to go directly to market via the streaming services. However, record companies still have a pivotal role to play in the industry; it is their holistic investment and guidance in an artist's career, helping them to realise their vision and cut through the sheer volume of music out there, that allows them to amplify their communication to the greater domestic and international audience.*

SCOTT MACLACHLAN

Senior Vice President of A&R,
Warner Music Australasia

A&R: the journey from discovering talent to producing a recording

The term 'A&R' or 'artists and repertoire' is used in the music industry to describe the process of:

- finding new artists
- investing in their development and their recordings to the point where the artist and their music are ready to take to market for the first time
- the continued development of existing artists and working with them in the ongoing production of their music.

The A&R process begins with scouting for talent, in many areas including the internet, through a deep network of contacts (often globally) and through schools and colleges. It continues through the process of working with the artist to develop their music, introduce them to collaborators and producers, record the songs and produce the videos, and devise marketing strategies.

A&R is the music industry equivalent of other industries' R&D (research and development). Just as the pharmaceutical industry invests in researching new products and developing them to the point they are ready to market, record companies invest in selecting talent and developing a compelling music product. IFPI figures indicate that record companies globally invest up to 27% of their revenues in A&R and marketing[12].

While A&R is the lifeblood of a record company, it relies on having revenues available to invest. This was a challenge in New Zealand through the early 2000s where revenues were in decline due to piracy, transitioning business models and an uncertain future.

Since streaming began to deliver growth to recorded music revenues in 2014, New Zealand record companies have increased their A&R activity and investment. All three major record companies have increased their dedicated A&R headcount during that time, and some have expanded their rosters of new artists. In 2018 one major record company signed nearly twice as many artists as they did three years earlier in 2015.

The evolution of record company artist relationships

When a record company sees an artist they believe has the talent to succeed, they will look to establish a relationship through a contract. This is referred to as being 'signed' to a record company.

There are different types of artist contracts involving different levels of investment and risk by the record company. The traditional 'recording contract' involves the record company making a substantial up-front investment (called an 'advance') to pay for the costs of producing the recording. In return, the artist will agree to deliver a specific set of recordings for the record company to market. The record company agrees to distribute and market the recordings. The resulting income is then recouped against the original advance and then a share is paid to the artist.

Under a recording agreement, the record company will own copyright in the sound recordings. This is partly a result of copyright law which recognises the investment made by record companies[13] and is also the mechanism by which record companies can recoup their substantial upfront investment.

Other types of artist contract involve a different mix of rights and services offered. For example under a distribution agreement, the artist will deliver completed recordings to the record company which agrees to distribute the recordings using its contacts, systems and expertise. Ownership of copyright will remain with the artist and the record company will charge a fee for its distribution service. Licensing recordings to a record company for a number of years is another common form of contract between the artist and label.

In the past 10 years, record companies have developed their offering so that in addition to the core functions of recording, distribution and marketing, they can offer an artist a suite of services depending on their needs. This can include merchandising, live and events, building brand partnerships and developing the artist's long term audio-visual strategy. The options available to artists have multiplied.

[12] https://investinginmusic.ifpi.org/report/ifpi-iim-report-2016.pdf

[13] NZ copyright law provides that the owner of copyright in a sound recording is the "person by whom the arrangements necessary for the making of the recording … are undertaken".

Greg Haver is a leading New Zealand-based record producer who is best known for his work internationally with the Manic Street Preachers, and has worked with many other local artists including Kimbra, The Chills, Devilskin and The Feelers. He says

“A producer’s role is both musical and logistical. A producer should have an overview of the sonics and performances of the recording, and based on communication with the artist, the role would include sorting diaries, negotiating deals and choosing studios, musicians, engineers, mix and mastering engineers, troubleshooting problems and liaising with management, labels, publishers, while keeping the artist focussed on the process.”

Manager Ashley Page says that producers “are increasingly important in the music creation process and often tend to be co-writers as well. As we know, it is hard to make money solely from working in New Zealand – the scale just makes it difficult, however the industry is global now and there are massive opportunities. Joel Little is a good example: after his work with Lorde, we looked very strategically as to his strengths and hooked him up with the right artists – Khalid, Imagine Dragons, and Sam Smith. His top five songs have received over one billion streams globally.”

The technology underpinning recording and sound engineering has developed exponentially in the past few years. There are several recording facilities in New Zealand, one of the most well-known is Roundhead Studios in Auckland which is owned by Neil Finn.

Roundhead in-house producer and engineer Simon Gooding has worked with Ed Sheeran, P!nk, Migos, Dua Lipa, Neil Finn, Six60, Drax Project, Fazerdaze, Alien Weaponry and many more. Simon explains that: “A sound engineer helps to produce a recording technically, selecting and setting up equipment, balancing and adjusting sound sources and effects throughout the recording process, and often mixing and mastering afterwards.”

THE RECORDING PROCESS AND THE ROLE OF PRODUCERS AND SOUND ENGINEERS

The process of songwriting and recording is intensively creative and usually collaborative. Even when an artist is recording an existing song, there are multiple decisions to be made about how the song is performed and recorded. Time in the recording studio is devoted to perfecting this creative process, to realise the artist's vision, as much as the technical process of recording and sound engineering.

AN ONGOING PARTNERSHIP

While the artist contract formalises the relationship between record company and artist, the paperwork doesn't reflect the ongoing partnership and the role of record companies as champion and protector of artists' rights.

There is no single formula for relationships with artists – what works for one artist will not work for another. Some will want a lot of business advice and others want to do their own thing, and we work with that. It's above and beyond just fulfilling the terms of the contract. On a day-to-day basis the relationship is all about trust and knowing you're on the same side. It's also about allowing the artist to get on with what they do best. To maximise the chance of being successful, artists need to concentrate on their art and have a team working on their behalf. Every bit of concentration an artist puts into being their own manager, being their own label, is energy they are not putting into the music. The record company is there to take care of all the other stuff.

SIMON BANKS
A&R, Universal Music New Zealand

"*Record companies are offering more options to artists now. There is more variation in the deals and more friendly terms available depending on what artists' needs are.*"

CUSHLA ASTON
Manager: Louis Baker, Julia Deans

Part of the key to being a good record company is to understand how artists and musicians think, and understand the creative process and challenges. It's like different worlds – the world of creating music is very different from the business side – and a good record company will bring these worlds together.

BEN HOWE
Flying Nun

Record companies as early-stage investors in New Zealand talent

Due to their often substantial up-front investment, record companies are like early-stage investors. It's a risky business and especially with new artists there is no guarantee of success.

Most releases don't make money. In our conversations with New Zealand record companies, some estimate only one in 10 projects generate sufficient revenue to recoup the initial investment. The revenues from the few successful projects help to pay for the rest. The risk is amplified in the streaming environment – one record company estimates that at the peak of CD buying, the success rate was more like one in four.

The ongoing investment and risk-taking by record companies enables a variety of New Zealand artists to develop their art and their careers, and delivers a wide variety of music to consumers. The continued investment in the development of sound recordings for over 70 years has produced a rich and vibrant collection of New Zealand's deep musical history, most of which is available to New Zealand consumers today on digital services.

Revenues aside, record company staff and the hundreds of people working in the New Zealand music industry, in independent and major record companies alike, are passionate about supporting and developing Kiwi artists and helping them to succeed on the world stage.

> *"It's a risky business. We compare it to panning for gold: we're signing artists and developing them and we never know when we're going to strike gold – it might be this year, it might be in 10 years. You never know when you'll find your next Mitch James or Stan Walker. We're investing the money not knowing if we'll get a return. But we do it because we think it's important to reinvest in our local artists.*
>
> **KIM BOSHIER**
>
> Managing Director,
> Sony Music Entertainment New Zealand

The money we invest in artist development is unlikely to be recouped in New Zealand. However, in many ways we are cultural investors – we make investments in artists and their creative works with the view to achieving global success, just as we did with Lorde recently and OMC in the Nineties.

ADAM HOLT

UNIVERSAL MUSIC NEW ZEALAND
Chairman

The creative process: perfecting the recording

A key part of the A&R process is working to develop recordings until they are ready to market. Record companies invest in this process by advancing recording costs and working with the artist and others to make the song and the recording the best it can be.

Although with current technology anyone can make a recording and put it online, the reality is that making a quality, market-ready recording takes hard work and substantial resources both creatively and technically.

> *"Developing artists to a market-ready quality product takes a substantial investment. You have to fund five or six artists and say: "Go off and work on your songwriting and see where it goes". There are good songwriters but the last 5-10% is the difference between being okay and being really successful creatively and commercially – this is what A&R is for.*
>
> **SIMON BANKS**
>
> A&R, Universal Music New Zealand

Marketing: connecting artists with their audience

Once the songs are developed and the recordings produced, record companies and digital aggregators/ distributors play a crucial role in marketing and promoting the artist's music and connecting it with the public.

In the streaming world, marketing and promotion is the key competency for record companies, requiring a variety of creative approaches. With the proliferation of online streaming and social media, there is no longer one established route to market for an artist and their songs. While previously radio airplay and music television were the primary avenues used to expose the music to a wide audience, today it's all about positioning the artist correctly and creating the right buzz on social media and online services to generate excitement and develop an audience for the songs.

The internet has multiplied the opportunities for marketing music and reaching an audience. Artists and songwriters regularly use channels such as Spotify, Soundcloud and YouTube to post their music online. Without a strategic marketing and promotional plan however it's difficult for an artist to be heard and discovered above the throng.

The role of a record company is to ensure, through its resources, contacts, experience, industry knowledge and analytics that a recording rises above the noise. Record companies and independent aggregators have evolved to work in the online environment and with the global music distribution platforms, which requires different people with different expertise.

As well as serving artists' need to reach their audience, record companies serve the New Zealand public by promoting and curating music so that it can be enjoyed as widely as possible.

> *"Years ago, once you had a record on the radio, with advertising on TV you could sell 40,000 to 50,000 records. A marketing campaign could be put together in two phone calls, one for media purchasing and one for the TV advert. Now the team has to cover multiple bases – social media campaigns, influencer campaigns, playlist positioning, the list goes on. Instead of pulling two levers like we did before, we now need to pull about 50 levers.*
>
> **ADAM HOLT**
>
> Chairman, Universal Music New Zealand

MARKETING IN THE DIGITAL WORLD

MIXING IT UP: A DAY IN THE LIFE OF A DIGITAL MARKETER

Connecting artists with their fans, making sure their creativity stands out, monitoring social influencers and toggling between numerous Instagram accounts are all in a day's work for **Taryn Kljakovic, Senior Marketing Manager, Sony Music New Zealand**.

Kljakovic says one of her roles is to help artists make content that is "authentic, compelling and relevant". "We also build and amplify the connection our artists have with their fans across all their activities, through the best channels possible. In an era of 'click-bait' news stories we work hard to assist in ensuring our artists' creativity stands out and cuts through the noise."

It takes "a multi-tiered approach" to make an artist successful on streaming platforms, she adds. This can include on-platform play-listing, editorial and marketing support for artists as well as traditional media.

"Mitch James is a great example. Mitch had great play listing support from Spotify in particular with his latest single 'Bright Blue Skies', which had 15 million streams globally before it had had any radio airplay. Traditional media have played a large part in the success of this artist, but it is not the only part."

Standing out in today's environment is about artists being unique and being themselves, and producing music and content that will cut through. We're competing against gaming, social media, streaming video networks, sports and books, all forms of entertainment, so it has to be completely unique and a world-class production, and the marketing and content we're creating has to stand out. It's as simple as that – and as difficult as that.

KIM BOSHIER

SONY MUSIC ENTERTAINMENT NEW ZEALAND

Managing Director,

Recouping the investment

Once the music is developed and marketed to an audience, the record company or aggregator is responsible for maximising revenues from the music in order to recoup the initial investment and return royalties to the artist.

Through the transition from CD purchasing to online streaming, the models for monetising music have changed dramatically.

While the popularity of streaming has delivered growth to the New Zealand recorded music industry over the past four years, it has had a profound impact on the economics of producing music:

First, since each 'listen' on a streaming service, or unit of consumption, delivers a tiny portion of overall revenue, it takes many more streams and a longer timeframe for an artist to earn and for a music company to recoup the initial investment than in the music purchasing world of 10 years ago

Secondly, without the mass sales of CDs that drove the business 10 years ago, more than ever in the streaming world, the audience in New Zealand is not large enough to generate enough streams to deliver the revenues needed for an artist to earn meaningfully and for a music company to recoup investment in producing and marketing recordings. By necessity, the market for New Zealand music is now truly global.

While this is a challenge for a small country like ours, it also presents an exciting opportunity for the future of New Zealand music exports. The internet means that the tyranny of distance is no longer a barrier to export growth – in the digital world, a hit can come from anywhere.

New Zealand has an established reputation on the global stage following the success of artists such as Lorde and Gin Wigmore and our international reputation for creativity in related areas (eg in film making and post production) all helps to fuel New Zealand's image and identity globally, contributing to Brand New Zealand.

In the CD economy of 10 years ago, a consumer paid around $20 for the CD, including all their future listens of the music on the disc upfront, even if they only listened to the CD once. The streaming economy is completely different in that each play earns the labels and artists only fractions of a cent. To replicate the earnings from the sale of a few thousand CDs in New Zealand an artist has to stream tracks in the tens of millions of times. Even incredibly successful New Zealand artists like Lorde and Six60 can't realistically achieve that level of streams from the New Zealand population alone.

ADAM HOLT

UNIVERSAL MUSIC NEW ZEALAND

Chairman

6. ROLE OF MUSIC PUBLISHERS

To produce new musical works, artists, songwriters and composers often engage others in the process and in doing so, share the rights they enjoy. Songwriters share copyright with other creators (ie by working collaboratively), they join rights management organisations (that administer the copyright on their behalf) or they enter into commercial arrangements with music companies that specialise in the exploitation of a work where the songwriter/composer doesn't have that particular ability.

For songwriters and composers such rights management organisations might be APRA AMCOS and such a commercial company might be a music publisher.

What do music publishers do?

Music publishers invest in songwriters and composers across all genres of music. They play an important role in nurturing and commercially exploiting the musical works of the songwriters they represent and in turn provide returns to those writers from areas that the songwriter would be unable to exploit themselves.

The business of music publishing is twofold: signing and developing songwriting talent; and licensing their works in a way commensurate with their value and the moral rights of the creators. Music publishers actively support the songwriters they represent to allow them the time and resources to create.

Music publishers work with other intermediaries in the business such as record companies and managers to bring the works to market. Together with rights management organisations, they are responsible for certain streams of a writer's income on a global basis and they create new income streams for songwriters through, for instance, synchronisation licensing in the film and television worlds.

In return the publisher will share in the returns from a writer's copyright for a particular work, for a particular period or, for example, in particular territories.

Helping their songwriters develop their skills is a key aspect of publishing. Publishers often find and nurture new writing talent, and to help established writers to continue to grow. In addition to this, by taking care of certain parts of the business aspects of their songwriters careers, publishers give their writers more time to concentrate on writing and composing. Helping a writer or composer develop their skills can involve providing financial support, advising on writing for particular markets and introducing a writer to new contacts, such as co-writers, record companies and film and television producers.

On the business side, a publisher would usually be responsible for seeking new ways for existing works (songs and instrumental music) to be exploited, such as in TV programmes, film, advertising or games, finding commissions for new works either for performance or recording, registering the works with the collecting societies, APRA and AMCOS, who in turn license the performing rights and reproduction rights in those works.

Music publishers make an investment – in terms of money, time and experience – in their writers. They exploit the copyright in the music and songs created by their writers in order to make a return on that investment, and to reward the writers for their creative work and in doing so ensure more new works are created.

MUSIC PUBLISHING IN NEW ZEALAND

Music publishing around the world is dominated by major multi-national music companies (much the same as the multi-national recording industry) including Universal Music Publishing, Sony/ATV, Warner Chappell, BMG, Kobalt and others. No major multinational publishers have offices in New Zealand although they are generally represented via offices in Australia and do actively seek out New Zealand writing talent to support and invest in.

Native Tongue represent more than 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 such as 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-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.

Jaime Gough,
Managing Director,
Native Tongue Music Publishing

7.

ARTIST AND SONGWRITER PERSPECTIVE

Compiled and written by Victoria Kelly – Composer, Director of NZ Member Services/APRA AMCOS

WHAT DO MUSIC CREATORS THINK ABOUT COPYRIGHT?

“I think copyright is an amazing thing. Somewhere back in history, someone created legislation that allowed artists to get paid. Copyright makes me feel that my work's not for nothing. It's hard enough to be a musician.
If we didn't have mechanisms to protect our work it would be almost impossible.”

Bic Runga
Artist & Songwriter

“I would say that protecting the integrity of copyright should be our number one priority, so that the work of music creators continues to be valued.”

Neil Finn
[Split Enz, Crowded House, Fleetwood Mac] – Artist & Songwriter

“Royalties have sometimes been a life-changing experience for me. They're a source of income that artists desperately need.”

Karl Steven
[Supergroove] – Artist, Songwriter & Screen Composer

“If the law is protecting my interests as an artist, then I feel my artistic output is valued.”

Ashley Brown
[NZTrio] – International Performing Artist

“Copyright gives the artists and writers I work with the resources to be able to make their music. Without that, I don't have a career and neither does anyone else in the musical ecosystem. The income from copyright flows on and gives artists the ability to create work and to sustain a career over time.”

Greg Haver
Music Producer [Manic Street Preachers, The Chills]

“Copyright is such a huge part of a screen composer's income stream. I was one of the lucky ones, working in a time and place where upfront fees were reasonable, but that's not the case for most screen composers today who are extremely reliant on the ongoing income from copyright to make up for low fees upfront. Copyright is essentially a composer's survival plan.”

Graeme Revell
Screen Composer [Dead Calm, The Crow, Sin City, Strange Days]

What Are Music Creators Trying To Protect?

It's very hard to define music. One piece of music can exist in several forms, be articulated by many people, and interpreted or experienced in infinite ways. Music isn't a tangible thing. It's laden with meaning and emotion, and that meaning and emotion is felt differently by each individual according to their particular state and circumstances at any given moment in time. Music is a universal language that means something different to everyone. It's fundamentally human and incredibly precious, yet it's difficult to say exactly how or why that is.

How can the law exert an enforceable influence over something so difficult to quantify and contain?

Precisely because music is so abstract, music creators need the structure of legislation to enshrine our rights and protect our work. We rely on the ownership that Western law has assured for us through the mechanism of copyright.

Those of us with a Māori world view seek our own parallel and self-determining system of guardianship that preserves and enhances the mana of our work.

All of us share the conviction that music is a taonga that resonates at the heart of society.

Even if there's diversity in the way we measure and comprehend the value and mana of music in Aotearoa, our need to protect our core creative principles – and our dependence on fairness and reciprocity when it comes to creation – is aligned.

"Music is the cultural currency of young people. It's the biggest thing in their lives... their connective tissue. I've seen so many students transformed by having a space where they can process and express their deep feelings through music and lay those feelings down, so that they're not carrying them around with them all the time. Music is like blood to kids. It's that important."

Jeni Little

[Chair of Music Education New Zealand Aotearoa, Head of Music – Green Bay High School] – Composer, Teacher & Ethnomusicologist

Also aligned is our deep conviction about the importance of music to our future generations.

“Music creators aren’t a ‘nice to have’… we’re not a luxury or a novelty. Composers and songwriters are the future of the art-form. We’re making music that defines this moment in time.”

Alex Taylor
Composer, Performing Artist & Teacher

What we’re trying to protect is not simply a commercial right, or the career sustainability that this right is intended to secure, but the promise of everything undefinable and immeasurable that this right can support and enable in our society.

Language Barriers

As much as music creators depend on copyright law, we often feel unqualified to discuss its complexities. Our skills and talents are different from those of lawyers and politicians. Expecting music creators to comprehend the intricate language of legislation is like expecting intellectual property lawyers to write songs. That’s why our voices are often hesitant when it comes to joining the conversation, even when we know the outcome of that conversation will impact us deeply.

In the simplest of terms, we look to copyright legislation to protect our music and ensure that we can share in the value our music creates, so that we can continue to create it.

We acknowledge too that a conversation about protecting music under copyright is different from a conversation about protecting taonga and Mātauranga Māori under Te Tiriti o Waitangi.

We look to policy makers to embrace the opportunity to support Māori in their creation of a world-first legal mechanism to govern and manage the rights of an indigenous people.

“What we don’t have at the moment is a formal mechanism to assist or facilitate individuals and companies who want to use traditional Māori works. There’s no system to help them understand what they’re doing or how to get it right, let alone a way for them to ask for permission and reimburse the traditional owners. The creation of a system was advocated for in the final WAI262 report, and this is what many indigenous people are advocating for… practical, innovative and world-leading, tikanga-driven solutions and strategies that legislation can wrap itself around, instead of Māori expecting to slot ourselves into a Western framework.”

Moana Maniapoto
[Ngāti Tūwharetoa/Tūhourangi-Ngāti Wahiao]
Artist & Songwriter

Music Creators in the Digital World

Music creators traditionally exist at the vanguard. Throughout history, the arts have heralded and documented cultural, social and industrial change. Individually we’re the world’s early adapters (musical synthesis, sampling, digital workstations, virtual instruments…) and collectively our industry has been the first responder to the impact of digital and internet technology on the commercial landscape – a disruption from which we are only just starting to recover, and with which other creative industries are still grappling.

Music creators love technology. The internet has enabled and empowered us in a myriad of ways. But as it evolves we’re finding that the freedom and choice that the internet first promised us is becoming something different.

“There’s nothing more integral to a musician’s nature than the desire to control their own destiny. The internet allows us to communicate who we are and the way we think directly to our fans, as well as through our music. And it allows our fans to make decisions about us based on reality, not on how other people choose to present us.”

Matiu Walters
[Six60] – Artist & Songwriter

While the world now demands and consumes more music than it has at any other point in history, we're not seeing that growth or demand fairly reflected in our own lives or bank balances. In fact, we're struggling in the face of the erosion of our rights and income.

"As an artist it's difficult because nowadays I find myself in the same market as someone posting a video of their cat. It's so hard to make a fair distinction between something like that, and music. My life has been made harder as a result. It's quite distressing when you see how many times something of yours is viewed, but you don't see that interest in your work translating into your life."

Bic Runga
Artist & Songwriter

"The internet facilitates a digital Ātea – a space where people can come together. But I think the increasing power of internet platforms – to the extent that a creator's control over what happens to their work is completely overridden and left unacknowledged – has created an imbalance. The more that can be done to correct that imbalance, the better."

Tama Waipara
[Ruapani/Rongowhakaata/Ngāti Porou]
Artist, Songwriter & Festival Director

"I think we're in danger of letting big tech stamp out local voices in pursuit of a global market. I think that we need to be strong and stand up for the things that make us unique and not allow our voices to be silenced or forced into ubiquity. New Zealand has a history of standing up for itself in front of the rest of the world. I don't see why that can't continue.

Julia Deans
Artist & Songwriter

"The concept and reach of YouTube is brilliant but the financial reality is different for the majority of artists. The thing is… everybody knows that the money's there. Google reports billions of dollars in profits every quarter. But where does that go? Almost none of that wealth is distributed back to the creators who helped to generate it. If YouTube was purely a passive hosting platform, it would be more palatable. But it's a multi-trillion dollar industry that's not sharing the love."

Chris Van De Geer
[stellar*] – Artist, Writer & Executive [BigPop]

"I'm concerned about the erosion of artists' rights… about the large-scale, systematic exploitation of the human desire for music by companies like YouTube, and the deliberate siphoning of income away from artists. They dress it up as 'sharing is caring', but it's actually just artists subsidising the profits of big-tech companies."

Karl Steven
[Supergroove] – Artist,
Songwriter & Screen Composer

"I don't think there's ever been a technology that didn't have a bright side and a dark side. But the explosion of opportunity provided by the huge online platforms like Google, YouTube and Facebook, is betrayed by the fact that it's so difficult for artists to make any money out of their work being used. The platforms simply do not make money without content – and it's disgraceful that they've managed to achieve so much without paying the people who create that content."

Graeme Revell
Screen Composer [The Chronicles of Riddick, From Dusk Till Dawn, Gotham]

Canaries in the Coal Mine

Careers in the arts have always been challenging. The digital revolution has resulted in large-scale disruption and an unprecedented erosion of artists' rights and revenue, alongside its many benefits. Music creators embrace the internet because it embodies freedom, but as the platforms that dominate it grow, we see that freedom diminishing.

As the canaries in the digital coal mine, it's our experience that the dilution of our copyright protection, and the lack of choice we have when it comes to following our audience to platforms that don't engage with us fairly, is making it much, much harder for us to survive.

"I have many question marks around the value of my work… it becomes psychological… you start thinking that what you make isn't valuable because you can't pay your rent… meanwhile, you're being invited to play Coachella overseas and seeing your streaming stats creep into the millions."

Amelia Murray

[Fazerdaze] – Artist & Songwriter

So much is said about the right of consumers to enjoy unlimited access to content online, and about how that freedom is a fundamental human right. But not much is said about the sustainability of that freedom should we find ourselves living in a world where the people who create that content can't survive. What if the consequence of short-term freedom is the loss of long-term freedom?

Music creators don't believe that it's in consumers' best interests for our careers to become unsustainable so that we can no longer create work.

In particular, daring and innovative new work – which might not generate a billion likes in the short term – is essential to driving our art-form forwards, providing diversity of choice and inspiring future musical mainstreams.

In a compromised artistic environment, creative risks and the artists who take them are the first casualties. If we in New Zealand want to preserve, nurture and encourage our cultural uniqueness, retain our authenticity and develop our competitive edge in the global market, then creative bravery and risk are the most important things for us to foster. The sustainability of a rich and diverse musical landscape is crucial to achieving those goals.

"Making good music takes a massive amount of time and energy and having financial security would allow me and other artists, to take bold creative risks – which I think is key to New Zealand creating groundbreaking world-class music."

Amelia Murray

[Fazerdaze] – Artist & Songwriter

"There's little choice for most people when one of their options is 'free'. On a moral level people can understand why artists need to survive… but when the content is free and right there at their fingertips… they're going to push play. They're not going to think about how that tiny, individual click will contribute to the bigger picture."

Joost Langeveld

[Unitone Hi-Fi] – Artist, Producer & Executive [BigPop]

Our audience deserves choice. We believe that valuing and protecting music will ensure that choice is always available to them. Human beings need music. We need an ongoing supply of meaningful, inspiring and provocative new musical perspectives to inform and tell our stories, reflect us back to ourselves and place our existence into context.

"We still have quite an old-fashioned mentality towards musicians – we think of them as people who don't contribute tangibly to society. But if you took away what musicians create and removed everyone's access to their art, what would the result be for society?"

Abigail Knudson

[Missy] – Emerging Artist & Producer

It's important to note that music creators are not asking the law, or the government, to shield us from the reality of a market that doesn't want music. We're asking the law to reflect the fact that an unprecedentedly enormous market is demanding more music than ever, yet the revenue generated by that demand is being diverted away from creators through holes in our legislative safety net that are being purposefully exploited.

"So many musical income streams are currently optional. Under the current law, platforms can choose not to pay for music. Is there a parallel commodity that people can choose not to pay for? Can people opt out of paying for power, data or tech hardware? This disparity creates huge uncertainty and doubt in music creators. These income streams need to be enshrined and clarified so that music creators can survive."

Greg Haver

Music Producer [Manic Street Preachers, The Chills]

"The internet changed things so quickly and there's so much still to be revealed about its nature. It scares me that big tech companies are determining so much of the future for artists – and for the world in general. So much has been made possible for us by sharing – but far more has been made possible for them by what we share."

Salina Fisher

Composer, Performer & Fulbright Scholar

"Algorithms remove the human element from the artistic experience. Not for creative or artistic reasons... but for the purposes of marketing and data-collecting. Choice is being taken away from people without them really realising it. And now musical experiences aren't just being dictated by algorithms, but by algorithms skewed by bot farms created to feed algorithms. You have to ask... who stands to benefit from this massively distorted and artificially manipulated marketplace? It's not the artist and it's not the consumer."

Joost Langeveld

[Unitone Hi-Fi] – Artist, Producer & Executive [BigPop]

We appreciate that there is another dimension to this conversation entirely for Māori – taonga and Mātauranga Māori embody a different world view. There is great demand in the world for Taonga Maori, and this too is being taken without thought for, or reciprocity towards, its creators.

"Māori are still forced to operate within a system that doesn't recognise a Māori world view, traditional knowledge or tikanga. I would never help myself to a Ngati Porou waiata tawhito, put some jams on it and use it to flog chocolate. I don't know a single Māori artist who would do that. But under the current law, anybody who wants to can. The door is open because Māori waiata are in the public domain – and not everyone is respectful or knowledgeable about Mātauranga Māori – which is how it's possible for an Italian company like Fiat to use Te Rauparaha's haka to sell Bambinas."

Moana Maniapoto

[Ngāti Tūwharetoa/Tūhourangi-Ngāti Wahiao] – Artist & Songwriter

"For Māori, kaupapa and whakapapa define the nature of people's interactions with music, and the mana enhancing balance that comes from the creative process is as fundamental to our music, as the music itself."

Tama Waipara
[Ruapani/Rongowhakaata/Ngāti Porou] – Artist, Songwriter & Festival Director

In the context of today's world, a commitment to kaitiakitanga for taonga and Mātauranga Maori – and to the guardianship of all music – is paramount if we wish to preserve the mana of our music and ensure that it remains free to exist on its own terms.

The Exceptions that Prove the Rule

As a community of creators, we know how important music education is – not just to the landscape and future of our art-form, and the creation of discerning and enthusiastic audiences, but to the lives and wellbeing of our young people. Music has incredible power as an educational tool, and we value the fact that our music is accessible to schools and tertiary institutions under the existing system of licensing.

We also appreciate the dilemmas faced by galleries, libraries, archives and museums when it comes to preserving, documenting and archiving music, especially in the case of orphaned works.

Along with the rest of the music industry, we'd like to work with these organisations to enable them to continue their important work, while also ensuring that our own financial and creative interests aren't compromised.

We'd much rather work with the institutions that preserve, champion and teach our music, than against them. We look to legislation and to policy-makers to facilitate the mutual respect between our sectors and, by so doing, create incredible opportunity for collaboration between us.

"Things are shifting so quickly in the educational environment. By the time Team Adult understands what Team Teen are doing, Team Teen has upped sticks and are two stations ahead of us on the train. One of the things that I always insist my school does is to keep our OneMusic license. That's a nice, straightforward way of dealing with copyright issues at school. Simplicity and clarity is what educators need – both for themselves and their students. Lack of clarity makes things extremely confusing and difficult for teachers who are often not trained to have an understanding of copyright. The more clarity and definition the law can offer the education sector in this rapidly transforming environment, the better."

Jeni Little
[Chair of Music Education New Zealand Aotearoa, Head of Music – Green Bay High School] – Composer, Teacher & Ethnomusicologist

We know that tertiary institutions in particular want greater freedom of access to copyright materials in order to support their teaching and augment their academic culture. Copyright musical works and recordings are crucial not only to the teaching of music, but to many other aspects of student life and music adds value to tertiary institutions in ways that extend far beyond specialised music education.

We want to support tertiary institutions to teach, develop and perpetuate our craft. We also note that they, like us, operate in a business environment, collecting fees in return for what they offer. We seek fair exchange when our music is adding value to their offerings.

We'd like to ensure that our shared interests can be reflected in legislation in a way that's fair to both music creators and the institutions that benefit financially from the use of our music.

Career Sustainability

"Protecting the value of what people compose, write and create is fundamental. If we were to lose sight of that, we would disadvantage the next generation of composers, writers and creators. And if they couldn't make all the work that's in them, what a terrible loss that would be."

Don McGlashan

[Blam Blam Blam, From Scratch, The Front Lawn, The Mutton Birds] – Artist, Songwriter & Screen Composer

Music creators know that our work is valuable and that value is being taken from it by others. We believe that the law is well placed to provide structure, restore balance and ensure music creators receive a fair share of the value we create.

Alongside the collective music industry and the wider creative industries, music creators hope that the Copyright Review will take into account the precarious reality of the many thousands of atomised composers, artists, producers and songwriters in Aotearoa who combine to form the heart of our music industry. Our creations fuel not only this industry, but many others – not least the enormous digital platforms that rely on our music to fuel their business.

"The internet has removed a lot of the barriers to entry for creators, which is a big advantage. Creators can now promote and distribute their music to a wide audience, cost effectively, without having to deal with the traditional gatekeepers, but I don't believe that the money music creators are receiving from tech platforms reflects the value that they add to them. Those platforms aren't necessarily about distributing and promoting music – rather, music is a means to a greater end for them; building an audience and the very valuable data and access to that audience.

"To some of these businesses, music is just an input. It's like electricity or steel. The business of business is to keep your input costs low. The reality is though, that music is much more than an input. There's a huge social and cultural benefit inherent in music, so driving the value of it down, to the point where music creators can't survive, is counterproductive.

"A company operating fairly in this space should have an ethos to respect the creativity and the business of music. If those things are respected then a fair result will usually follow."

Malcolm Black

Executive [Les Mills International], Artist & Songwriter [The Netherworld Dancing Toys] – NZ Writer Director, APRA AMCOS Board

The music industry is recovering from the disruption of the past 14 years by innovating and investing in alternatives to free music, and 272 million members of our global audience have responded by embracing those alternatives. This is a great source of hope for music creators.

However, for every one of the 272 million people in the world who value music through paid subscriptions (and who generated $5.569 billion in revenue for our industry in 2017), there were five people consuming it for free through video streaming services, empowered by companies exploiting loopholes in our law to direct revenue away from music creators.

It's a very old cliché. Free-to-consumer video streaming, which has become a necessary and inescapable method of promotion for music creators, is the ultimate modern expression of the time-worn expectation that musicians should 'do it for the exposure' and be 'grateful for the opportunity', while others receive tangible benefits from their work.

"Sometimes fans upload my work onto YouTube. I like the fact they're sharing my music with their followers and their friends, but I also wonder who's really benefiting from that. It's great to be building a following, but how do you make a living from endless free streams without getting paid fairly?

Amelia Murray
[Fazerdaze] – Artist & Songwriter

The thing is, music creators want to share their work. We want it to be heard and felt. But we also value the right to choose what happens to our music. We want to be able to decline requests to place our work into contexts that don't align with our values. We want to be acknowledged for our contributions. And we expect a fair and equitable share in any wealth that others create on the backs of our creations.

"In general, when the use of my music feels connected to the community of people I come from, I'm happy to share it because the mana of my music is determined by the way the people respond to it. The conversation changes when that use isn't connected to, or acknowledging, us."

Tama Waipara
[Ruapani/Rongowhakaata/Ngāti Porou] – Artist, Songwriter & Festival Director

"I'd always want to be able to say no to a use of my music that I thought was distasteful."

Matiu Walters
[Six60] – Artist & Songwriter

"Rock and roll has always eaten itself. People are always finding new uses for old things. Talent plagiarises… genius steals… but stealing music for commercial purposes is entirely different."

Sean Donnelly
[SJD] – Artist, Songwriter & Producer

"You can't just take my music. I would totally expect to be asked first… and given the chance to say no to anything gross or derogatory."

Maude Morris
[LEXXA] – Emerging Artist, Songwriter & Producer

"If you want to make money from my music, then I want to share in that income. Listen to it, tell your friends, but don't try and make money off it without asking me first."

Matt Penman

[San Francisco Jazz Collective, James Farm, Root 70] – Composer & International Performing Artist

Sharing and sustainability are not mutually exclusive in a commercial and legislative environment that enshrines fair and equitable exchange. There is a line that separates generosity from exploitation, a line that prevents generosity from being exploited. The law has the power to draw that line.

Music is a long game. It evolves over time, both for individual creators and across the art-form as a whole. Just as a music creator's best music may take many years to reveal itself, so too does the influence each creator has on another as music transforms over generations.

Sustainability for music creators is a necessity for all people. If music careers exist only in the short term because they've become impossible to sustain over time, then society as a whole is disadvantaged.

"In the current business environment, with all the transition the industry has been through, it's tough for artists to sustain their careers. Career sustainability is so important for musicians. The skills to create beautifully improve with time. Music creators can't produce their strongest work if their careers can't develop over time. Artists need the right support and legal frameworks to enable them to do that."

Malcolm Black

Executive [Les Mills International], Artist & Songwriter [The Netherworld Dancing Toys] – NZ Writer Director, APRA AMCOS Board

Music has become so ubiquitous and freely accessible that we rarely stop to think about the value it adds to our lives. The creation and existence of music is fundamental to the human experience"

Jamie Newman
[Bright Child] – Artist, Producer & Promoter
[Morning People, No Lights No Lycra]

You learn your craft over time and I feel that I'm better at my craft now than I've ever been. I want that for young people. The parent in me worries that their careers might be shorter, and therefore they won't have the opportunity to evolve over time, and that the loss will not just be theirs, but ours too."

Don McGlashan
[Blam Blam Blam, From Scratch, The Front Lawn, The Mutton Birds] – Artist, Songwriter & Screen Composer

Copyright protects creators. It creates boundaries around how our work can be used and ensures that we can claim reimbursement for what our music contributes to others. It serves to sustain creators, and enables us to keep creating.

From my perspective as an independent, it's hugely expensive to be an artist. The percentage of money I earn during the year that I then I have to reinvest in my career – versus the way it would be if I had an office job – is crazy. It would be so dumb to weaken the protection we get from copyright. I rely on so many different income streams as a result of copyright... if I want to survive I need all of those tiny little guys."

JessB
Artist & Songwriter

I want us to keep having great music. If you keep the money going back to the artists, they'll keep creating great music. Copyright is a direct way to support an artist and their creations."

Amelia Murray
[Fazerdaze] – Artist & Songwriter

Music is not content – it's about more than just clicks, likes and shares. Music is taonga. It's a whakapapa that connects us all to each other.

Music creators are not seeking to amend legislation in order to deny progress or enforce restrictions that stifle innovation. We're seeking legislation to reinforce balance and fairness, so that we can sustain creative careers. We're seeking value for our work.

We want the law to help us ensure that society can always find its voice.

Everybody knows, when they drive over a bridge, that their safety is guaranteed by generations of engineers, but not enough people are aware, when they listen to 'Strange Fruit' by Billie Holiday, that somebody wrote that song... and by so doing helped change the course of race relations in America. That's the potential power of what we do as music creators. Whether we get to make something that powerful in our careers or not, by sticking up for copyright, we – and society – are acknowledging the presence of that power, and safeguarding the conditions for it."

Don McGlashan
[Blam Blam Blam, From Scratch, The Front Lawn, The Mutton Birds] – Artist, Songwriter & Screen Composer

Music is a long game. It evolves over time, both for individual creators and across the art-form as a whole. Just as a music creator's best music may take many years to reveal itself, so too does the influence each creator has on another as music transforms over generations.

Term Extension

This is one of the reasons that allowing composers, songwriters and recording artists to continue receiving a return from their valuable work is so important.

Audiences transform over time. We are seeing – with the advent of streaming and the availability and accessibility of so much music from the past as well as the present – huge resurgences of interest in songs and compositions from across time and the entire musical spectrum, as they re-enter the public consciousness in new contexts and iterations.

At the moment our term of copyright is shorter (at 50 years after the death of the composer for musical works, and 50 years after the date of release for sound recordings) than almost anywhere in the world (the majority of which has a term of 70 years).

This discrepancy not only places our creators (and their children) at a 20 year disadvantage compared to their international peers, it complicates the application of copyright in an increasingly vast and complex global environment... impeding the process of making music available throughout the world, and adding several degrees of difficulty to the monitoring of its use and the return of revenue to its creators.

Under our law, artists who have made albums with New Zealand based record companies (Lorde, Dave Dobbyn, Bic Runga, Neil Finn…) will lose control of their recorded works while they are still living. They'll see their recordings used without their permission, and they'll have no power to decide whether that use aligns with their values or honors the spirit of their creations. Neither will they see any financial benefit from the use of their recordings.

> *"I would personally find it upsetting, at the age of 65, to see my own music appear in a bunch of commercials that I'd spent my life turning down on principle, just because my recordings have arbitrarily fallen into the public domain."*
>
> **Finn Andrews**
> [The Veils] – Artist & Songwriter

Most importantly, it removes an income stream from living artists, as well as from their families. This is felt by younger and more established artists alike:

> *"My working life since 1978 has been spent crafting and recording a catalogue of songs. In only nine years myself and fellow band members of Th'Dudes will lose our 'wages', our royalty income from early songs. It's like building a house over 40 years that the law can start dismantling, bit by bit. It is not the sort of downsizing I had in mind for my family's future. Yet if I was a British, Australian, Canadian or American musician I'd enjoy another two decades of copyright protection. That's not fair."*
>
> **Dave Dobbyn**
> Artist & Songwriter

"As a young Kiwi artist, I am working very hard to build my career in the global market and on a global stage. It seems unfair then, that because NZ is a global outlier when it comes to copyright term, my contemporaries around the world will benefit from an additional twenty years of royalties on their work than what I will."

Amelia Murray
[Fazerdaze] – Artist & Songwriter

"This year our record Nature will no longer have copyright protection in New Zealand. In real terms that means myself and the other members of Fourmyula will lose a significant portion of the income that we have been lucky enough to receive from the recording. It's incredibly hard to make a living out of being a musician in New Zealand and to know that we miss out on two decades of royalties in comparison to fellow musicians overseas is hard to take. It's time that New Zealand delivered term equality for its artists, record companies and songwriters."

Wayne Mason
[The Fourmyula] – Artist & Songwriter

"This is not about putting NZ artists ahead of the pack. It is simply about us catching up with the rest of the world and giving Kiwi musicians the same ability to make a living from our work as our international counterparts."

Marcus Powell
[Blindspott, City of Souls] – Artist & Songwriter

"Music has value; emotional, cultural, historical. That's why film makers, advertisers, politicians and many others are willing to pay to use it. In spite of this, most music writers and their families live their lives with the wolf, if not at the door, then no more than a few doors down. The fact that some songs and pieces of music have a longer life than their composer, and sometimes can even grow in popularity over time, helps to balance that out. If I'm lucky enough to have written something like that, then I would want my children and their children to get some benefit from it, in the same way as if I'd invented a piece of technology or a medical procedure that was still making people's lives better after I'm gone. That's why strong copyright beyond the life of the composer is crucial."

Don McGlashan
[Blam Blam Blam, From Scratch,
The Front Lawn, The Mutton Birds]
Artist, Songwriter & Screen Composer

We support the extension of New Zealand's term of copyright to 70 years.

8.

RECORDED MUSIC NEW ZEALAND

RECORDED MUSIC NEW ZEALAND IS AN ADVOCATE FOR THE RECORDED MUSIC INDUSTRY IN NEW ZEALAND, PROMOTING AND PROTECTING THE INTERESTS OF RECORDING ARTISTS AND LABELS, PROVIDING REGULAR MARKET ANALYTICS AND INSIGHTS, AND ACTING AS THE COLLECTIVE MANAGEMENT ORGANISATION FOR PUBLIC PERFORMANCE AND BROADCAST RIGHTS.

RECORDED MUSIC NEW ZEALAND REPRESENTS THE INTERESTS OF THE RECORDED MUSIC INDUSTRY IN NEW ZEALAND THROUGH INDUSTRY REPRESENTATION AND LICENSING.

Its activities include producing the annual Vodafone New Zealand Music Awards, publishing the Official New Zealand Top40 Charts, distributing Recorded Music New Zealand Music Grants, promoting the New Zealand Music Hall of Fame (jointly with APRA AMCOS), and participating in the sector-wide WeCreate group. It develops and implements music projects that celebrate, champion and encourage the recorded music sector, our local artists and our industry (examples include Auckland's successful bid for UNESCO Creative City status in 2017 and the first-ever major exhibition of popular New Zealand music in 2016 Volume: Making Music in Aotearoa).

The Vodafone New Zealand Music Awards honour outstanding artistic and technical achievements in the New Zealand recording field. Over 30 awards are presented each year spanning genre categories such as Hip Hop, Rock, Electronic, Jazz and Children's music among others, technical categories such as Producer, Engineer and Music Video Director, Best Māori Artist and Best Pacific Album, a publicly voted people's choice award, international achievement as well as the main categories for best solo artist, group, single and album. A new award in 2018 was established to honour music teachers and the outstanding work they do teaching and nurturing our Kiwi artists of the future (see Section 3). The Awards are held annually in Auckland at Spark Arena in front of a live audience of 5,000+ and broadcast live on TV3. The awards are among the most significant that a group or artist can receive in New Zealand music, and have been presented annually since 1965.

The Official New Zealand Music Chart is the weekly New Zealand top 40 singles and albums charts and has been providing an overview of music popularity each week since 1975. To compile the chart each week Recorded Music New Zealand receives an immense amount of music consumption data from streaming platforms, download stores, physical retailers and radio stations operating in New Zealand. The charts also include the top 20 New Zealand artist singles and albums and in 2018 a new 'hot chart' was launched to reflect the 'velocity' of songs as they gain sales, increase streams and airplay to highlight those songs that are receiving the most 'heat' in any given week.

Recorded Music New Zealand sets aside up to 1% of its net collective licensing revenue (approximately 110k annually), and makes this available for educational, archival/conservation and charitable projects. Initiatives that grants have supported have been workshops and seminars or events aimed at skills development for those involved in the New Zealand music industry, the work of MusicHelps [detailed in section 3], archival/conservation projects which focus on the preservation of the New Zealand recorded music industry's history, and charitable type projects that contribute to the vibrancy of the New Zealand music industry.

Created in 2007 in conjunction with APRA AMCOS, the New Zealand Music Hall of Fame pays tribute to those who have "shaped, influenced and advanced popular music in New Zealand." Two musicians or groups are inducted into the hall each year, one at the APRA Silver Scroll Awards, decided by APRA AMCOS, and the other is the winner of the Legacy Award at the New Zealand Music Awards, selected by Recorded Music New Zealand.

In 2017 Recorded Music New Zealand spearheaded a successful bid for Auckland to be designated a UNESCO City of Music. The cultural arm of the United Nations, UNESCO, launched the Creative Cities Network in 2004 to promote social, economic and cultural development among cities that have identified creativity as a strategic factor and enabler for sustainable urban development. Auckland is now one of the 116 members from 54 countries around the world covering seven creative fields.

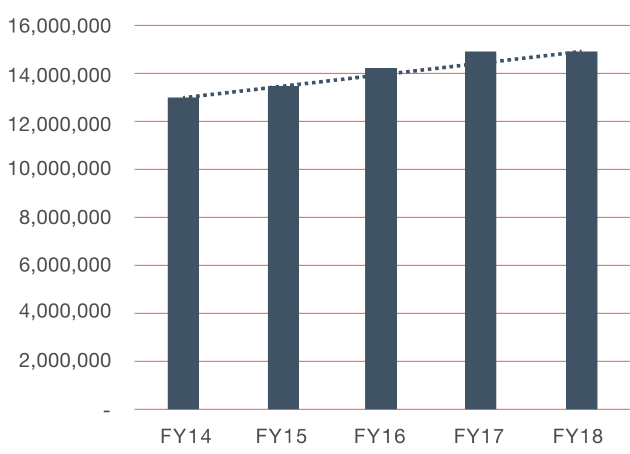
Recorded Music New Zealand is also the Collective Management Organisation for sound recording owners in New Zealand, licensing communication (radio and television broadcasts), public performance and certain webcasting and limited reproduction rights on behalf of its members. Recorded Music New Zealand's OneMusic initiative with APRA AMCOS provides blanket licence solutions for a wide range of New Zealand businesses and organisations performing and copying their members' recordings.

Recorded Music New Zealand collects licence income from thousands of music users each year. This income has been growing incrementally over the last five years, however not at the same pace as income derived from digital forms of music consumption which is licensed directly by record companies and digital aggregators for sound recordings and collectively by APRA AMCOS for musical works.

The Recorded Music New Zealand membership team manages member repertoire registrations, rights management and is the territorial administrator of the International Standard Recording Code (ISRC). It collects and analyses a vast amount of recording-use data from radio and television broadcasters, music service providers and others (such as airlines) using our members' recordings and then distributes royalties to the owners of those recordings used each year.

Recorded Music New Zealand's Direct-to-Recording Artist Scheme allows New Zealand recording artists who feature in recordings created in New Zealand to be paid 50% of the royalties collected if they are signed with a record company (where an artist owns the master sound recording themselves they are entitled to 100% of the royalty payable). Currently Recorded Music New Zealand has more than3,000 individual New Zealand recording artists and 2100 rights holders registered in the Direct-to-Recording Artist Scheme.

RECORDED MUSIC NZ REVENUE



[14] The majority of sound recording music licensing. (Note: Streaming platforms Spotify, Apple Music, download stores iTunes, and physical retail shops JB HiFi and The Warehouse are directly licensed by record companies and distributors.)

9.

APRA AMCOS

APRA AMCOS HAS BEEN REPRESENTING NEW ZEALAND SONGWRITERS, COMPOSERS AND PUBLISHERS SINCE 1926, MAKING IT NEW ZEALAND'S OLDEST RIGHTS MANAGEMENT ORGANISATION.

With 100,000 members across New Zealand, Australia and the Pacific, its membership includes the very best and brightest of established and emerging musical talent based here at home and around the globe. In New Zealand it represents over 11,000 songwriters, composers and music publishers alone, supporting them in an industry that is a flagship of New Zealand culture and creativity, and which generates many millions of dollars each year for the New Zealand economy.

APRA is the Australasian Performing Right Association. It administers performing rights (rights of broadcast, communication and public performance) collectively on behalf of its members who are songwriters, composers and their music publishers. AMCOS is the Australasian Mechanical Copyright Owners Society and administers particular rights to copy (generally online and mechanical reproductions) collectively for its members who are music publishers and individual songwriters and composers.

In 1997 the two CMOs became APRA AMCOS as one organisation.

APRA AMCOS enables access to a worldwide repertoire of music. It licenses organisations to play, perform, copy, record or communicate that music in New Zealand, and then it distributes the royalties to those members and those affiliated to more than 90 similar collecting societies around the world.

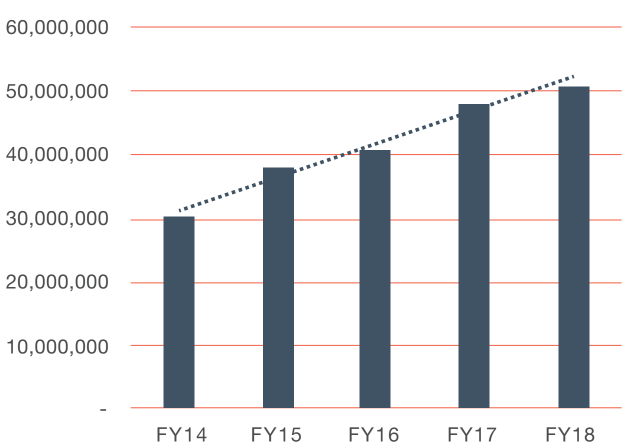
Similarly, as part of the worldwide network of composers' societies when New Zealand and Australian songs and compositions are performed overseas, Australian and New Zealand songwriters get paid via a highly organised and efficient collective system of reciprocal rights administration throughout the world. This network enables New Zealand songwriters, composers and music publishers to take part in a worldwide economy with a value of around €7 billion.

APRA AMCOS helps music lovers and businesses who use music in New Zealand access music from New Zealand and the rest of the world. This is achieved via communication and copying licences, APRA AMCOS licenses, technology companies such as Spotify, Apple Music and YouTube. Live performance licences enable music to be performed at concerts and festivals throughout the country, and public performance licences give access to businesses that use music to entertain.

APRA AMCOS puts copyright into practice, striving for simplicity, educating the public about copyright and looking for better and more efficient ways to maximise returns to its songwriter, composer and music publisher members.

APRA AMCOS NZ revenue has grown over the last five years:

TOTAL APRA AMCOS LICENSING REVENUE - NZ NZD



There are a number of reasons behind this growth.

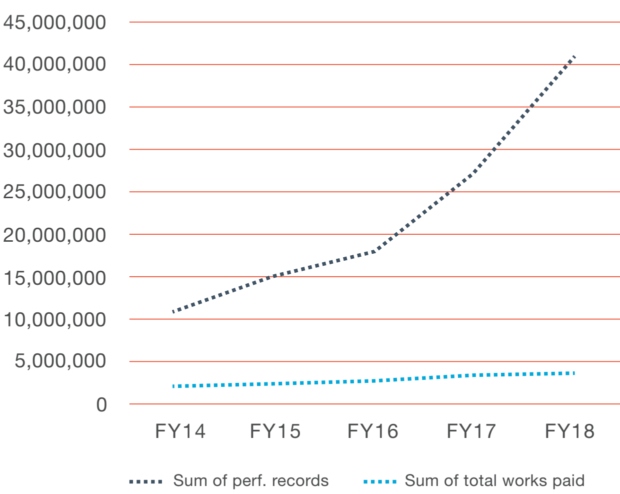
APRA AMCOS's collective approach to copyright licensing allows new innovative digital services such as Spotify, Apple Music, Netflix and Lightbox among others to operate effectively and for right holders to share in the benefits.

Widespread adoption of such services by the New Zealand public and the subsequent returns to copyright owners has grown considerably here and around the world.

Alongside the growth in digital service providers has come a massive growth in the sheer volume of works consumed, watched, listened to and accessed. The effective management of copyright in digital services now requires a considerable capacity to process, identify and match the data of the works streamed and their respective owners.

The number of performance records analysed and processed and the corresponding number of songs and writers paid by APRA AMCOS has grown exponentially. In the last five years APRA AMCOS have gone from processing 11 million performances against 2.3 million works to 40.6 million performances against 3.8 million works.

PERFORMANCE RECORDS, SONGS & WRITERS PAID BY APRA AMCOS



The technological requirements of administering such high volumes of data are considerable.

APRA AMCOS processes data (and payments) from digital service providers and matches performance records to its databases (of who owns each song). This practice enables a primary revenue stream for songwriters, composers and music publishers.

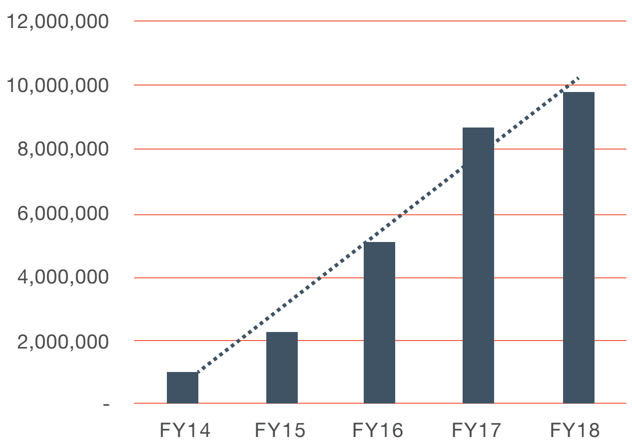
New sources of revenue from new technological platforms have contributed to revenue growth for songwriters, composers and music publishers. Revenue from music service providers (streaming services such as Spotify) and subscription video on demand (VOD) services (such as Netflix and Lightbox) has increased. This must be balanced, however, with the decline in physical product sales and traditional mechanical royalties.

(NB Apple Music reports via its AU Company to APRA AMCOS in Australia)

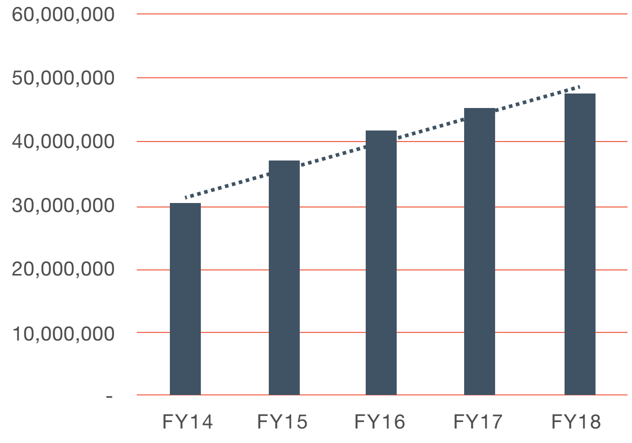
At the same time there are traditional revenue streams for songwriters and composers. Historically these have been from traditional broadcasters (radio and TV) and live performances – at festival concerts and in venues. APRA AMCOS's licensing of such live music is still very much dominated by large festivals and performances by overseas artists.

The joint licensing initiative between APRA AMCOS and Recorded Music New Zealand, OneMusic, has been a shining example of efficient and improved copyright licensing (more about this in Section 11 How Music is Enjoyed, see 'Public Performance').

NZ STREAMING (EXCL APPLE) APRA AMCOS REVENUE NZD



TOTAL APRA (NZ/AU) INTERNATIONAL REVENUE NZD



10.

THE ROLE OF MUSIC MANAGEMENT

An artist manager can often be one of the most influential and contributing factors in taking an artist's career to the next level. Over the last decade, the role of the manager has grown and expanded considerably.

The modern-day manager has to coordinate and manage many individual and organisational relationships and the role requires a wide set of skills and knowledge such as leadership, administration, finance, legal and logistical management. In some instances managers can also take on some of the traditional roles of the record label, publicist, publisher, booking agent or promoter. It's a very important relationship in the music ecosystem.

Managers will often negotiate contractual terms on behalf of their artists with many of the other entities in the music industry such as record companies, music publishers and live promoters.

Artist managers are the CEOs of musicians, they are key to not only building equity in the artist's brand but they also hold all of the artist's investors accountable for delivering on their promises[15].

Not all artists have managers, and that choice can be dictated by a wide range of factors including career timing, personalities, financial, etc. However, artists who do not have management will typically have to take on these roles themselves, managing relationships, business arrangements and all aspects of their own career.

In New Zealand there is a good network of artist managers representing hundreds of artists (including self-managed artists), and collectively they are represented by the New Zealand Music Managers Forum. The MMF NZ is a non-profit trade association dedicated to helping grow artist manager businesses through education, networking and advocacy and is part of an International Music Management network throughout the world.

> *A music manager plays an important role in shaping the career of an artist. From taking care of the artist's day to day business to the vision of the artist's career moving forward.*
>
> **TERESA PATTERSON**
> Chair of MMF NZ, Artist Manager

There is still a steep learning curve for artists understanding the business, so managers are crucial in navigating the complexities and guiding their artists forward to success. New Zealand has developed a very healthy management ecosystem locally over the past decade and, in what is now a global industry, this professionalism will be a key part in taking Kiwi artists to the world.

SCOTT MACLACHLAN,

ARTIST MANAGER:
SOL3MIO, LEISURE, THOMSTON

> *Nowadays the artist manager does so much more than ever before. Previously you were really the liaison between other parties. Now we're facilitating those relationships, marketing, some promotion, you really do everything. Especially in New Zealand.*
>
> **ASHLEY PAGE**
> Artist Manager: Joel Little, Broods, Robinson

[15] 'It's time artist managers got paid properly' by Luke Girgis, The Industry Observer https://theindustryobserver.thebrag.com/its-time-artist-managers-got-paid-properly/

11.

HOW MUSIC IS ENJOYED

In 2019 consumers are enjoying more music in more ways than ever before. There are now more than 40 million tracks available – legally – online and through digital services in New Zealand as well as around the world. By industry agreement, all music is released globally on the same day each week, meaning that New Zealanders don't need to wait to listen to their favourite music. In fact, because of New Zealand's time zone, Kiwis are often the first people in the world to hear new music.

Kiwis today have a menu of options for choosing how they listen: on-demand streaming, via a subscription, or free and ad-supported, via audio or video, whether from a curated, shared or personal playlist; a la carte downloads; CDs and vinyl as well as enjoying music on the radio, television and in public performance venues.

This section outlines each of the ways in which music is enjoyed by consumers in New Zealand, with live performance covered in a dedicated section.

NEW ZEALANDERS ENJOY MUSIC IN A VARIETY OF WAYS

"Users" are defined as those using in the past 3 months to consume music.
Note: These figures are percentages of users. Overall percentages using each source are net figures for the source (e.g. some respondents use paid streaming and free streaming)

Audio streaming services

Streaming music services have revolutionised the way we listen to music since their introduction in 2012, as New Zealanders have enthusiastically adopted services like Spotify and Apple Music. Some 61% of New Zealanders listened to music on audio streaming services in the past three months, with 33% of them listening every day[17].

Audio streaming has broad appeal – consumer research indicates that although usage is more concentrated among younger listeners aged between 18-24 years old (75%), 37% of older listeners above the age of 55 have also used it in the past three months[18].

New Zealanders have a choice of several different music streaming services for a monthly subscription fee. Spotify is currently the most popular service and is by far the largest player in terms of revenues. These services generally offer unlimited online streaming of the entire catalogue of music, the ability to create and share playlists, and download tracks for listening offline.

Spotify also offers a free service which has more limited functionality ("shuffle play" as opposed to unlimited skips and playing any track on demand) and requires listeners to listen to advertising.

Many Spotify Premium users in New Zealand have the service 'bundled' as part of their mobile phone subscription with Spark, ie the price is included in the price of the mobile plan.

Curation and recommendation features

Audio streaming services drive listening via playlist curation and recommendation features. Users can create and share their own playlists, and the services also offer curated playlists. Because many users listen to the songs 'pushed' to them via playlists, the positioning of music within a playlist is critical to promoting it and seeking to maximise the number of 'listens' or streams.

Teams within the major streaming services focus on curating playlists for individual territories to reflect local tastes and promote local music. Spotify and Apple Music staff, while based in Australia, regularly visit New Zealand and engage with the local industry, and feature New Zealand music on their playlists.

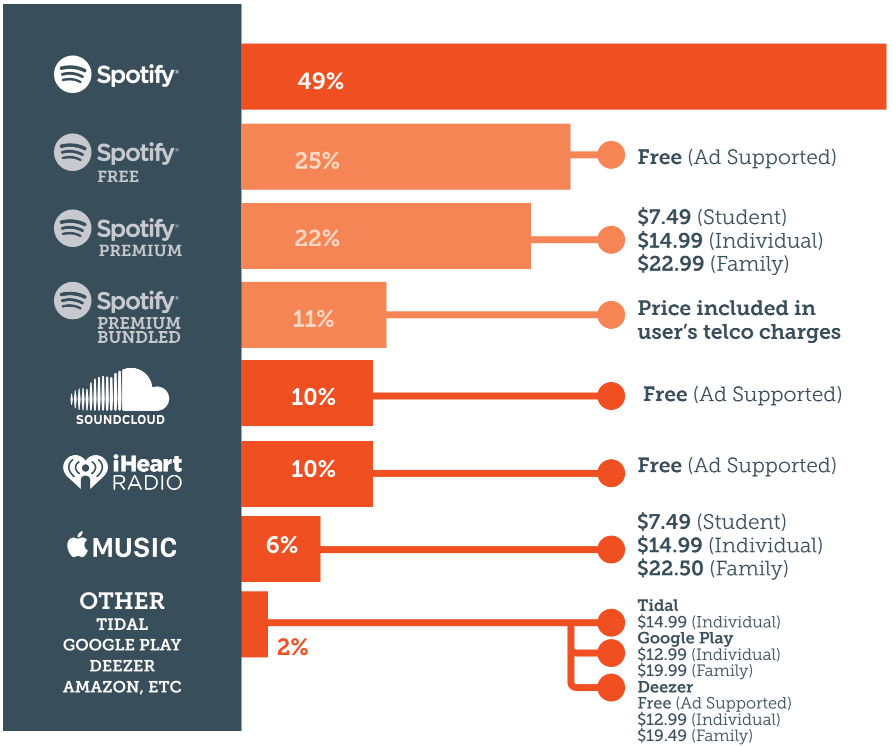
Because playlist positioning is critical, some in the music industry have called for streaming services to be more accountable for the proportion and positioning of local music within their playlists and this conversation is happening in New Zealand and Australia.

[17] Horizon Research. 2018. Music Consumer Study November 2018.
[18] Horizon Research. 2018. Music Consumer Study November 2018. Source: Q7.5 Which of these streaming services have you used to listen to music? (N=1230 respondents)

AUDIO STREAMING SERVICES

Use in last three months

Source: Q7.5. Which of these streaming services have you used to listen to music? (N=1230 respondents). Horizon Consumer Research Study 2018



HOW SPOTIFY TAKES KIWI ARTISTS TO THE WORLD

As the largest driver of revenue in the music industry, Spotify plays a central and important role. It boasts a community of 207 million users (including 96 million subscribers) across 79 markets, and offers a multitude of tools to help artists, artist teams and labels maximise these opportunities.

"Spotify is committed to artists and their fans. We have an entire team dedicated to working with everyone needed to making great music, including songwriters, performers and industry partners", says Managing Director, Spotify Australia and New Zealand (ANZ), Jane Huxley.

"Spotify develops amazing tools, and provides education around the tools and resources that Spotify offers creators – most notably, the Spotify for Artists platform.

"There are also tips for best practice around how to release, market and promote music within the music streaming economy."

The editorial team promotes New Zealand artists both within Spotify ANZ's editorial space and its global network. This give fans more opportunities to discover Kiwi talent.

Greymouth-born singer-songwriter Robinson's single 'Nothing To Regret' went stratospheric after the editorial team secured multiple New Music Friday playlists globally on release. They then worked the track through Spotify's local pop and mood playlists "to an incredibly receptive audience", says Huxley.

"This allowed us to spread the track wider into our global playlist network, and Nothing To Regret ultimately making its way into Today's Top Hits - Spotify's biggest global playlist."

As a result, Robinson now has 2.32M monthly listeners globally. 'Nothing To Regret' is currently at 66+ million streams.[1]

[1] As of March 2019.

Other audio streaming services

Other subscription audio streaming services have much lower usage than Spotify. Apple Music offers a subscription streaming service used by 6% of New Zealanders in the past three months. Other services – Deezer, Tidal, Google Play and Amazon – have much lower usage with a combined 2% of New Zealanders using them in the past three months.

Soundcloud operates a hybrid model with some music provided by licence partners, but also the ability for individual artists and creators to upload and share their music and obtain a share of revenue.

Soundcloud was licensed by major and independent record companies between 2014 and 2016, after operating for a period without licences and claiming the benefit of 'safe harbour' privileges in copyright law[19].

iHeart Radio is an online service which is sometimes referred to as 'semi-interactive' because it curates and delivers radio broadcast streams to users based on their genre and artist preferences, but does not have the same level of interactivity offered by a premium streaming service.

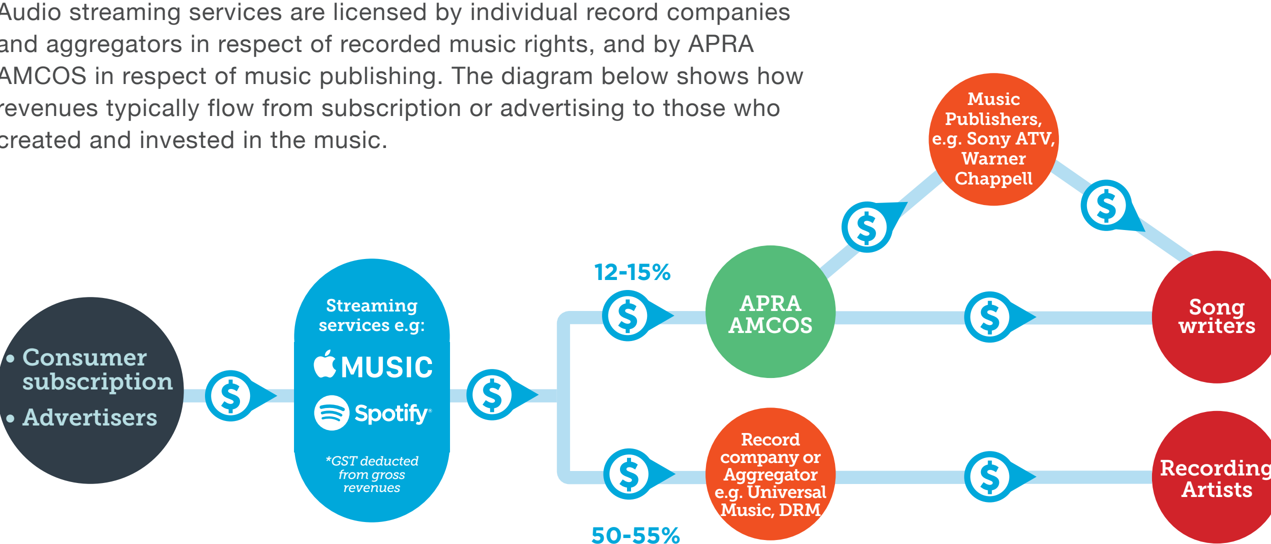
Streaming and the New Zealand music industry

As well as revolutionising music listening, and enabling songwriters, artists and record companies to more easily reach a global audience, streaming services have delivered growth in recorded music revenues over the past three years, after several years of decline. Streaming platforms contributed nearly 70% of wholesale recorded revenues in 2018 ($74.2 million, up from 62% in 2017)[20], with physical and downloads decreasing in popularity, a trend which seems likely to continue.

However, the rapid transition to streaming has challenges. New Zealand artists and songwriters are competing with their counterparts globally more than ever before, and work is needed to promote New Zealand music on international playlists. In addition, the economics of streaming means that each 'play' pays only fractions of a cent. More than ever before, we need a robust copyright framework to ensure that there are fair returns to songwriters, artists and investors, and to secure a sustainable future for Kiwi creativity in the music industry.

LICENSING AUDIO STREAMING SERVICES

Audio streaming services are licensed by individual record companies and aggregators in respect of recorded music rights, and by APRA AMCOS in respect of music publishing. The diagram below shows how revenues typically flow from subscription or advertising to those who created and invested in the music.



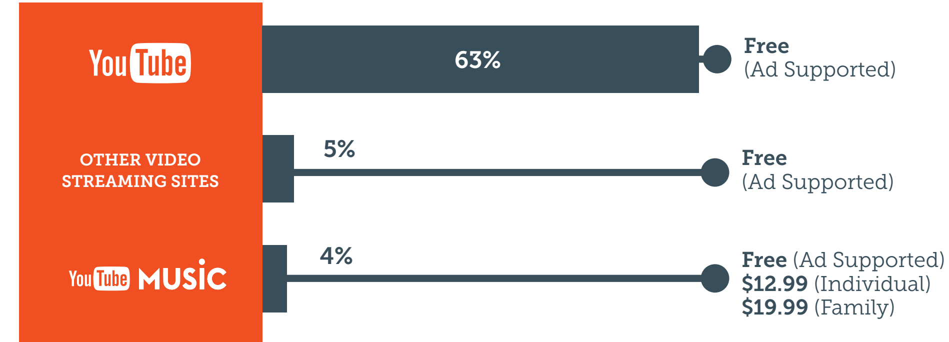
[19] See https://www.theguardian.com/technology/2015/aug/27/prs-for-music-takes-legal-action-against-soundcloud

[20] Recorded Music 'NZ Recorded Music Revenues Top $100m in 2018'. https://www.recordedmusic.co.nz/nz-recorded-music-revenues-top-100-million-in-2018/

VIDEO STREAMING SERVICES

Use in last three months

Source: Q7.5. Which of these streaming services have you used to listen to music? (N=1230 respondents). Horizon Consumer Research Study 2018



Video streaming services

Video streaming services such as YouTube have become a key channel for enjoying music. 65% of New Zealanders report using YouTube or another video streaming service to watch or listen to music in the past three months – which exceeds the number of people using audio streaming (61%).

YouTube is by far the dominant video streaming service in New Zealand, used by 99% of people who are video streaming. The vast majority of video streaming is free to the consumer and monetised via advertising. In May 2018, YouTube launched a paid subscription service in New Zealand, YouTube Music, which 4% of New Zealanders report having used in the past three months.

The dominance of YouTube for music listeners, especially under 24s, is even more clear from other consumer research:

- 18 to 24-year-olds spend nearly 20% of their music listening time each week on YouTube
- Over 60% of 18 to 24-year-olds report discovering new music on YouTube in the past three months, as opposed to around 30% discovering new music on radio or streaming services
- When asked what they would choose if there was only one way to listen to music, 23% of 13 to 17-year-olds would choose YouTube or other free video streaming
- When asked why they don't pay for a subscription to a music service, 22% of New Zealanders, and 45% of 18-24s, said "anything I want to listen to is on YouTube".

Licensing of video streaming

YouTube is the only dedicated video service in New Zealand that is licensed by many right holders including APRA AMCOS, New Zealand record companies and digital aggregators. Premium licensed music videos are made available through YouTube's Artist Channels and via official third party channels such as the Vevo service. In addition, videos that are uploaded by users and incorporate music ('user-generated content' or UGC) can be tracked and monetised via YouTube's Content ID tool.

Facebook also operates a video service which is licensed (see below).

Music is a key driver of growth and audiences on video platforms

It is clear that video services offer new opportunities for artists to connect with their fans. Artists can have their own dedicated channels for fans to follow, and fans can interact with the artist and each other via social media features. Independent Auckland-based artist Princess Chelsea's video for 'Cigarette Duet' has been viewed on YouTube over 45 million times[22] while fellow Kiwi artist Stan Walker has more than 69,000 subscribers on his official StanWalkerVEVO channel[23].

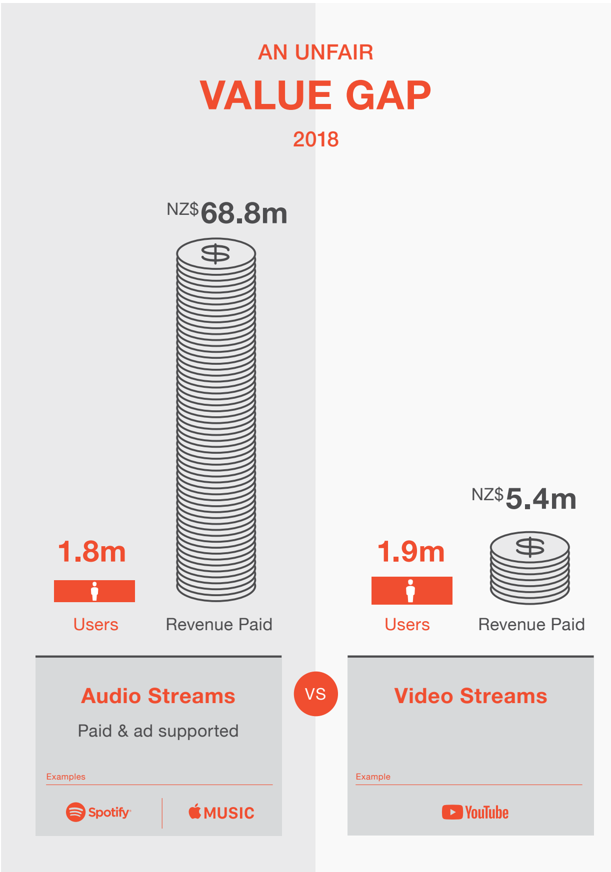
On the flip side, video services derive huge benefits from music. Of the 10 most-watched videos on YouTube since its launch in 2005, nine are music videos, with the top video 'Despacito' by Luis Fonsi ft. Daddy Yankee holding the YouTube record for most views in the platform's history (more than six billion views in March 2019).[24] Of the top 30 most watched videos on YouTube, only two are not music videos.

[22] https://www.youtube.com/watch?v=4TV_128Fz2g, visited on 29 March 2019
[23] https://www.youtube.com/channel/UCMJh-TtFXfxl00mR6Wh2xIA, visited on 28 March 2019
[24] https://en.wikipedia.org/wiki/List_of_most-viewed_YouTube_videos, visited on 7 March 2019

The value gap

Despite music driving massive traffic to video platforms, video streaming is not delivering fair returns to the music industry as shown by the graphs below.

Considering the revenue per user, video delivers about 1/13th of the revenues per user of audio streaming services like Spotify.



Unlike audio streaming services such as Spotify, which negotiate licences with right holders before they start, existing video services like YouTube and Vimeo rely on their users to upload videos which the services then make available to their audience and monetise with advertising. For this reason they are sometimes called 'user uploaded content' or UUC services.

Although YouTube and other UUC services are now licensed by many major right holders, it wasn't a fair negotiation. These platforms built up their audience by streaming music uploaded by members of the public and relying on special privileges in copyright law called 'safe harbours' to claim they didn't need to obtain licences at the outset in the usual way. This puts right holders in an unfair bargaining position and reduces the revenues they are able to obtain in licence deals, while giving user upload platforms an unfair advantage over other digital music services.

Safe harbour privileges have a legitimate place in copyright law to protect companies such as internet service providers that play a passive role in providing infrastructure and storage space for internet users. They should not be available to platforms such as YouTube that actively monetise, curate and promote music.

In other parts of our submission we are calling on government to review these special privileges and address the value gap.

Another issue created by the growth in video streaming, combined with YouTube's lack of effective security measures, is stream ripping, which is addressed further below.

Social media

Social media is a key part of how we interact online and a key driver of how we enjoy music, especially for younger New Zealanders. Our research shows that 22% of New Zealanders access music via links on social media platforms (32% of 13 to 17-year-olds). These are likely to be a combination of links to licensed services such as YouTube and Soundcloud, and links to pirate sites.

Social media is a vehicle for getting the message out about new music. Across the music industry, artists, record companies and others are using social media to engage with fans and promote new music.

Music companies have been proactive in licensing social media platforms. Facebook is now licensed by APRA AMCOS, major record companies and some independents for the use of music on Facebook, Instagram and Messenger. These licences enable users to engage with music in a variety of ways, including to share personal videos incorporating music, soundtrack personal videos from a library of audio recordings, record and live-stream 'lip-synch' performances, pin snippets of licensed music to their personal Facebook and on Instagram stories, there is also the option to add a music sticker which plays a snippet of licensed music.

Digital downloads

Digital downloads are declining in popularity, and in 2018 accounted for only 5% of recorded music industry revenues. The main download store in New Zealand is iTunes, other stores are Google Play and Bandcamp.

Download services never eclipsed physical product as the dominant form of recorded music consumption in New Zealand, and streaming has subsequently superseded it as the more favoured form of digital music consumption. However, for a time downloads were growing in popularity and reached an industry peak in 2013 representing 34% of all recorded music revenue.

In terms of functionality, consumers have the option to buy a single, a number of singles off an album, or a full album, which can then be downloaded as a digital file on to their computer (or tablet or smartphone). Users are licensed in different ways to use the files and the services themselves evolved over many years with pricing and bundling but also in terms of the media players themselves and related digital rights management.

Download platforms, however remain a valuable tool for both users and artists. Examples include artists offering their recordings for download direct to fans via their own online platforms, or via a third party platform such as Soundcloud or Bandcamp, or users who may wish to have an audio file 'offline' ie when streaming is unavailable or for use in other applications eg a DJ using Serato.

> *"iTunes is still where most people look to purchase and download music, however Bandcamp, Soundcloud, ReverbNation etc cater to a percentage of the marketplace and it's important to be visible on as many platforms as possible.*
>
> **ANDY LOW**
> DRM

Physical media – CDs and vinyl

As recently as 2013 physical music remained the dominant form of music consumption, however in New Zealand CD sales have decreased year-on-year for close to 20 years and in 2018, represented just 10% of all recorded music revenues.

Despite this decline, CDs and vinyl remain popular especially in the older demographic for occasional purchases. More than half of 45 to 64-year-olds have bought music on CD or DVD in the past three months. Box sets and other premium products can help to enhance the physical offering. An example is the Beatles 50th Anniversary White Album re-release in 2018, which included previously unreleased recordings and visual material as well as the original album.

An interesting development in recent years bucking the overall trend is the massive resurgence in vinyl. From a point in the mid-2000s where there were next to no vinyl sales it now represents 20% of all physical music sold, and 20% of people aged 45 to 54 report purchasing vinyl in the past three months.

CDs also remain a medium by which artists release music and artists will often produce limited runs of physical product for sale at their own gigs, via their own websites or online stores.

> *"Over the past 20 years, there has been a shift in how people enjoy music from CD to LP, from CD to download, from download to streaming, and from retail stores to direct to consumer portals. Artists now have numerous avenues to earn revenue from their works and physical is still a strong part of that picture: blockbuster artists still sell significant numbers of CDs and vinyl, and some independent artists have seen a massive swing towards vinyl and even cassettes. There's a world of opportunity now, with direct to customer solutions available to an artist. From the business perspective, there's still plenty of life left in physical formats.*
>
> **PETER BAKER**
> Rhythmethod

There are two large retailers (The Warehouse and JB HiFi) and many smaller independent record stores (Real Groovy, Southbound, Slow Boat, Flying Out, Marbecks) throughout the country that stock CDs and vinyl. In addition physical product can also be purchased online through those physical retailers' websites as well as other online retailers such as Mighty Ape, Fishpond and other international platforms.

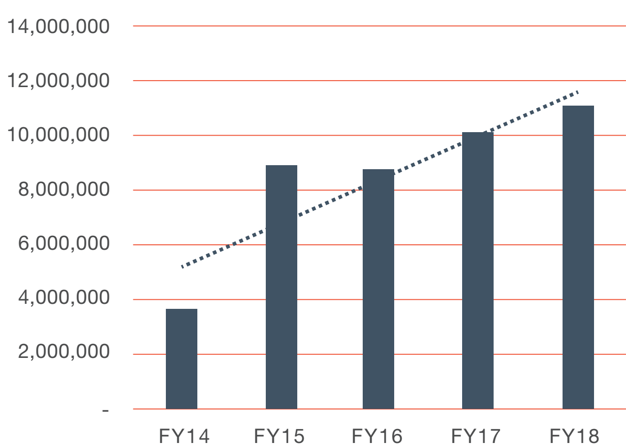
Public performance

While streaming is the most common distribution channel for artists, it could be argued that public performance is the most widespread method for consumers to engage with music, and is an important revenue stream for artists, songwriters and composers.

Public performance is the playing of live and recorded musical works in a public space. In 2013 Recorded Music New Zealand and APRA AMCOS launched OneMusic as a joint licensing company offering a licensing service to all New Zealand individuals and businesses that are publicly performing music with a range of licence fees structured to suit each business sector.

OneMusic is a leading example of joint licensing and helps simplify music licensing for New Zealand businesses as well as providing them with a useful product. OneMusic grants businesses the legal permission they need to use music, while helping to ensure that music creators are compensated for the use of their work.

ONEMUSIC (PUBLIC PERFORMANCE) REVENUE NZD



OneMusic licenses retail stores, hospitality spaces such as bars, restaurants and pubs, exercise facilities such as gyms and fitness studios, music on hold (MOH), schools and tertiary education providers, airlines and many other instances where music (live and recorded) is publicly performed. OneMusic also licenses B2B music service providers who compile and supply music to these premises.

> *We support anything that means compliance issues don't get in the way of business. This new process means our members can get a music licence quickly and easily and we're very happy APRA AMCOS and PPNZ [Recorded Music New Zealand] have heard us on this issue.*
>
> **MARISA BIDOIS**
> CEO The Restaurant Association[25]

Some of the licence tariffs are based on the size of the premises where music is played and is accessible to the public (in square metres), some licence tariffs are based on the number of days that the music is performed at a venue (such as a live band or featured DJ), other tariffs are based on the number of people that are members at a facility such as a gym or fitness studio.

> *Typically, a retailer will play over 2000 hours of background music each year, representing thousands of songs. OneMusic offers simple annual music licences that grant businesses permission to use virtually all commercially released music, provides the music user with peace of mind that they are operating legally and ensures that music creators are fairly compensated for the use of their music.*
>
> **GREER DAVIES**
> OneMusic Director

OneMusic collects the license fees and distributes that revenue between the two collective management organisations (APRA AMCOS and Recorded Music New Zealand) which then distribute to their members: songwriters, composers, music publishers, recording artists and record companies.

Communication and broadcast

Radio and television broadcasts remain a popular vehicle for enjoying music. Consumer research indicates that 90% of consumers listened to radio in a three-month period while 65% listened to music on the radio every day. As indicated in PWC's annual music industry report, radio is a significant contributor to GDP and employment[26].

As well as offering broadcast radio through traditional radio devices (including stereo tuners, car radios, portable radios etc.) listeners are also able to listen to radio via a mobile device and through apps such as iHeart Radio, Rova or RNZ. 43% of New Zealanders have listened to music on the radio online or on their mobiles in the past month – 19% listen to radio online at some point in a typical day, however only 2% of people listen to radio online only.

[25] "APRA AMCOS and PPNZ Music Licensing have come together to create a world-first, single music licence that best serves New Zealand businesses", https://evanz.co.nz/members/news-amp-announcements/apra-and-ppnz-music-come-together

[26] https://www.recordedmusic.co.nz/portfolio/nz-music-industry-economic-report/, also see graphic, above right: 'Radio remains a popular music source' from Horizon Music Consumer Study November 2018.

Both free-to-air television broadcasters and pay TV broadcasters use music in every programme, advertisement and promotion that they broadcast. The screen composing industry is a vital component of the New Zealand music community. For writers of the music used by television producers and broadcasters royalties collected by APRA AMCOS are a critical source of revenue.

Radio and television stations are licensed to use music by APRA AMCOS (in respect of music works) and Recorded Music New Zealand (in respect of sound recordings). APRA AMCOS and Recorded Music New Zealand are mandated on behalf of their respective members (and in the case of APRA AMCOS members of similar organisations all over the world) to offer simple 'blanket' licences for their respective repertoires, enabling broadcasters to broadcast essentially a worldwide repertoire of music.

Unlicensed consumption: piracy

Despite the proliferation of legal choices for consumers, 24% of New Zealanders are still using pirate sites to obtain or listen to music[27]. The rates are higher among young people with nearly half of 13 to 17-year-olds having used music piracy sites, and more than one third of 18 to 24-year-olds.

Stream ripping has become the most popular form of music piracy.

Stream ripping is the process of creating or obtaining a permanent, free, downloadable file from licensed content that is available to stream online. It is typically done by users to produce an MP3 file from a streamed music video, which can then be kept and listened to offline or on other devices. An estimated 90% of stream ripping downloads are sourced from YouTube, although ripping can also take place from other streaming services such as SoundCloud.

Users typically obtain downloads using a stream ripping website, app or browser extension. Most users that download files to a computer then transfer them to a mobile device so they can listen to them offline.

There are many websites that offer downloads from streaming sites like YouTube, and these are easily located using a search engine. According to consumer research, one-third of people using stream ripping sites in New Zealand discover the sites using Google or another search engine.

Stream ripping sites compete unfairly with licensed music services, enabling users to permanently download music licensed only for ad-supported streaming on the site from which they download and then listen to it offline without advertisements and without paying.

The music that these websites make available has not been licensed for download or offline use, only for streaming. Services such as YouTube operate an ad-supported streaming model and users are prohibited in terms and conditions from downloading. In addition, the agreements between record companies and streaming services like YouTube prohibit downloading and require streaming services to apply measures to prevent it. The remuneration that record companies and artists receive for online ad-supported streaming is far lower than that received for a download or subscription streaming model.

As a result, we believe that stream ripping is causing substantial harm to the music industry by reducing traffic and interest in licensed music streaming platforms, reducing advertising revenues and importantly, reducing sales of premium subscription streaming services, which offer offline and mobile access as a benefit.

Other forms of piracy also remain popular, with 5% of people using cyberlockers and 6% using BitTorrent to obtain or listen to music.

[27] Horizon Music Consumer Study November 2018

The impact of piracy

Piracy impacts licensed consumption in a straightforward way: without piracy, users are very likely to use licensed methods to consume music. Consumer research indicates that if pirate sites were not available, over 70% of people would choose a licensed alternative to enjoy music.

Based on this data, we conservatively estimate that the losses to the music industry from piracy in 2018 were around $50 million.

As well as the straightforward substitution effect, piracy drives down the value of music generally and results in lower licence fees from legitimate services, and from the perspective of individual creators, piracy takes away the choice to make their work available or not.

Online piracy is a negative for our society as a whole. It results in revenues, including advertising revenue, being diverted away from New Zealand artists and creators and the companies that support them towards offshore companies that do not pay tax in New Zealand or anywhere else. These companies are often also vehicles for money laundering and other organised crime.

Safeguarding creativity

Piracy is made possible by illicit websites, the vast majority of which are based outside New Zealand, leaving New Zealand creators with very few options to address them.

Piracy is amplified and made easier by a variety of intermediaries including search engines, advertisers, payment providers, domain registrars and app store operators. Consumer research shows that 33% of New Zealanders used a search engine to find infringing content online.

It is essential that copyright law is updated to provide for effective tools for right holders to tackle piracy. In particular, we need a clear and streamlined process to enable courts to order internet service providers to block their users' access to illegal websites offering unlicensed music to New Zealanders. We also need online intermediaries to take responsibility to prevent their services being used for illicit purposes.

12.

LIVE PERFORMANCE AND TOURING

LIVE PERFORMANCE IS AN ESSENTIAL PART OF THE MUSIC MIX. REVENUES FROM LIVE PERFORMANCE CAN BE A LUCRATIVE INCOME FOR MANY ARTISTS, AND LIVE EVENTS CONTRIBUTE SIGNIFICANTLY TO THE NEW ZEALAND ECONOMY ON AN ANNUAL BASIS. LIVE MUSIC IN VENUES, MAJOR CONCERTS AND FESTIVALS CAN ALSO BRING MASSIVE OPPORTUNITIES TO LOCAL ECONOMIES FROM INFRASTRUCTURE TO TOURISM.

The February 2019 Six60 concert at Western Springs broke New Zealand music records for the largest sell-out crowd to see a Kiwi band. In total 50,000 fans attended the show. In the days that preceded the event, builders spent 10 days building the stage, erecting fences, and unloading 30 trucks worth of equipment. A documentary crew was in attendance filming the event and international music company staff flew in for the show[30]. Six60 performed again to 20,000 fans in Dunedin a few weeks later and together with the annual HomeGrown music festival in Wellington, over 100,000 people attended just 3 events featuring all-Kiwi line-ups.

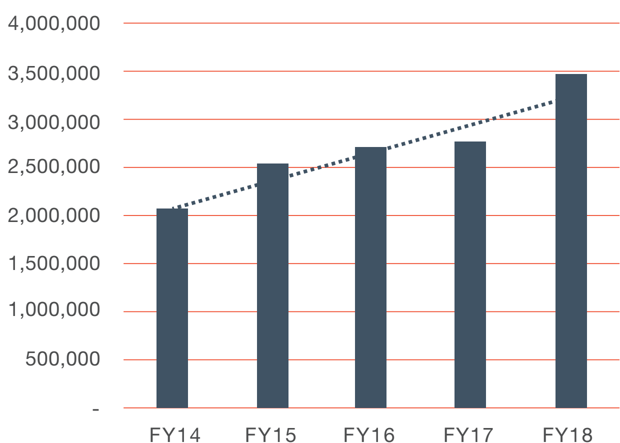
Auckland Council reported[31] that just seven major events over the 2018 summer, including music performances by Six60 and Fat Freddy's Drop and international artists Taylor Swift and Mumford and Sons, injected $21 million into the local economy, attracting over 200,000 people.

Eminem's March 2019 performance in Wellington attracted 45,000 people in total, which was a record for the most people at a one-day event at Westpac Stadium. Some 25,000 of those fans were from out of Wellington, which broke a record set in 2017 for most out-of-region visitors, when around 20,000 Lions fans attended an All Blacks test match[32].

Even where the headlining performing artist is from overseas, often local artists will support these international performances. In doing so they are paid to perform and will earn royalties for the songwriters of the musical works performed at the same rate as the international artist.

While a majority of the revenue earned by artists in this context comes from sums paid for admission to the performance, concert or festival, separate revenue streams exist for songwriters whose works are performed. Songwriters – both New Zealand and international are paid via APRA AMCOS' licensing of every venue, concert and festival. APRA AMCOS in 2018 reported $3.5 million in revenue generated from live music performance (up 29.6% on 2017[33].) These amounts are the songwriter's share. The revenue figures below represent APRA AMCOS licence fees (1.65% of total gross sums paid for admission at live music events).

LIVE MUSIC APRA REVENUE NZD



> *"New Zealand's international trailblazers Katchafire celebrated their 20th anniversary with an intrepid 69 date world tour, while Lorde wowed crowds and won hearts worldwide on her 70 date Melodrama tour. Flight of the Conchords were warmly welcomed back to the UK with 13 sold-out arena shows, and rising stars Aldous Harding, Marlon Williams, Tami Neilson and Drax Project are just a few of the other members making an impact on the global scene."*
>
> **APRA AMCOS[34]**

[30] "Hours before Six60 take to the stage for record-breaking concert". NZ Herald. 25 February 2019. https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12206566

[31] https://www.nzherald.co.nz/entertainment/news/article.cfm?c_id=1501119&objectid=12149303

[32] https://www.radionz.co.nz/news/national/383765/record-breaking-number-of-visitors-in-wellington

[33] http://apraamcos.co.nz/news/2018/october/digital-revenue-eclipses-broadcast-in-apra-amcos-record-setting-financial-year-results/

[34] http://apraamcos.co.nz/news/2018/october/digital-revenue-eclipses-broadcast-in-apra-amcos-record-setting-financial-year-results/

KIWI ARTISTS TOUR THE WORLD

Live performances at small venues, large concerts and music festivals are certainly growing domestically, and Kiwi artists are also making their mark internationally. The New Zealand Music Commission collected and collated global live performance data over a 12-month period (January to December 2018) and the results highlighted wide and diverse areas where Kiwi artists are performing live throughout the world.

IN 2018 **94** ARTISTS PLAYED **1,333** SHOWS IN **41** DIFFERENT COUNTRIES.

The artists:

Aaradhna
Aldous Harding
Alien Weaponry
Anika Moa
Antagonist AD
Anthonie Tonnon
Aron Ottignon
Bakers Eddy
Baynk
Broods
Cairo Knife Fight
Carb On Carb
Connan Mockasin
Dave Dobbyn
Delaney Davidson
Devilskin,
Die! Die! Die!
Don McGlashan
Eden Mullholland
Esteré
Fat Freddy's Drop
Fazerdaze
FIS
Flight of the Conchords
Gin Wigmore
Grouch
I Am Giant
Ian Munro
Israel Starr
Janine
Jenny Mitchell
JessB
Jon Toogood
Jonathan Bree
Katchafire
Kimbra
Ladi6
Latinaotearoa
Liam Finn
Lontalius
Lord Echo
Lorde
Louis Baker
Luckless
Mark de Clive Lowe
Marlon Williams
Mel Parsons
Merk
Miss June
Mitch James
Modern Māori Quartet
Montell2099
Nadia Reid
Neil Finn
Nomad
NRG Rising
Opiuo
Orchestra of Spheres
Pieter T
Pitch Black
Princess Chelsea
QUIX
Raiza Biza
Rhombus
Ria Hall
Rob Ruha
SACHI
Shapeshifter
Shihad
Sola Rosa
Sons Of Zion
State Of Mind
Tali
Tami Neilson
TEEKS
The Adults
The All Seeing Hand
The Beths
The Black Seeds
The Naked and Famous
The Upbeats
Thomas Oliver
Tim Finn
Tiny Ruins
Tomorrow People
Topp Twins
Truth
Tunes Of I
Ulcerate
Unknown Mortal Orchestra
Wax Chattels
Yoko-Zuna
Yukon Era
Yumi Zouma

13. OTHER REVENUE STREAMS

Synchronisation

A potentially lucrative method for songwriters, composers and artists to generate another form of revenue and, in some instances, expose their music to a completely new audience is synchronisation. A 'synch' is when a musical work or sound recording is included in an advertising promotion, television programme, film, or video game – where music is synchronised to video.

Generally, upfront licence fees are negotiated by the rights holders for the initial synchronisation of the music at the outset, and then there may be additional communication royalties collected when the advertisement or programme is subsequently broadcast. Recorded Music New Zealand and APRA AMCOS collect royalties for artists, songwriters and composers when those advertisements, TV programmes, and films are subsequently broadcast in New Zealand and, if they are broadcast around the world, the broadcasts are licensed in each territory and royalties collected and distributed to rights holders here.

Advertising campaigns can be the most lucrative types of synch, but are relatively rare for local artists and in New Zealand there are few opportunities available annually. Some artists, songwriters and composers don't wish their work to be commercialised in this way or associated with products that they themselves don't believe in. Notable advertising synchs might be New World's synch of Avalanche City's 'Love, Love, Love'[35] Teek's 'Never Be Apart' used by 2Degrees, and Gin Wigmore's 'Man Like That'[36] which was picked up by Heineken (tying in with the James Bond film, 'Skyfall'). These licences can provide significant and meaningful returns to the artist, songwriter, music publisher and record companies.

Television and film synchs are more common but do not return the same level of revenue as advertising synchs. International film synchs are slightly more fruitful for artists, particularly if they appear in big budget international films with a global release, but these are very rare. Historic examples include Savage's 'Swing' appearing in the US film 'Knocked Up'[37] and Bic Runga's 'Sway' in US film 'American Pie'[38].

Brand partnerships

As an artist becomes more well known they develop a high-profile brand presence, which is often sought after by corporations and organisations in marketing. These brand partnerships are generally forged between the artist's manager or record company and offer another revenue stream for the artist. Examples of recent brand partnerships include Anika Moa and her long relationship with Mazda, Kings and Air New Zealand, Tiki Taane and Hyundai Ioniq[39], and TrustPower with Age Pryor, Laughton Kora, Chris O'Connor and Emma Eden[40].

Hyundai have been progressively moving forward with their electric and hybrid vehicles, which I'm really into. So together we've come up with an exciting plan that will see me touring this summer in the new Hyundai Ioniq. This car is a fully electric-powered vehicle with zero carbon emissions and that's really exciting. My kids are so excited, too, and can't wait to ride around in it. This is the future and this will be their reality one day soon, so to be able to share this experience with them now will be unforgettable.

TIKI TAANE

ARTIST & SONGWRITER

[35] https://www.youtube.com/watch?v=ARJKfuKzeN0
[36] https://www.youtube.com/watch?v=FcsRI-CqSOM
[37] https://www.imdb.com/title/tt0478311/soundtrack
[38] https://en.wikipedia.org/wiki/Sway_(Bic_Runga_song)
[39] http://evtalk.co.nz/tiki-taane-touring-in-a-hyundai-ioniq/
[40] http://www.campaignbrief.co.nz/2018/03/new-zealand-musicians-collabor.html

Brand association can mean financial support for musicians and large and enthusiastic audiences for brands –

The Guardian UK[41]

Brand partnerships also extend to business-to-business interactions. By way of example, Recorded Music New Zealand has a long standing partnership with Mediaworks as production and broadcast partner and Vodafone as main sponsor of the annual New Zealand Music Awards.

The VNZMA's are the longest standing arts and culture awards event in New Zealand, annually celebrating the achievements of New Zealand music, recording artists, and performers for the past 53 years. A world class event of national significance, it provides the most highly visible and important platform to showcase and celebrate the achievements of our outstanding musical community. Without the support and involvement of Vodafone and Mediaworks (and other partners, sponsors and media) the event would not be able to showcase and celebrate our New Zealand artists and their music and expose that to a huge Kiwi audience.

Brand partnerships are also emerging in private and public sector collaboration. NZ On Air has recently partnered with Spark to create the 'Spark Presents NZ On Air Showcase series'.

> *"Partnering with Spark has given us the opportunity to expose these artists to a larger audience through Spark's various platforms and relationships, and for us that means more engagement with the New Zealand public for these artists.*
>
> **JEFF NEWTON[42]**
> NZ On Air Broadcast Promotions Executive

Merchandising

While selling merchandise such as posters and T-shirts has been commonplace for decades in the industry, these have predominantly been supplementary business ventures often tied in with live performance and concerts. Nowadays, music merchandising has become a business in its own right.

In New Zealand, music merchandising is gaining popularity among artists. Shapeshifter has an online store dedicated to its merchandise that includes clothing and jewellery alongside its CDs and Vinyl. Kings has brought out his own clothing line, SIX60 offers a wide range of shirts, hoodies and hats for men and women, and Alien Weaponry has an extensive range of T-shirt designs and completely sold out of its merchandise on its 2017 European tour where the group played at massive European music festivals Metal Days and Wacken.

[41] Knight, Mark. "When bands meet brands: the mutual benefits of music partnerships" in The Guardian. 14 October 2015. https://www.theguardian.com/media-network/2015/oct/14/bands-brands-benefits-music-industry-partnerships

[42] "Spark and NZ On Air team up to support local musicians". NZ Herald. 25 October 2018. https://www.nzherald.co.nz/sponsored-stories/news/article.cfm?c_id=1503708&objectid=12147710

14. RESOURCES

Authors of The NZ Music Industry/ Te Ahumahi Puoro Aotearoa

Recorded Music New Zealand
recordedmusic.co.nz

APRA AMCOS
apraamcos.co.nz

New Zealand Music Commission
Te Reo Reka O Aotearoa
nzmusic.org.nz

Independent Music New Zealand
indies.co.nz

Music Managers Forum
mmf.co.nz

Other resources

Recorded Music New Zealand Revenues 2018
https://www.recordedmusic.co.nz/nz-recorded-music-revenues-top-100-million-in-2018/

Economic contribution of the music industry in NZ (PwC)
https://www.recordedmusic.co.nz/wp-content/ploads/2018/12/NZ-Music-Industry-Economic-Report-2017.pdf

Overseas Earnings for NZ Musicians 2012–2016 (PwC 2017)
https://www.recordedmusic.co.nz/wp-content/uploads/2019/03/2012-2016-EXPORT-report-FINAL.pdf

WeCreate - Growing the Creative Sector
https://wecreate.org.nz/#1

IFPI Global Music Report 2019
https://www.ifpi.org/downloads/GMR2019.pdf

Music Consumer Insight Report (IFPI 2018)
https://www.ifpi.org/downloads/music-consumer-insight-report-2018.pdf

Investing in Music (IFPI 2016)
https://investinginmusic.ifpi.org/

Music Consumer Study November 2018 (Horizon Research 2018)

Same Heart New Beat (Musonomics 2018)
http://musonomics.org/modernlabelreport

Where are the audiences? (NZ On Air August 2018)
https://www.nzonair.govt.nz/research/where-are-audiences-2018/

The Economic Impacts of Counterfeiting and Piracy (BASCAP 2016)
https://iccwbo.org/publication/economic-impacts-counterfeiting-piracy-report-prepared-bascap-inta/

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P98 Aaradhna 2018 APRA AMCOS Silver Scrolls (Photo: James Ensing-Trussell, Topic Photography)

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SECTION 4
ANNEXES

ANNEXES

NZ Music Industry Submission

1. Horizon Music Consumer Study November 2018
2. Stakeholder Strategies analysis of losses from music piracy
3. Economic Impact of the Music Industry in 2017, PWC

Music Consumer Study 2018

New Zealand

November 2018

Summary

HorizonResearch, on behalf of Recorded Music New Zealand, studied how people in New Zealand listen to, discover, and **consume music**.

1,230 New Zealand internet users aged **13-64** were interviewed in November 2018. The sample was representative of the New Zealand internet population.

61% listened on **audio streaming** services

65% listened to music on **New Zealand radio** every day

16.7 **hours** listening to music each week

63% Listened on **video streaming** services

24% NZ internet users **pirated music** in last three months

81% listened to music using **streaming**

51% said streaming was their **music listening choice**

20% downloaded music through **stream ripping**

1. Music consumption

New Zealanders enjoy music in a variety of ways

Licensed audio streaming	Licensed video streaming	Licensed purchasing	Digital piracy	Radio
61%	63%	33%	24%	90%

Licensed audio streaming:
- Free audio streaming: 39%
- Paid audio streaming: 37%

Digital piracy:
- Stream ripping: 20%
- P2P/Lockers: 10%

Radio:
- Traditional radio: 88%
- Online NZ: 49%
- Online overseas: 18%

"Users" are defined as those using in the **past 3 months** to consume music.

Note: These figures are percentages of users. Overall percentages using each source are nett figures for the source (e.g. some respondents use paid streaming and free streaming)

How do people in NZ listen to music?

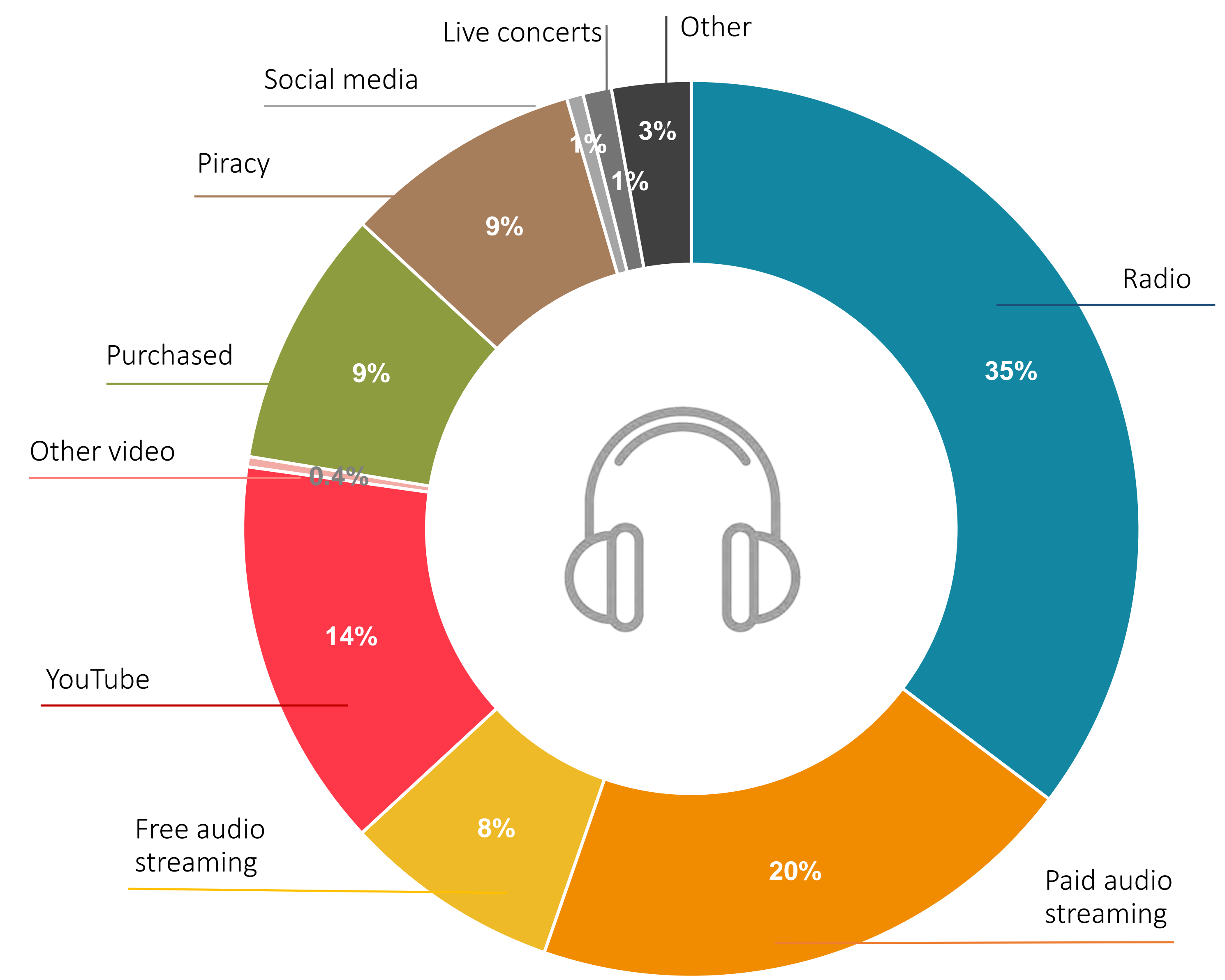
We asked people how many hours they listen to music through various sources in a typical week.

The average user in New Zealand spent

16.7 hours

listening to music each week –

over two hours every day



Source: Q16. In a typical week how many hours do you spend listening to music in the following ways?
Base: All listening 1+ hours per week (excluding those over 70 hours) (N=1115 respondents)

Younger consumers are committed to on-demand streaming – older consumers prefer the radio.

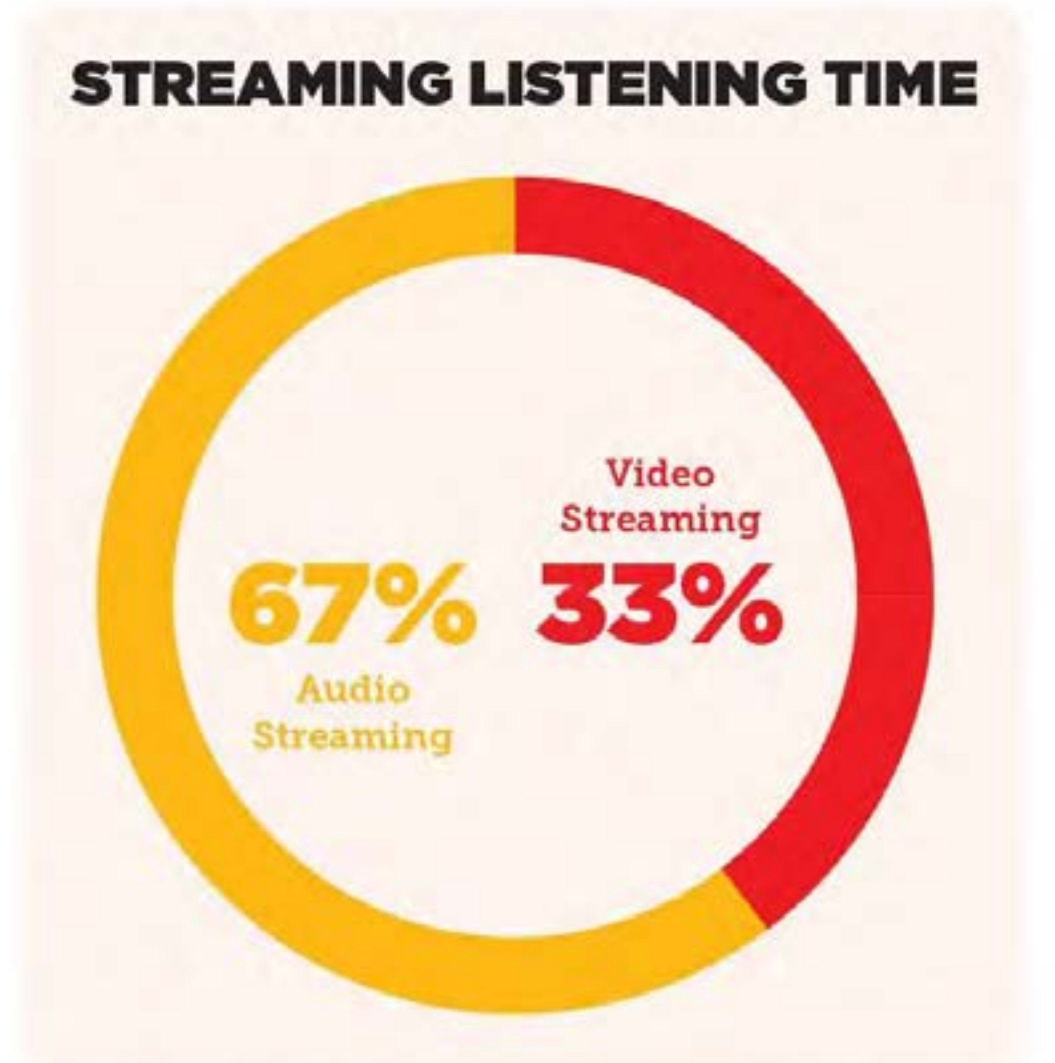
Age	Streaming (approx.)	Radio (approx.)
18-24		
25-34		
35-44		
45-54		
55-64		

For 18-24s, 62% of music listening time is through audio and video streaming (e.g. Spotify and YouTube)

In contrast, more than half of all music is listened through the radio for 55-64s.

Source: Q16. In a typical week how many hours do you spend listening to music in the following ways?
Base: All listening 1+ hours per week (excluding those over 70 hours) (N=1115 respondents)

The value gap: video streaming is one-third of on-demand listening time but returns less than one-tenth of streaming revenues in New Zealand

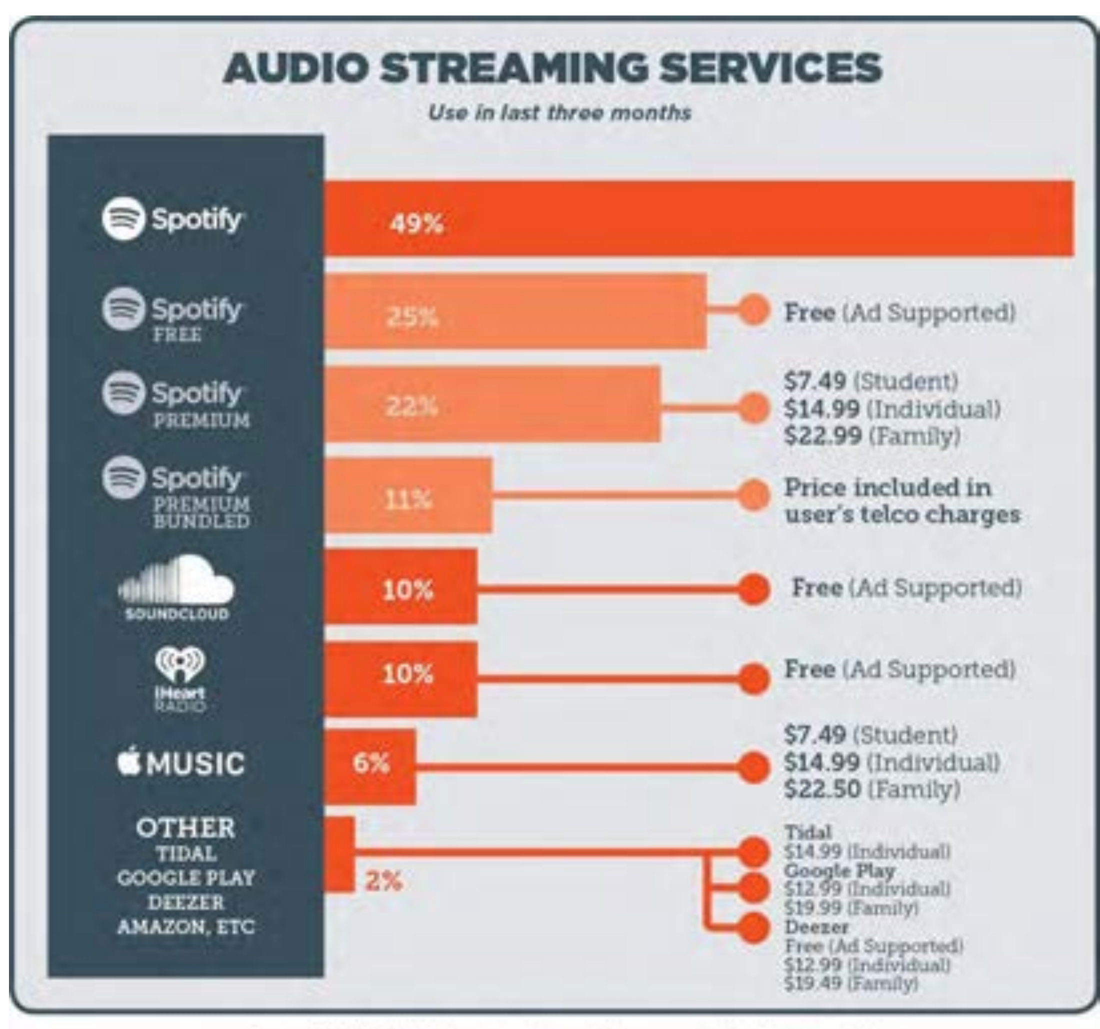


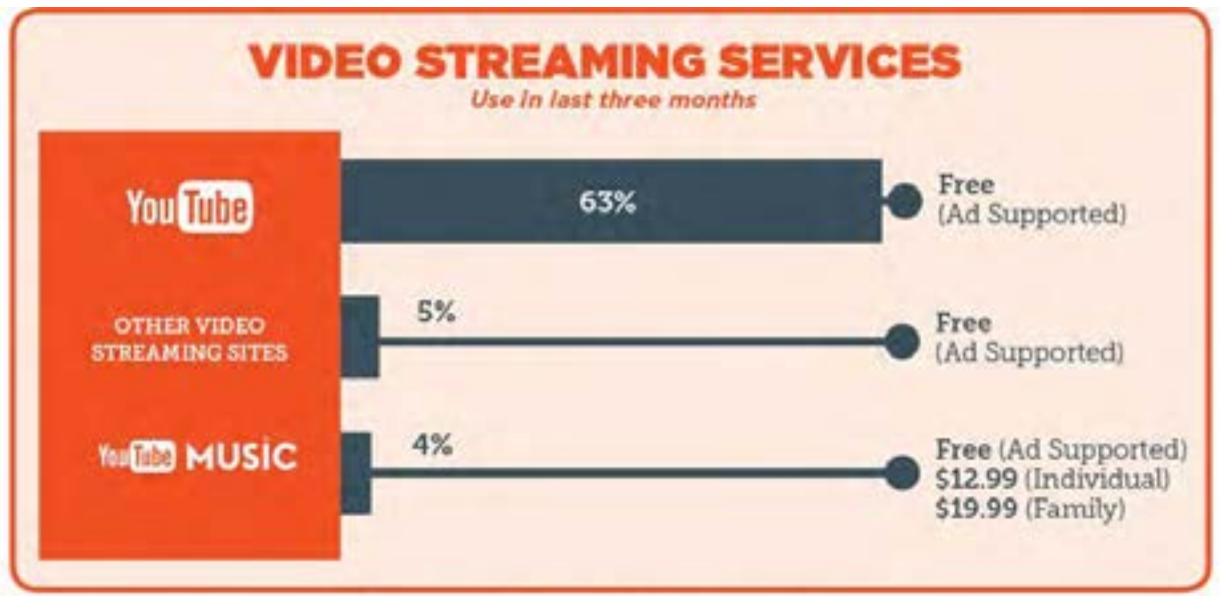
Sources: Q16. In a typical week how many hours do you spend listening to music in the following ways?

Recorded Music NZ Annual Report & Horizon Consumer Research Study 2018

2. Licensed Music Consumption

On-demand streaming services in NZ: Spotify and YouTube most popular





37%
used a paid audio streaming service

39%
used a free audio streaming service

Paid streaming popular with young

56% of 18-24s had used a paid music streaming service in the last three months

	Paid	Free
Total		
18-24		
25-34		
35-44		
45-54		
55-64		

Paid & Free streaming use over the past 3 months

Younger demographics, typically most engaged with music, were most likely to respond to the attractions of **paid music streaming** services like Spotify Premium.

Older consumers preferred to stream for free, taking advantage of **free and ad-supported music streaming**.

Source: Q7.5 Which of these streaming services have you used to listen to music? (N=1230 respondents)

Why did some users not pay for music streaming?

50%
40%
30%
20%
10%
0%

18-24 25-34 35-44 45-54 55-64

45% of 18-24s didn't pay for a music streaming service bceause of the influence of free music on **YouTube**

46% of 55-64s found all the music they wanted on the **radio**

■ Anything I want to listen to is on YouTube ■ Listening to the radio gives me all the music I want

Younger demographics, typically most engaged with music, were most likely to respond to the attractions of **paid music streaming** services like Spotify Premium.

Older consumers preferred to stream for free, taking advantage of **free and ad-supported music streaming**.

Source: Q21.5. What are you main reasons for not paying for a music subscription service?
Base: Those without a paid subscription (N=668 respondents)

Older demographic still purchasing physical copies

	I bought music on CD or DVD	I bought music on vinyl
18-24		
25-34		
35-44		
45-54		
55-64		

61% of 45-54s had bought music on **CD or DVD** in the last three months

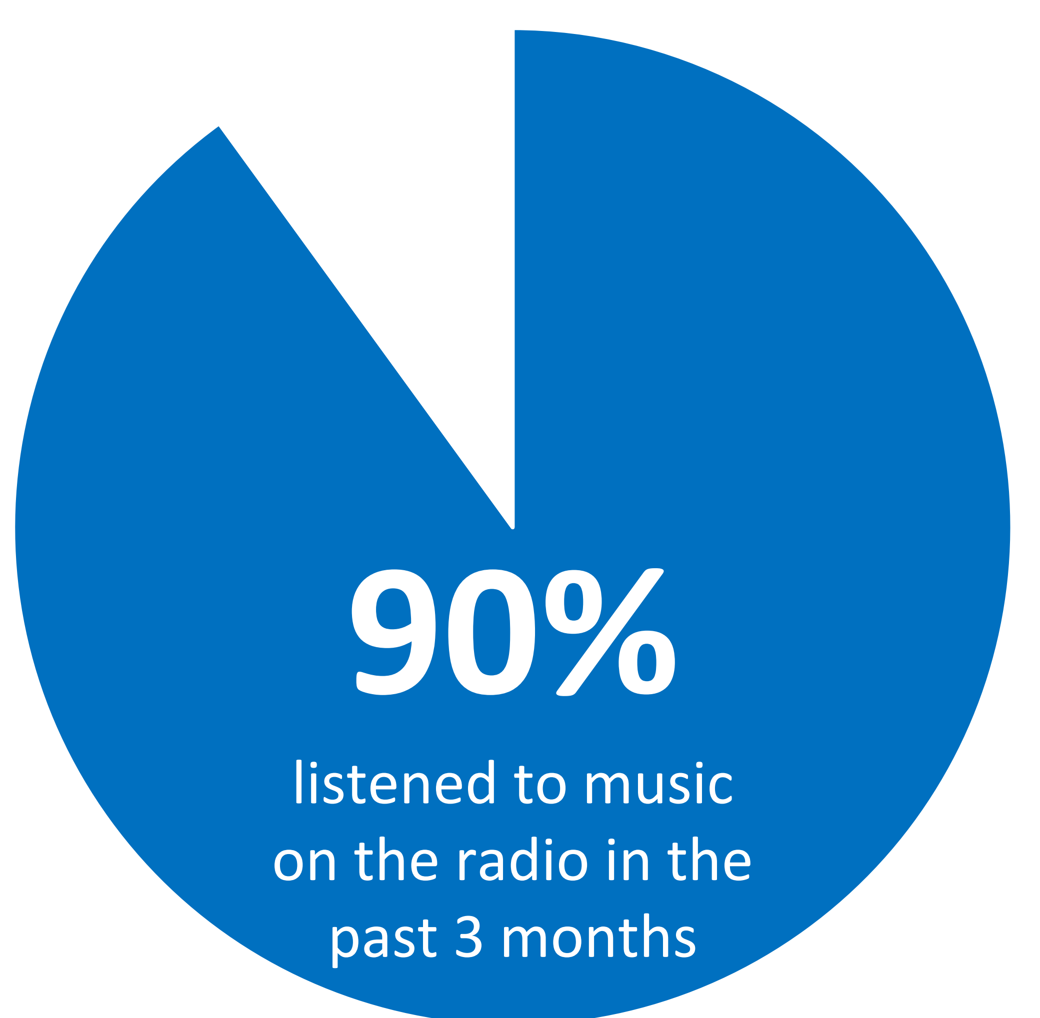
The **resurgence of vinyl** as a way to listen to music is particularly marked amongst older age groups

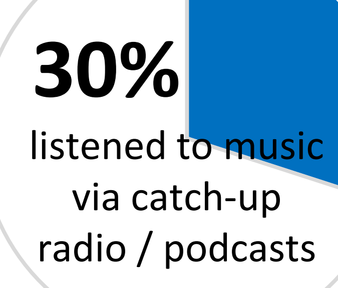
Y-axis: 0%, 10%, 20%, 30%, 40%, 50%, 60%, 70%

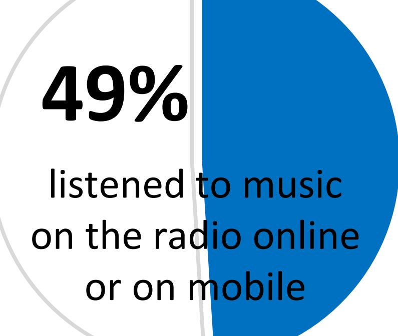
Younger age groups may have rapidly adopted music streaming but occasional **purchasing of music** remains popular. **More than half** of 45-64s have bought music on CD or DVD in the past 3 months, and 20% of 45-64s have purchased vinyl in the past 3 months.

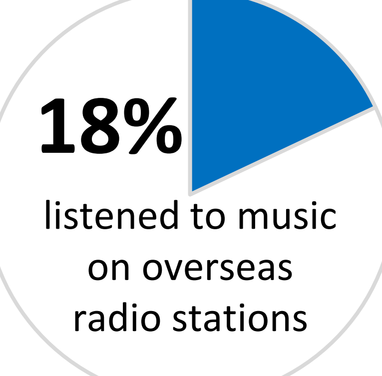
Source: Q5.8 Have you personally done any of the following? (N=1,230 respondents)

Radio remains a popular music source









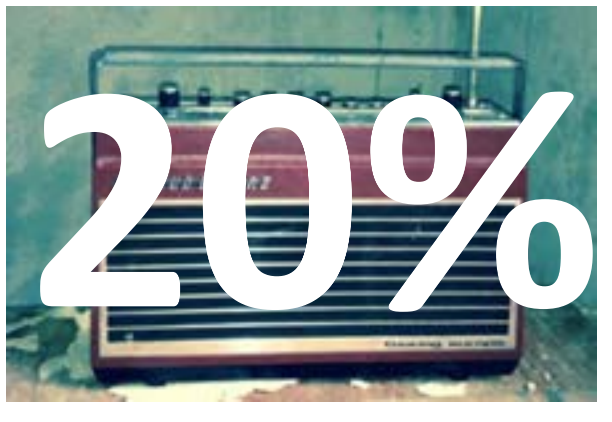
Source: Q2. In which of these ways, if any, have you listened to music on the radio?
Base: All respondents (N=1,230)

If users had to choose only a single way to listen to music, more than half chose on-demand streaming

Audio Streaming

(46% of 18-24s)

Video Streaming



Radio

(37% of 55-64s)

Piracy

CDs

Downloads

Vinyl

Source: Q40. If you had to select only one method for listening to music, what would it be? (n. 2,000 respondents)

3. Unlicensed music consumption

Almost one-in-four New Zealand internet users downloaded music via unlicensed means

	All	13-17	18-24	25-34	35-44	45-54	55-64
	24%	46%	35%	27%	21%	16%	19%

50%
40%
30%
20%
10%
0%

24% of New Zealand internet users had downloaded music via pirated means in the last three months.

Piracy rates were **highest in the youngest age groups**, a finding common across all countries. Approaching half of all 13-18s and more than one-third of 18-24s had pirated music.

Source: Q8.4. There are also other ways to find music online. Which of the following, if any, have you used as a way to listen to or obtain music? (N=1230 respondents)

Stream ripping was the most-used music piracy method with high rates amongst youngest

	All	13-17	18-24	25-34	35-44	45-54	55-64
	20%	42%	33%	21%	15%	11%	17%

20% of New Zealand internet users had used stream ripping to pirate music in the last three months.

The ability to download music tracks from sites like YouTube was attractive because it was free and because it allowed users to listen offline without having to pay for a premium streaming service.

Source: Q8.4. There are also other ways to find music online. Which of the following, if any, have you used as a way to listen to or obtain music? (N=1230 respondents)

Two-out-of-three use more than one unlicensed means of downloading music

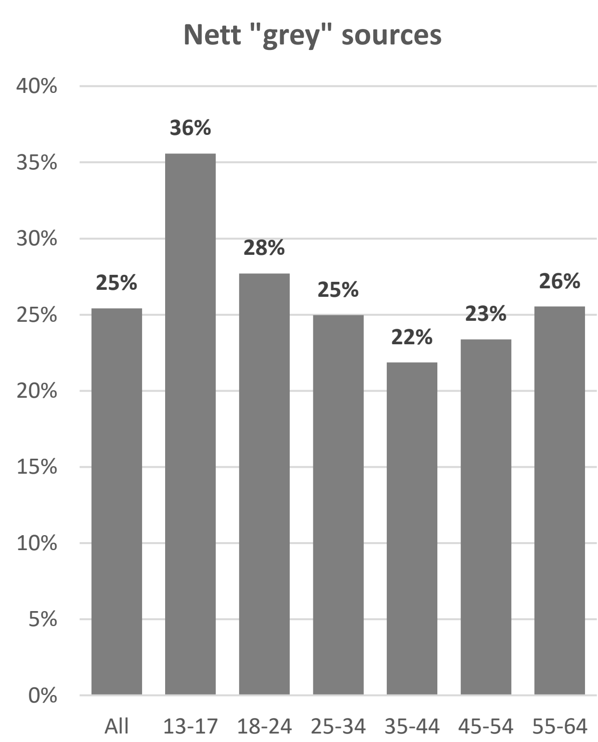
Stream ripping	20%
Mobile app piracy	8%
File Hosting/ cyberlockers	5%
BitTorrents	6%

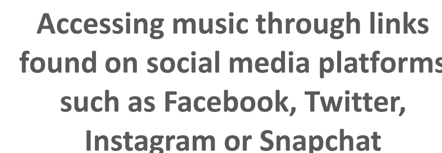
10% nett

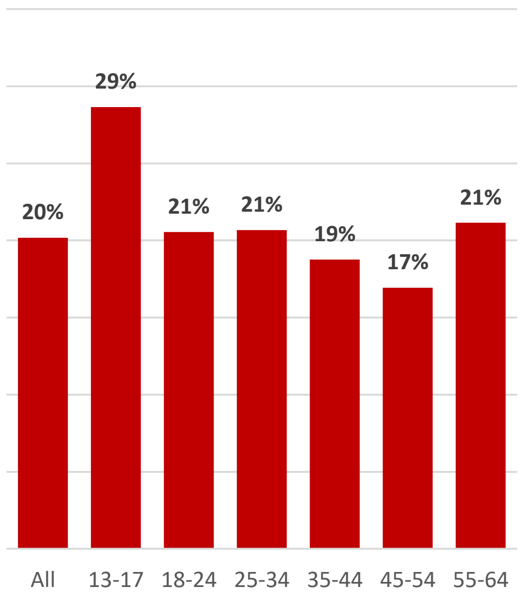
24% nett piracy

Source:
Q8.4. There are also other ways to find music online. Which of the following, if any, have you used as a way to listen to or obtain music? (N=1230 respondents)
Q9.8. Have you used any of the following methods to make a download of music content from YouTube or another similar streaming site? (N=1230 respondents)
Q11.6. Have you used any of the following websites or apps to listen to or download music in the past three months? (N=1230 respondents)

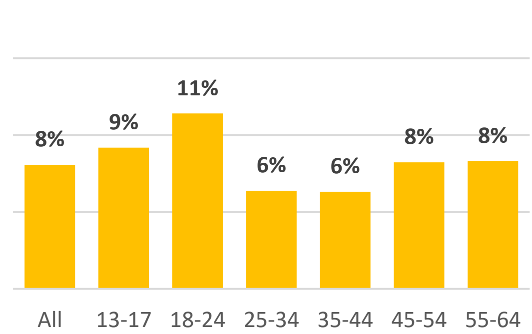
Piracy in “grey” channels more difficult to measure





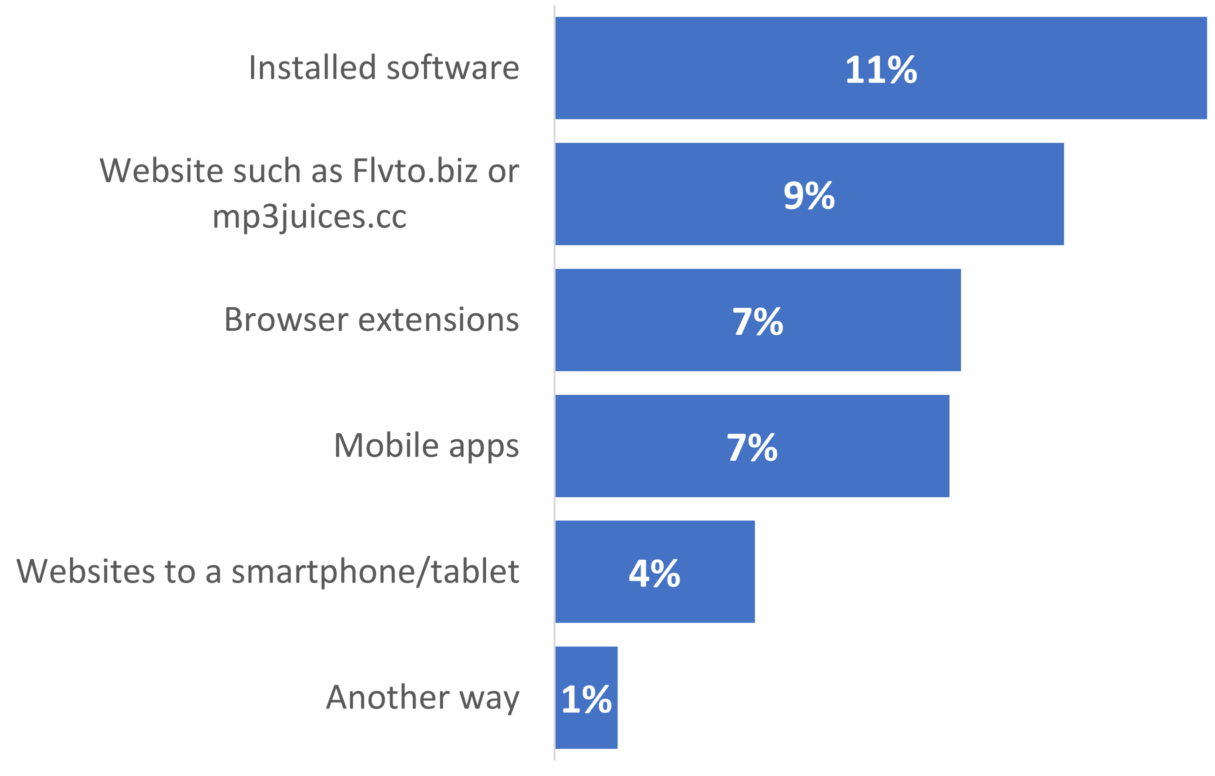


Downloading or streaming music for free from the internet, without really being sure where it comes from



Source: Q8.4. There are also other ways to find music online. Which of the following, if any, have you used as a way to listen to or obtain music? (N=1230 respondents)

Variety of methods used for stream ripping



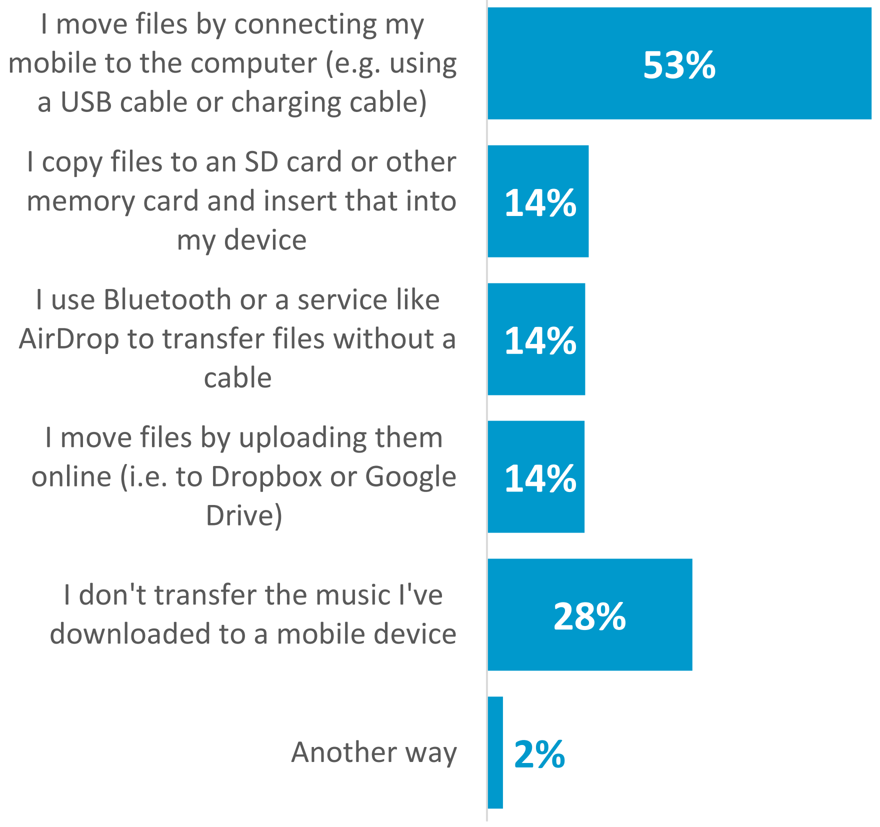
Source: Q9.8. Have you used any of the following methods to make a download of music content from YouTube or another similar streaming site? (N=1230 respondents)

Most stream rippers transfer music to mobile devices

72%

of those stream ripping are then transferring the music to mobile devices

Physical connection is the primary transfer method



Source: Q9.9. You have told us that you download music from YouTube or a similar site to your desktop computer or laptop. How, if at all, do you then transfer that music to your mobile device? (N=279 respondents)

Why did users engage in stream ripping?

It's free / You don't have to pay to get the music you want
To sample music before you buy
You can listen to music you are not willing to pay for
No banking details or account needed

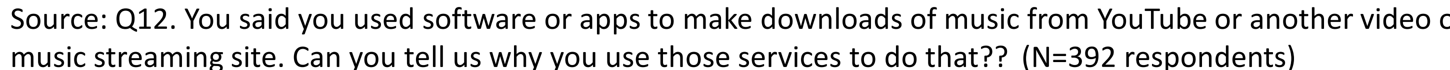
FREE

53% gave at least one reason related to payment – most commonly, that stream ripping provides **free music**.

Listen on a mobile device even with no internet connection
Access music offline without paying
Don't have to use my phone's data allowance to listen to music
Listen to music while on the go without having to pay

OFFLINE

53% said they used stream ripping because it lets them **listen offline without paying** – a key feature of paid streaming services.

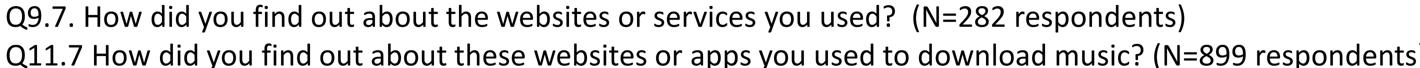

Source: Q12. You said you used software or apps to make downloads of music from YouTube or another video or music streaming site. Can you tell us why you use those services to do that?? (N=392 respondents)

Search engines are an important way to discover pirate sites

	NETT	File hosting, cyberlockers, file sharing, P2P service, streaming or downloading music without being certain of source	Stream ripping
Through word of mouth / someone told me about it	53%	54%	50%
I used a search engine like Google to find ways to download free music	35%	43%	33%
On a social network like Facebook / Twitter / Snapchat / Instagram	22%	26%	17%
Another way	16%	4%	7%

35% are using an internet search engine to find ways to download free music *(from services such as file hosting , cyberlockers, file sharing, P2P services, streaming, or downloading music without being certain of source).*

22% are finding pirate sites using social media networks.



Source:
Q9.7. How did you find out about the websites or services you used? (N=282 respondents)
Q11.7 How did you find out about these websites or apps you used to download music? (N=899 respondents)

If piracy wasn't possible, three-quarters would turn to licensed services for music

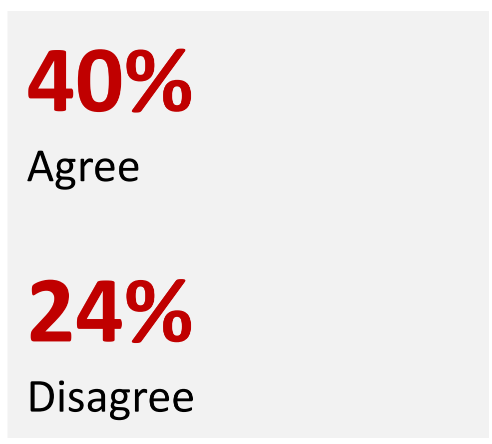
LICENSED: 77%

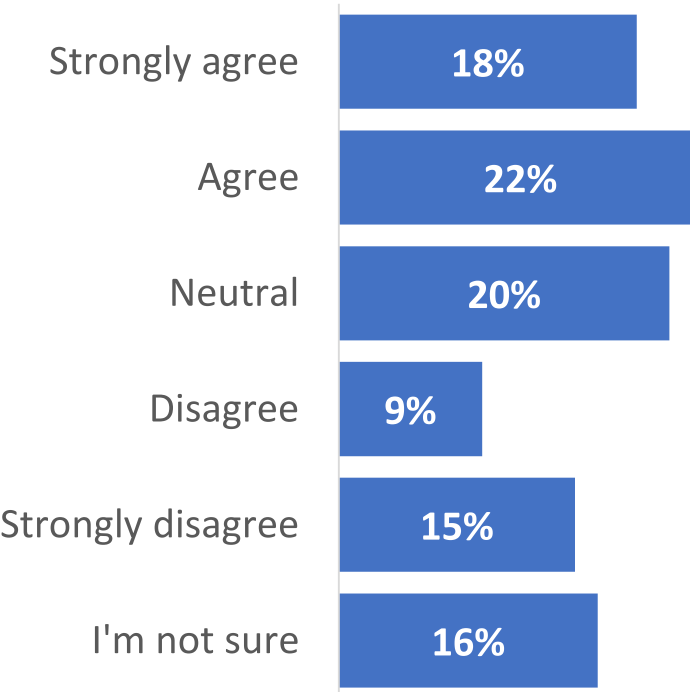
Current method of piracy	Stream from YouTube	Paid streaming	Free streaming	Listen to more radio	Buy d/ls	Find another free download service	Stop listening to music	Something else
P2P / Cyberlockers	27.3%	17.5%	13.0%	15.6%	3.3%	12.6%	2.7%	8.0%
Stream ripping	23.5%	16.3%	13.3%	15.1%	5.6%	12.1%	6.0%	8.1%

LICENSED: 74%

Source: Q9.75 If the file hosting sites, cyberlockers, or file-sharing services such as uTorrent or Pirate Bay (or similar services or apps) you use were closed down or blocked so you couldn't use them, what do you think you would do? (N=282 respondents)
Q12.1 If the sites or apps you use to download music from YouTube were closed down or blocked so you couldn't use them, what do you think you would do? (N=387 respondents)

More people agree than disagree that courts should be able to order website blocking





Source: Q25. How strongly do you agree or disagree with the following statement? New Zealand courts should be able to order Internet Service Providers in New Zealand to block websites that allow illegal access to music.
Base: All (N=1230 respondents)

Methodology

The sample

represents the New Zealand population 13-64 years. Respondents were sampled using age and gender quotas from Horizon's own panels and a specialist third party research panel. 13-15 year olds included with parental permission. Sample weighted to match the New Zealand population 13-64 years at the last available census (2013).

1,230

respondents aged 13-64, representative of the NZ population

Survey carried out between 8-27 November 2018

by Horizon Research Limited on behalf of Recorded Music NZ.

Online survey

Device agnostic, respondents completed on desktop, laptop, phone, or tablet.

Methodology

Questions aligned

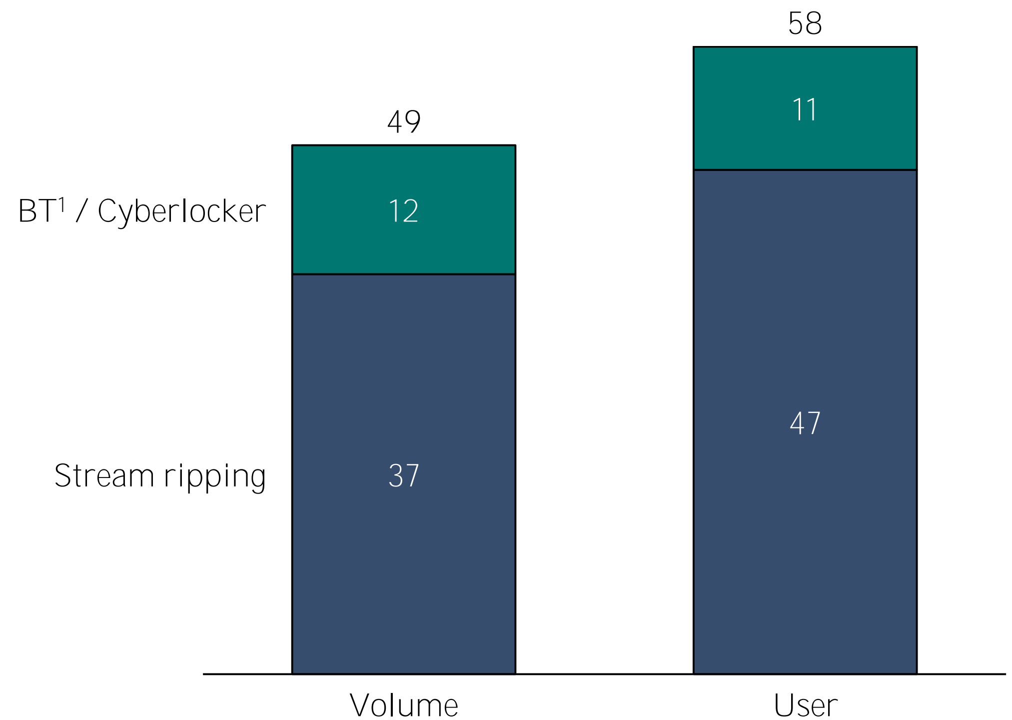
with IFPI's global Music Consumer Study, carried out across twenty markets in 2018.
±2.9% overall margin of error.

Horizon Research *Limited is a full-service marketing research company based in Auckland, New Zealand. It has more than 80 clients, including multi-national and national companies, government departments and agencies, local authorities, iwi, national business and community organisations, communications agencies, tertiary institutions and scientific organisations.*

Horizon undertakes quantitative and qualitative research. It has been specialising in online research since 2005 and operates the HorizonPoll and Horizon Research Maori Panels, representing the New Zealand adult and Maori adult populations at the 2013 census. While most of Horizon's work is online, it also undertakes research by mobile phone, telephone and postal mail.

Horizon also hosts, manages and operates client customer research panels.

NZ MUSIC DIGITAL PIRACY LOSSES ARE ESTIMATED IN THE RANGE OF $48-$60 MILLION



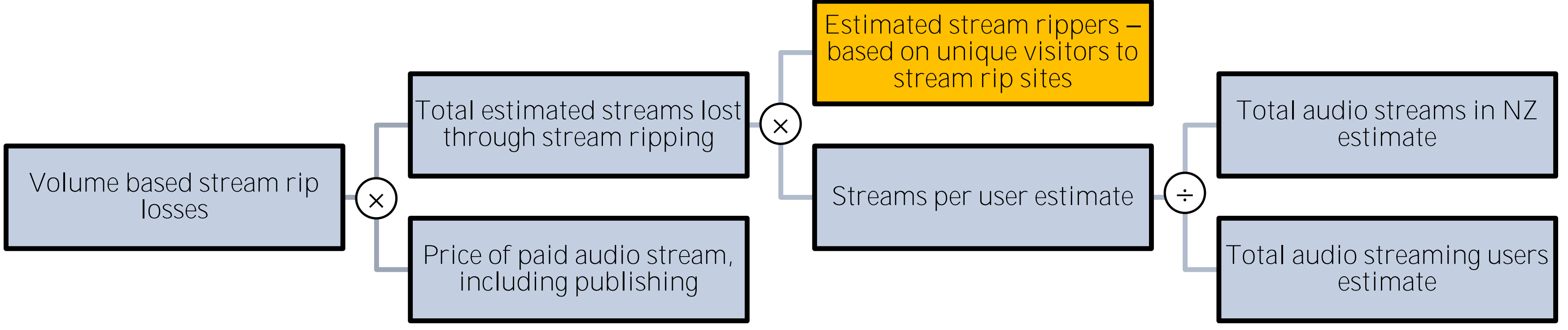
1 BT is an abbreviation of BitTorrent
2 Assumes each pirate consumes the average volume of an audio streamer at the paid audio stream rate
3 both methodologies include publishing revenues

STAKEHOLDER STRATEGIES

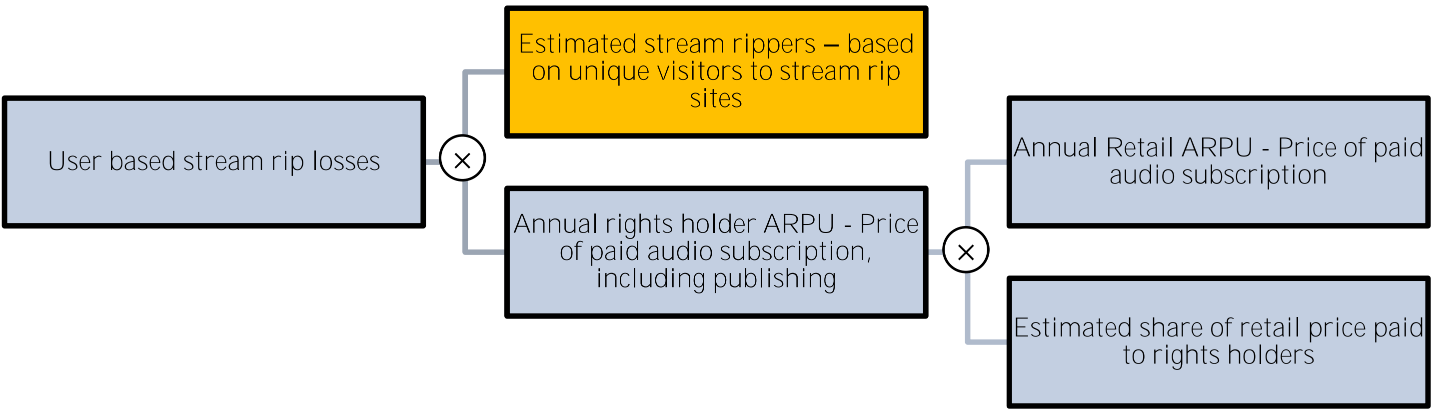
Source: RMNZ, HorizonPoll, Similarweb

BOTH METHODOLOGIES RELY ON ESTIMATE OF PIRATE USERS, BASED ON UNIQUE PIRATE SITE VISITORS

Volume based piracy loss methodology
(Stream rip example[1])



User based piracy loss methodology
(Stream rip example[1])



STAKEHOLDER STRATEGIES

1 Methodology is similar for BT/Cyberlocker

pwc.co.nz

Economic contribution of the music industry in New Zealand 2017

A report for the New Zealand music industry

Estimating the direct and indirect economic impacts of the music industry in New Zealand

December 2018

Damian Vaughan
Recorded Music New Zealand
Private Bag 78 850
Grey Lynn
Auckland 1245

21 December 2018

Dear Damian

Economic contribution of the music industry in New Zealand

We are pleased to provide our report on the economic contribution of the music industry in New Zealand. This report contains the analysis of the music industry in New Zealand.

This report is provided in accordance with our terms of engagement dated 30 June 2017, and is subject to the Restrictions set out in Appendix C.

If you require any clarification or further information, please feel free to contact us.

Yours sincerely

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(09) 355 8641

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Director
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(09) 355 8153

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Executive summary

2017 was a successful year for the New Zealand music industry, after a mixed 2016. The substantial increase in annual economic contribution was primarily driven by strong growth in streaming revenues and a good year for live music.

2017 economic contribution estimate

We estimate that the New Zealand music industry directly contributed $292m to national gross domestic product (GDP), and $639m in total (after accounting for multiplier effects).

We also estimate that the industry directly contributed over 2,500 full-time equivalent (FTE) jobs, and over 5,500 FTEs in total.

Table 1 Estimate of overall economic impact of the music industry in New Zealand, 2017

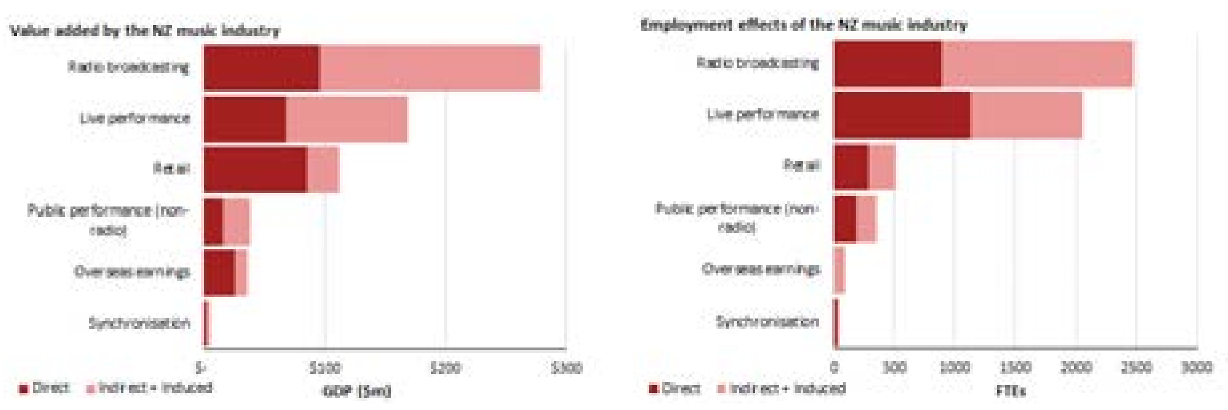
Industry sector	Total sales ($m)	Value added (GDP, $m)		Employment (FTEs)	
		Direct impact	Total impact	Direct impact	Total impact
Retail	131	85	112	288	509
Physical music	*23*	*17*	*26*	*107*	*181*
Downloads	*20*	*12*	*16*	*33*	*60*
Online Streaming	*89*	*55*	*71*	*148*	*268*
Public performance (non-radio)	50	16	39	194	350
Radio broadcasting	240	96	279	891	2,481
Live performance	126	68	168	1,132	2,050
Synchronisation	4	2	5	28	51
Overseas earnings	25	25	36	-	94
Total	**576**	**292**	**639**	**2,533**	**5,535**

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Note: Overseas earnings figures are an average over 2013-16, based on survey data. No survey data was collected for 2017.

The largest subsector continues to be music radio broadcasting, accounting for around 45% of both the total GDP and total employment contribution. Live performance is the next largest subsector. Retail makes a significant contribution toward industry GDP, but has a lower employment impact.

Figure 1 Estimate of overall economic impact of the music industry in New Zealand, 2017



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Overall trends over time

Our estimate of the music industry's economic contribution increased in 2017, following a decrease in 2016.[1] This was driven by growth in retail (particularly streaming) and a strong year for live performance. Our direct GDP estimate is higher than any of our estimates from recent years.

Figure 2 Composition of direct GDP impact, 2014-17

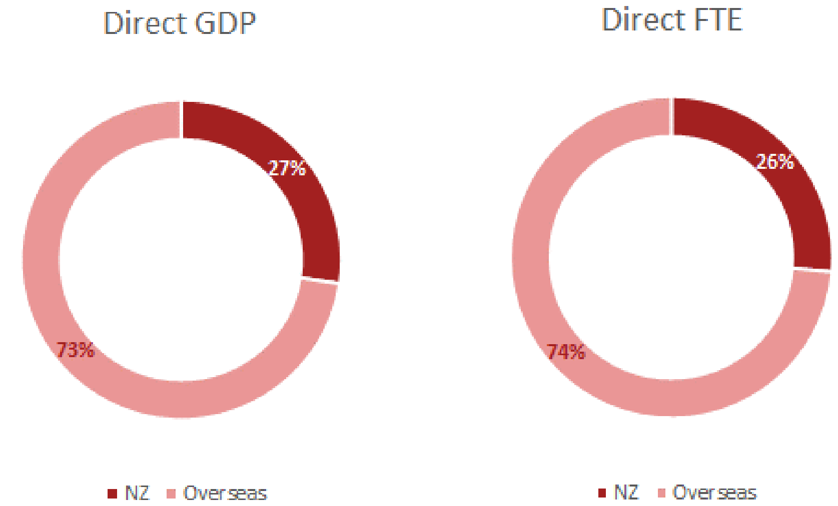
$350m
$300m
$250m
$200m
$150m
$100m
$50m
$0m
2014
2015
2016
2017
Overseas earnings
Synchronisation
Live performance
Radio broadcasting
Public performance (non-radio)
Retail

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

New Zealand generated content

New Zealand generated content accounts for around one quarter of the economic contribution of the New Zealand music industry, with overseas content accounting for the majority.

Figure 3 Share of direct GDP and employment from New Zealand generated content, 2017



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

[1] The decrease in 2016 was the result of fluctuations in live performance, which depends on which shows are scheduled for a given year. Music retail has been consistently growing in NZ from 2014 to 2017.

Retail consumption channels

Revenues for traditional physical music retail has been declining for some time, and this trend continued in 2017. Similarly, download revenues continued to decline. This has been more than offset by the substantial growth in streaming revenues, which have increased five-fold over the last three years.

Figure 4 Retail direct GDP contribution, by consumption channel, 2014-17

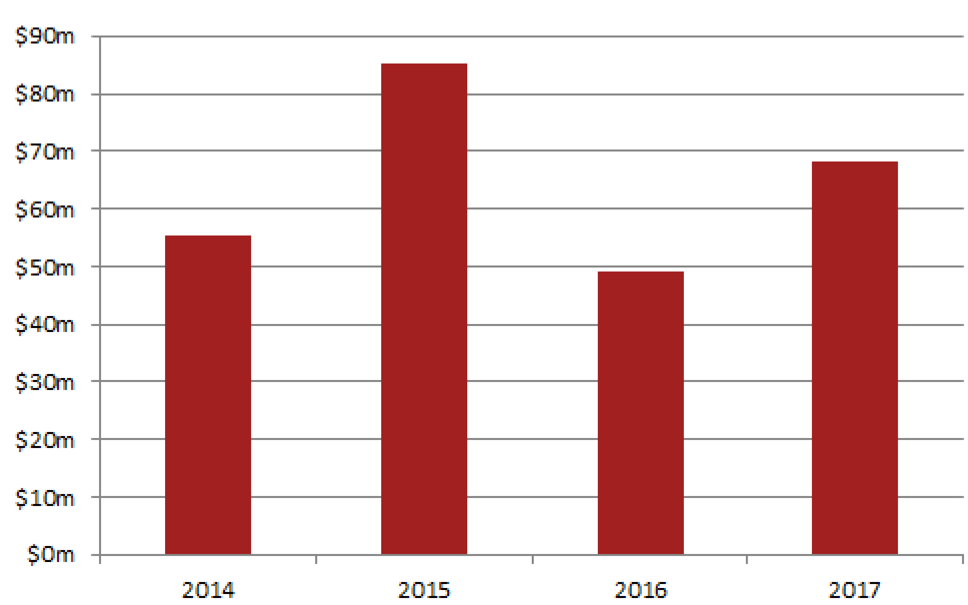
$60m
$50m
$40m
$30m
$20m
$10m
$0m
2014
2015
2016
2017
Physical
Downloads
Streaming

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Live performance trends

Live performance revenues has been relatively volatile over recent years, primarily as a result of the scheduling of different tours. 2017 was significantly better than 2016, but not as strong as the extraordinary year in 2015.

Figure 5 Live performance direct GDP contribution, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Wider impacts

Although this report focuses on estimating the contribution of the music industry in New Zealand to employment and GDP, we emphasise that the industry has a broader cultural and social role to play. Music contributes to New Zealand in a number of other ways that are not measured in GDP. The enjoyment, or utility, that New Zealanders derive from consuming and producing music is likely to be considerable but is not easily quantified.

1. Introduction

The purpose of this study is to estimate the contribution of the music industry to the New Zealand economy. It provides a snapshot of the industry using data for the 2017 calendar year.

In addition, the report provides some broad insights on the trends occurring in New Zealand's music industry that are affecting the impact of the industry on New Zealand's economy.

This report has been commissioned by Recorded Music New Zealand supported with funding from its project partners, the Australasian Performing Right Association Australasian Mechanical Copyright Owners Society (APRA AMCOS) and the New Zealand Music Commission.

This section:

- sets out the purpose and scope of this report
- defines the music industry in New Zealand
- establishes the geographic boundary for the study
- sets out the headline measures reported in this study.

The remainder of this report summarises the direct and total economic impact of the music industry in New Zealand. It estimates the industry's overall contribution to New Zealand's GDP and employment and allocates economic impacts across the five main subsectors of the industry:

- retail
- public performance (non-radio)
- radio broadcasting
- live performance
- synchronisation.

We also report estimated overseas earnings as a separate subsector, comprising income from overseas live performance and recordings and publishing. Our analysis of these earnings is outlined in a separate report released in 2017. We have not collected export revenue date for the 2017 year.

Purpose and scope of report

This report examines some 'bottom-line' measures of the music industry's impact on the national economy. In this respect, it differs from other analyses that focus on the total revenue earned by the industry (eg sales of recorded music or royalties related to communication rights), a 'top-line' measure that does not account for factors such as intermediate inputs purchased from other industries or imported from overseas.

By estimating bottom-line measures, this report enables comparisons between the music industry, other industries, and the economy as a whole. It is intended to provide industry participants and policymakers with a robust basis for understanding the importance of the industry to the New Zealand economy.

We have estimated three measures of the music industry in New Zealand's economic contribution:

- total sales – the gross output of all music industry participants, provided by industry bodies
- value added – the industry's contribution to New Zealand's GDP, which is calculated as the total returns to labour and capital in the industry
- employment – the number of full-time equivalent staff (FTEs) employed as a result of music industry activity.

In addition to its direct economic impacts, an industry will have multiplier effects elsewhere in the economy. In order to do business, firms must purchase inputs from other industries, while the wages and

salaries that they pay will subsequently be spent elsewhere in the economy. These effects fall into two categories:

- **Indirect (or upstream) impacts** occur when businesses in the music industry purchase goods and services from other industries in order to record and produce a song, market an album, or put on a concert.
- **Induced impacts** are generated when the wages and salaries paid out by the music industry are spent on goods and services, thereby stimulating further economic activity.[2]

The **total economic impact** of the industry is equal to the sum of its direct, indirect, and induced impacts. In order to estimate the direct and total economic impacts of the music industry in New Zealand, we have used multiplier analysis based on national input-output tables.[3] We have described our application of multiplier analysis in Appendix B.

We note that economic impact, and GDP contribution, is not the same thing as 'benefit' as would be used in a cost-benefit analysis. While there are methodological similarities, there are a number of differences.

Although this report focuses on estimating the contribution of the music industry in New Zealand to employment and GDP, we emphasise that the industry has a broader cultural and social role to play. Music contributes to New Zealand in a number of other ways that are not measured in GDP. The enjoyment, or utility, that New Zealanders derive from consuming and producing music is likely to be considerable but is not easily quantified. We have not included these effects in our analysis.

Defining the music industry

This report defines the music industry in New Zealand as activities related to the creation, production, distribution, sale, communication and performance of music in New Zealand, regardless of country of origin.

Industry basis

The music industry incorporates a number of distinct activities and related revenue streams. This report seeks to account for this complexity and report its conclusions in a usable and accessible format.

One way to define the music industry is presented in Figure 6.

This study examines the main revenue streams accruing to the industry. These include both sales revenue and royalty payments for the use of music:[4]

- Physical and digital retail sales of music, including traditional store-based retailing, online stores, and the recently introduced payments received for access to music via on-demand streaming services. We refer to this subsector as **retail**.
- Revenue from communication of music played on radio, television, and the internet, and for the public performance of music in premises such as but not limited to retailers, hospitality outlets (bars and cafes), educational institutions, and gyms. We refer to this subsector as **public performance**. Given the size of the radio component of communication and public performance we have included that component separately in our reported tables as **radio broadcasting**.

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[2] We note that there is considerable discussion in economics over the inclusion of induced impacts. We have included induced impacts in order to calculate the total economic impact of recorded music.

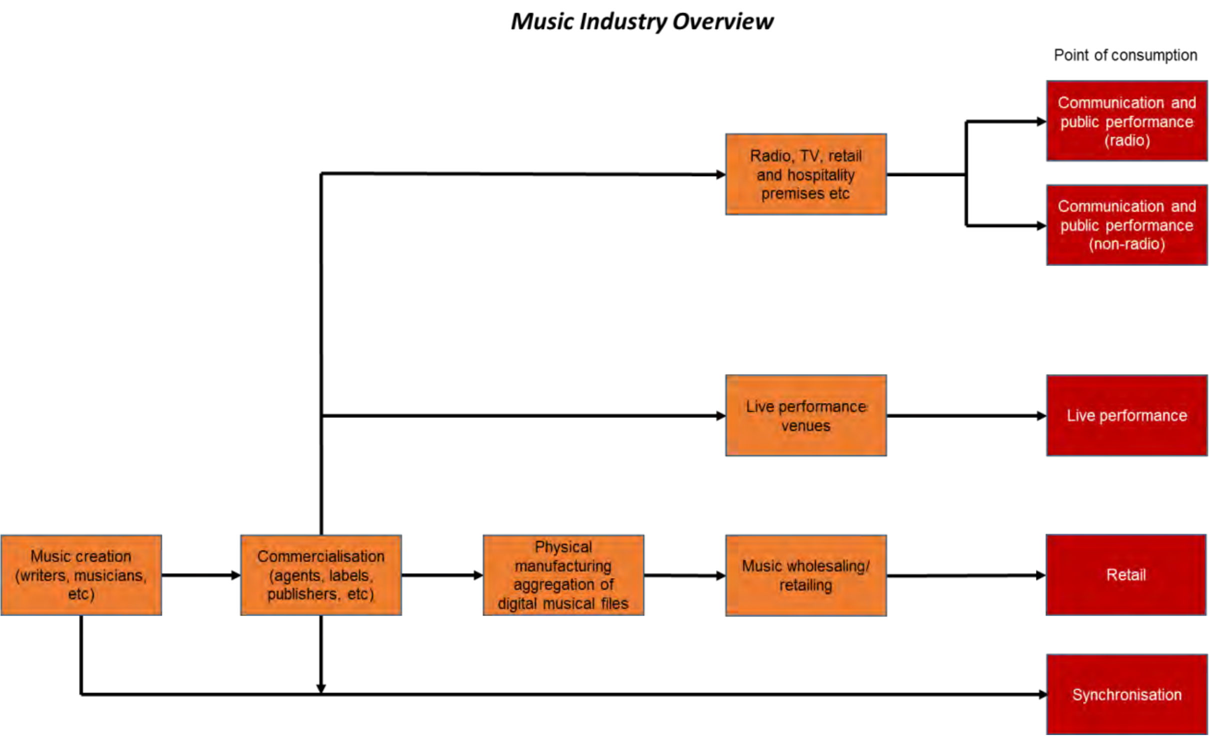
[3] Butcher Partners (2013), *New Zealand 2013 Input-Output Table and Multipliers*, based on Statistics New Zealand data.

[4] There are two royalty streams associated with the commercial exploitation of music. One represents songwriter royalties, stemming from the actual writing of the song. These rights are administered by music publishers and songwriters' collecting societies (eg APRA AMCOS). The second stream relates to sound recordings. These rights are administered by record companies and record company collecting societies (eg Recorded Music New Zealand). Through this report we use data provided by APRA AMCOS and Recorded Music New Zealand.

- Live performances of music, whether in concerts, festivals, or music venues. We refer to this subsector as **live performance**.
- Royalties earned from licensing music for use in advertisements, games, films, and television programmes. We refer to this subsector as **synchronisation**.

We also include the export revenue earned by New Zealand musicians. This is revenue earned outside New Zealand for live performances overseas, and recordings and publishing overseas. We refer to this subsector as **overseas earnings**.

Figure 6 Defining the music industry



These revenue streams are all associated with the consumption of music in different forms or through different channels. But before music can be brought to the consumer, it must be created, commercialised, manufactured, and distributed. Some of these activities are considered to be part of the core music industry, while others are defined as intermediate inputs purchased from other industries.

The following upstream activities are included in our definition of the music industry:

- music creation, including songwriters, musicians, recording studios, etc
- the activities of record companies and music publishing companies, including the recording and commercialisation of music
- the manufacture of physical carriers of music (eg CDs, DVDs) and the aggregation of digital music files for retail
- venue operation for live performances.

Our definition of the core music industry excludes some related industries, such as instrument manufacture and retailing as well as music teaching. Where activities in these industries support the production or consumption of music in New Zealand, we are likely to capture the multiplier effects (as discussed below).

Music expenditures also have an economic impact on other industries. As we have described above, businesses in the music industry must purchase inputs from other industries, while the wages and salaries

that they pay will subsequently be spent elsewhere in the economy. Consequently, the total impact of the music industry will include:

- purchases of intermediate inputs from sectors that are not directly linked to music, such as advertising and marketing, transport services, plastics manufacturing (such as for CDs), accounting and legal services, sound and lighting, and equipment hire
- additional consumer spending in other industries, such as food and beverage retailing, housing, and recreation, resulting from employment within the music industry and supplier industries.

Geographic boundary

This report aims to account for all economic impacts that take place in New Zealand. In order to do so, we have adopted an approach that is consistent with the national accounts statistics produced by Statistics New Zealand. As we discuss in more detail in Appendix B, this approach measures the total value of goods and services produced in New Zealand, rather than the net income of all businesses and individuals located within New Zealand.

In other words, we account for the domestic consumption of music of any origin from New Zealand-based channels. For instance, our measures of economic impact will:

- include activities related to the physical sale of overseas-originated music to a consumer in New Zealand, but exclude the (relatively minor) cost of importing the physical product.
- include income earned by overseas musicians touring New Zealand, as it was earned in New Zealand regardless of whether it is ultimately repatriated elsewhere.

Consistent with our 2016 report, we include payments made to New Zealand recording artists and songwriters from overseas sources. Recent changes to Statistics New Zealand's approach to calculating GDP means that royalties are treated as export revenue, and for the purposes of this study are pure value-add in our analysis.

Bottom line measures of economic impact

We have chosen to use a GDP measure, rather than revenue or an alternative measure that accounts for such inclusions and exclusions, for two reasons. First, GDP impact is the most commonly used measure of total economic impact. It is used by Statistics New Zealand when reporting on the size of the New Zealand economy and in many other economic impact studies. Second, it eliminates the impact of double counting, which is particularly problematic in industries where there are multiple steps before a good is purchased for final consumption.

Treatment of the economic effects of illegal music use

The illegal use of music is beyond the scope of this report. Discussions with industry stakeholders have indicated that it is a significant challenge facing the industry, which has had a significant economic effect.

This report is intended to provide a snapshot of the industry's actual economic impact at a point in time and as a result does not discuss revenue foregone due to the illegal use of music.

We understand that Recorded Music is investigating this issue separately.

2. Economic impact of the music industry in New Zealand

This section summarises the direct and total economic impact of the music industry in New Zealand. It estimates **the industry's overall contribution to New Zealand's GDP and employment and allocates** economic impacts between the five main subsectors of the industry: retail, communication and public performance, music radio broadcasting, live performance and synchronisation.

We also report overseas earnings as a separate subsector. This comprises income from overseas live performance and recordings and publishing overseas.

Sections 3 to 8 provide further detail on each subsector.

Overall industry

The tables below summarise our estimates of the overall economic impact of the music industry in New Zealand.

Table 2 Estimate of overall economic impact of the music industry in New Zealand, 2017

Industry sector	Total sales ($m)	Value added (GDP, $m)			Employment (FTEs)		
		Direct impact	Indirect + Induced	Total impact	Direct impact	Indirect + Induced	Total impact
Retail	131	85	27	112	288	222	509
Physical music	*23*	*17*	*9*	*26*	*107*	*75*	*181*
Downloads	*20*	*12*	*3*	*16*	*33*	*27*	*60*
Online Streaming	*89*	*55*	*15*	*71*	*148*	*120*	*268*
Public performance (non-radio)	50	16	23	39	194	157	350
Radio broadcasting	240	96	183	279	891	1,590	2,481
Live performance	126	68	100	168	1,132	917	2,050
Synchronisation	4	2	3	5	28	23	51
Overseas earnings	25	25	11	36	-	94	94
Total	**576**	**292**	**347**	**639**	**2,533**	**3,002**	**5,535**

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

The main findings of the study are that in 2017:

- The music industry in New Zealand directly added $292m to national GDP and provided the equivalent of approximately 2,533 FTEs.
- The total economic impact of the music industry in New Zealand includes direct, indirect, and induced (ie spending supported by the wages paid by the music industry) impacts. In total, the New Zealand music industry contributed $639m to national GDP and supported 5,535 FTEs.
- Radio broadcasting is the largest subsector by value, making up around 45% of both the total GDP and employment impacts. Together with retail, the second largest subsector, these two make up around 64% of total industry sales and 62**% of the music industry's direct GDP contribution.**

Table 3 Percentage of impacts by revenue stream, 2017

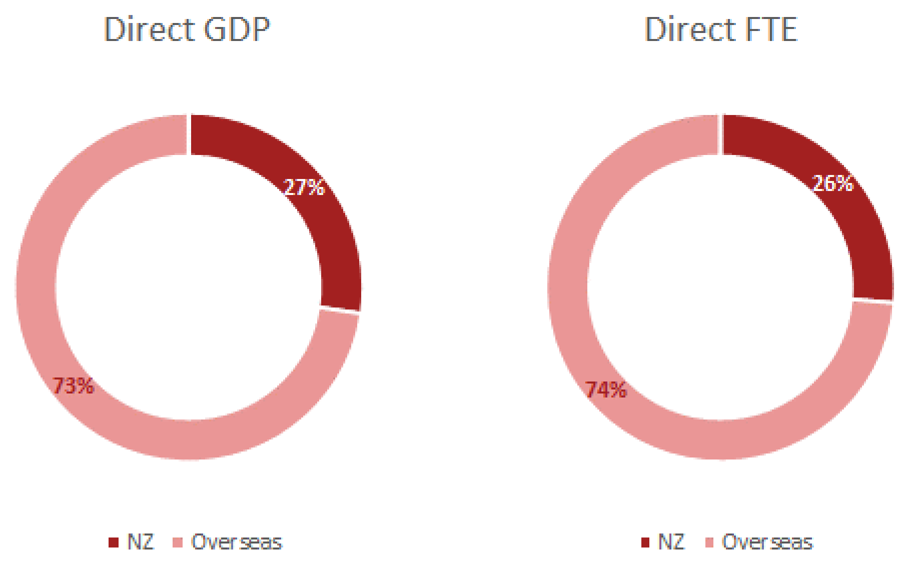
Industry sector	Total sales ($m)	Value added (GDP, $m)		Employment (FTEs)	
		Direct impact	Total impact	Direct impact	Total impact
Retail	23%	29%	18%	11%	9%
Public performance (non-radio)	9%	5%	6%	8%	6%
Radio broadcasting	42%	33%	44%	35%	45%
Live performance	22%	23%	26%	45%	37%
Synchronisation	1%	1%	1%	1%	1%
Overseas earnings	4%	9%	6%	-	2%
Total	100%	100%	100%	100%	100%

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Split between New Zealand and offshore generated content

- In 2017, approximately 27% of the direct contribution to New Zealand's GDP and 26% of the direct contribution to employment was derived from New Zealand generated content.
- This is equivalent to a direct impact of $80m and 669 FTEs from New Zealand generated content. After taking into account indirect and induced impacts, New Zealand content contributed $176m to national GDP and supported 1,448 FTEs.

Figure 7 Share of direct GDP and employment from New Zealand generated content



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Table 4 Estimated economic impact from New Zealand generated content, 2017

Industry sector	Total sales ($m)	Value added (GDP, $m)			Employment (FTEs)		
		Direct impact	Indirect + Induced	Total impact	Direct impact	Indirect + Induced	Total impact
Retail	11	7	8	15	66	52	118
Physical music	*3*	*2*	*1*	*3*	*14*	*10*	*24*
Downloads	*1*	*1*	*1*	*2*	*9*	*8*	*17*
Online Streaming	*6*	*4*	*6*	*10*	*43*	*35*	*77*
Public performance (non-radio)	12	11	16	27	118	96	214
Radio broadcasting	40	16	30	46	148	265	414
Live performance	35	19	28	47	317	257	574
Synchronisation	2	2	2	4	19	16	35
Overseas earnings	25	25	11	36	-	94	94
Total	**125**	**80**	**96**	**176**	**669**	**779**	**1,448**

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Table 5 Estimated economic impact from overseas generated content, 2017

Industry sector	Total sales ($m)	Value added (GDP, $m)			Employment (FTEs)		
		Direct impact	Indirect + Induced	Total impact	Direct impact	Indirect + Induced	Total impact
Retail	121	78	19	97	222	169	391
Physical music	*20*	*15*	*8*	*23*	*93*	*65*	*157*
Downloads	*18*	*11*	*2*	*14*	*23*	*19*	*42*
Online Streaming	*83*	*52*	*9*	*61*	*106*	*86*	*191*
Public performance (non-radio)	38	5	7	11	76	61	137
Radio broadcasting	200	80	152	232	742	1,325	2,067
Live performance	91	49	72	121	815	660	1,476
Synchronisation	2	1	1	1	9	7	16
Overseas earnings	-	-	-	-	-	-	-
Total	**451**	**212**	**251**	**463**	**1,864**	**2,223**	**4,087**

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Trends over time

- Over the 2014 to 2017 period, the industry's GDP and employment has stayed fairly constant, despite structural changes within the subsector components, and the impact of music piracy.
- GDP and employment have increased in 2017, following a reduction in 2016. Our estimate of the GDP contribution in 2017 is almost the same as 2015.
- The primary drivers of recent annual movements are live performance and streaming.
    - Live performance revenues were the main factor behind the significant revenue growth in 2015 and subsequent decline in 2016. Live performance revenues increased again in 2017, but not to the same levels as 2015.
    - Revenues from online streaming have grown steadily over time, and are the key driver behind increasing retail sales. The increase in streaming revenues has more than offset the decline in traditional physical retail consumption (refer to section 3).

Table 6 Estimated GDP impact, 2014-17

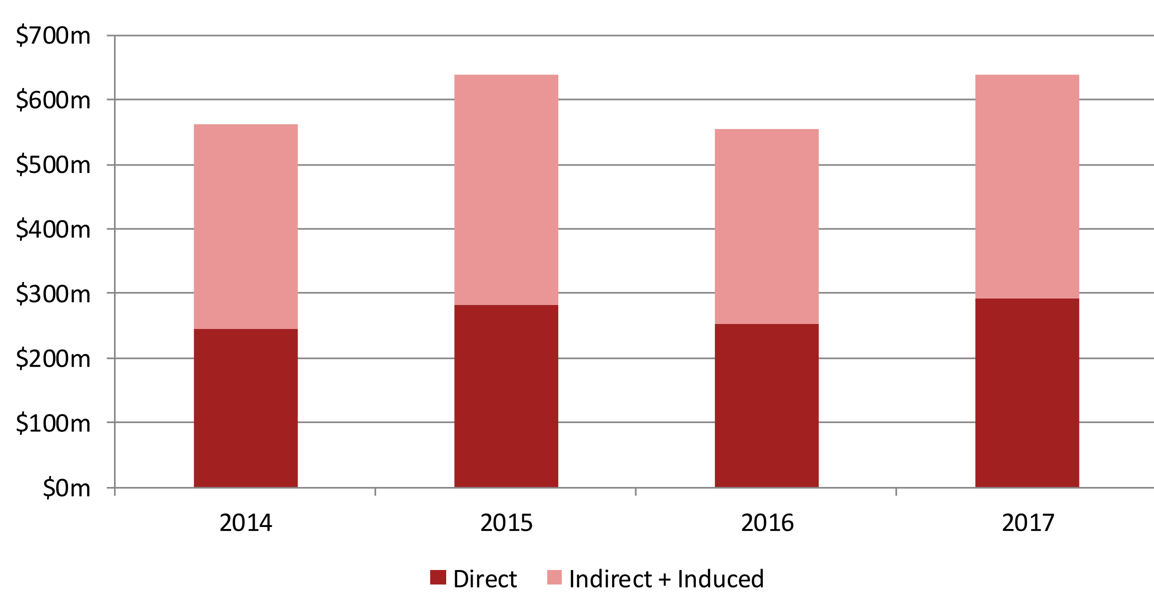
Economic impacts	Direct				Total			
Industry segment	2014	2015	2016	2017	2014	2015	2016	2017
Retail								
Value added (GDP)	$57m	$63m	$74m	$85m	$79m	$87m	$99m	$112m
Employment (FTEs)	258	268	276	288	449	468	485	509
Public performance (non-radio)								
Value added (GDP)	$14m	$14m	$15m	$16m	$34m	$36m	$36m	$39m
Employment (FTEs)	174	183	185	194	315	331	335	350
Radio broadcasting								
Value added (GDP)	$93m	$91m	$89m	$96m	$271m	$265m	$258m	$279m
Employment (FTEs)	893	870	837	891	2,488	2,424	2,331	2,481
Live performance								
Value added (GDP)	$55m	$85m	$49m	$68m	$137m	$211m	$121m	$168m
Employment (FTEs)	946	1,459	826	1,132	1,712	2,641	1,495	2,050
Synchronisation								
Value added (GDP)	$2m	$2m	$2m	$2m	$5m	$5m	$5m	$5m
Employment (FTEs)	28	29	29	28	51	52	52	51
Overseas earnings								
Value added (GDP)	$25m	$25m	$25m	$25m	$36m	$36m	$36m	$36m
Employment (FTEs)	0	0	0	0	94	94	94	94
Total								
Value added (GDP)	**$246m**	**$282m**	**$254m**	**$292m**	**$562m**	**$640m**	**$555m**	**$639m**
Employment (FTEs)	**2,300**	**2,809**	**2,152**	**2,533**	**5,109**	**6,009**	**4,791**	**5,536**

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Figure 8 Composition of direct GDP impact, 2014-17

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Figure 9 Estimated GDP impact, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Figure 10 Estimated employment impact, 2014-17

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

The methodology that underpins these estimates is outlined in Appendix B.

Comparison to other sectors

We shed light on the relative size of the music sector in New Zealand by comparing it to other sectors, including some in the creative space and related to recreational activities. Table 7 presents GDP and employment estimates for a number of other New Zealand sectors, which have been recently published.

Table 7 Estimated GDP and employment impact for other sectors

Sector	Direct GDP	Direct FTEs	Study
Music	$292m	2,533	PwC, 2018
Architecture	$436m	5,350	PwC, 2017
Book publishing	$97m	1,326	PwC, 2018
Film & TV	$1,303m	14,431	PwC, 2015
Games	$98m	1,024	PwC, 2015
Design	$10,098m	94,200	PwC, 2017
Cruise ships	$310m	5,330	Market Economics, 2013
Tourism	$13,500m	224,000	World Travel & Tourism Council, 2017
Agriculture	$8,100m		StatsNZ, 2015
Wine	$1,092m	7,580	NZIER, 2015
Commercial fishing	$550m	4,394	BERL, 2017

Note: The methodology used by all studies may not be fully consistent, and estimates may not be presented on identical bases.

3. Music retail

Overall subsector

The New Zealand retail music sector posted its third consecutive year of growth in 2017, earning $131m in retail revenues.

We estimate that these gross revenues resulted in a direct impact on the New Zealand economy of $85m in GDP and 288 FTEs within the music industry. After accounting for multiplier effects, the retail subsector had a total economic impact of $112m and 509 FTEs.

New Zealand music contributed a small but significant share of total value within the retail subsector accounting for approximately 8% of gross output.

Table 8 Estimated economic contribution through retail channel, 2017

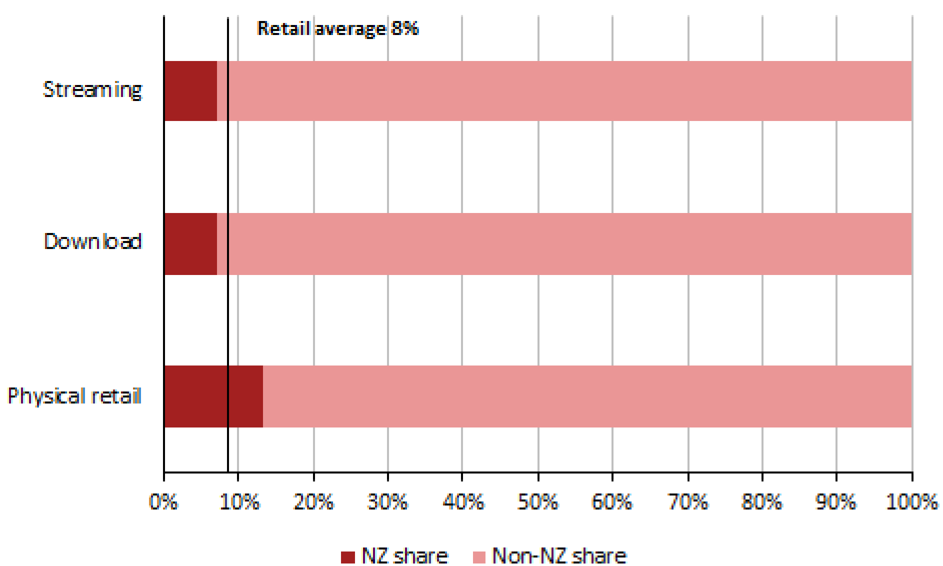
Industry sector	Total sales ($m)	Value added (GDP, $m)		Employment (FTEs)	
		Direct impact	Total impact	Direct impact	Total impact
Physical music	23	17	26	107	181
Downloads	20	12	16	33	60
Online Streaming	89	55	71	148	268
Total retail	131	85	112	288	509

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Split between New Zealand and offshore generated content

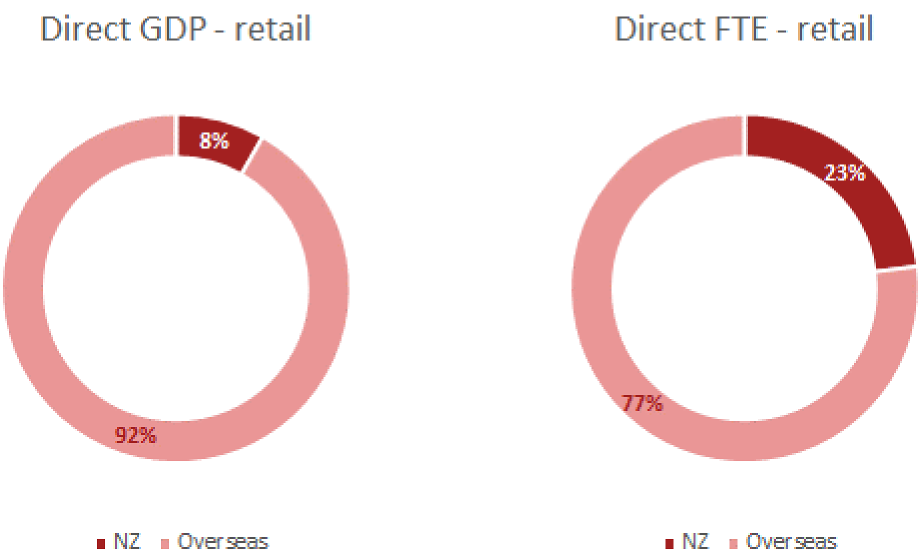
- Figure 11 shows the share of wholesale revenues from retail music earned by New Zealand musicians in 2017. It indicates that out of every $100 of music purchased at physical retail outlets, $13 was spent on New Zealand music. Across all retail channels, 8% was spent on New Zealand music.
- Figure 12 shows that 8% of the subsector's contribution to GDP and 23% of the subsector's contribution to employment is derived from New Zealand generated content in 2017.
- This is equivalent to a direct GDP contribution for the retail subsector of $7m and 66 FTEs supported from New Zealand generated content.
- The difference is due to the disparity in employment footprints for physical and online retail channels. Online retail has a much smaller footprint than retail through traditional bricks and mortar stores. As the trend towards online consumption continues to grow, we expect this disparity to increase.

Figure 11 Share of total retail sales earned by New Zealand generated content, 2017



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Figure 12 Share of the retail economic impact from New Zealand generated content



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Table 9 Economic contribution through retail channel for New Zealand generated content, 2017

Industry sector	Total sales ($m)	Value added (GDP, $m)		Employment (FTEs)	
		Direct impact	Total impact	Direct impact	Total impact
Physical music	3	2	3	14	24
Downloads	1	1	2	9	17
Online Streaming	6	4	10	43	77
Total retail	11	7	15	66	118

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Table 10 Economic contribution through retail channel for overseas generated content, 2017

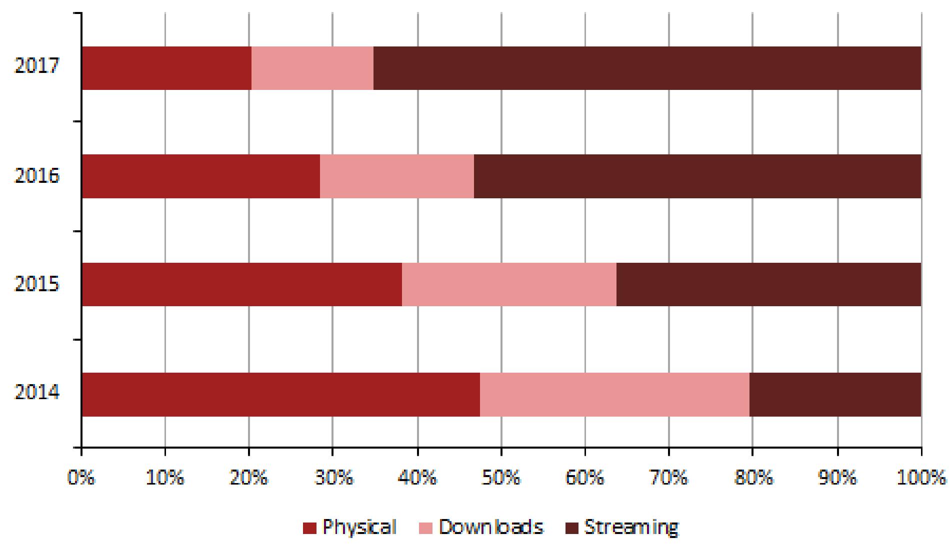
Industry sector	Total sales ($m)	Value added (GDP, $m)		Employment (FTEs)	
		Direct impact	Total impact	Direct impact	Total impact
Physical music	20	15	23	93	157
Downloads	18	11	14	23	42
Online Streaming	83	52	61	106	191
Total retail	121	78	97	222	391

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Trends over time

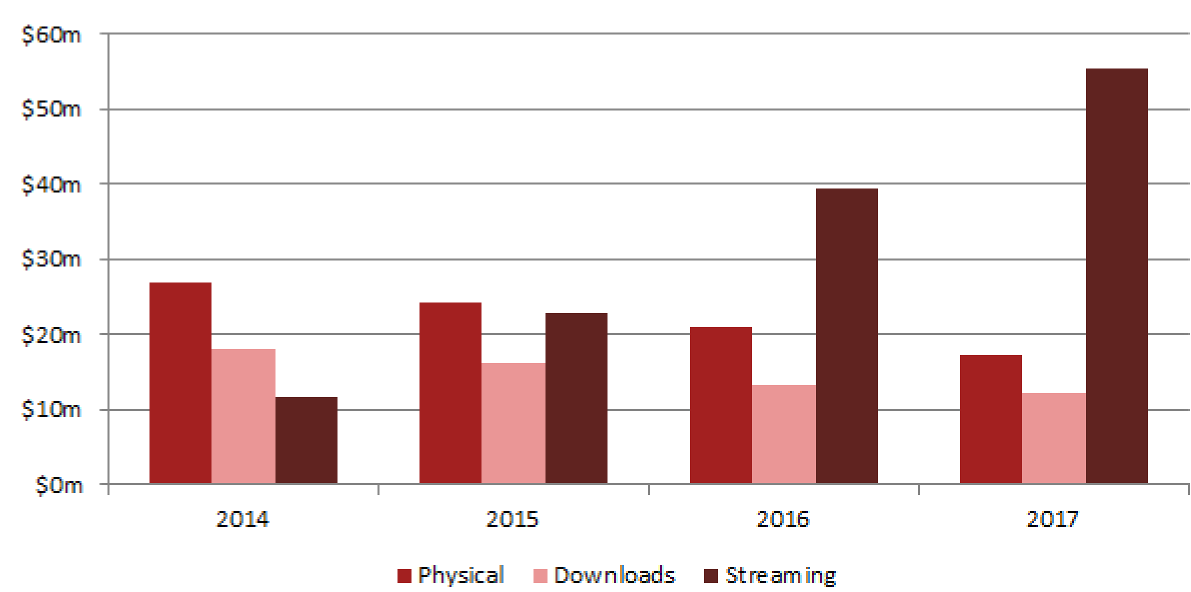
- Historically the majority of retail music's contribution to the New Zealand economy was driven from physical music retail. However, physical music retail has declined significantly and now makes up approximately 17% of total retail gross output in 2016 compared to 43% in 2014.
- The physical sales reduction has been offset by the growth of online streaming, which has grown rapidly over the past three years even after allowing for music piracy and now accounts for 68% of retail output.
- As shown in Figure 14, the gross output from online streaming increased five-fold between 2014 and 2017, indicating that consumers are embracing an on-demand consumption preference. This has been made possible by improvements to broadband internet, 3G and 4G mobile networks, greater uptake of mobile data accessible devices and more competitive prices for mobile data and the popularity of legal streaming services.
- The music industry in New Zealand is beginning to effectively monetise online music through the increase in streaming revenues. Digital consumption, combined with the effects of illegal use of music, has drastically altered the revenue landscape in the music industry.
- The breakdown of physical and digital revenue has changed over the past four years (as shown in Figure 13). Given what has happened recently, it seems likely that this trend will continue and that digital and streaming will further increase market share.

Figure 13 Retail direct GDP contribution, by consumption channel, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Figure 14 Retail direct GDP contribution, by consumption channel, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Box 1: Definition of the retail subsector

This subsector includes all activities related to music retail, whether they take place in a physical or digital format. This category encompasses a range of different consumption points, including on-demand streaming, online music stores, and physical retailers. **In all cases these represent the industries' channels** to market for the sale or personal use of recorded content.

Physical retail includes activities directly related to the sale of albums, concert DVDs, and other forms of recorded music in stores. There are two major retail chains involved in music retail: The Warehouse, which accounts for roughly half of total physical sales, and specialised retailer JB Hi Fi. In addition, there are independent music stores such as Real Groovy and Slow Boat Records. There has been some resurgence in sales of vinyl records, comprising 9% of all physical sales but the growth in the sales of vinyl records has not been enough to offset a falling physical product market. Over the last twenty years, the number of specialty music stores in New Zealand has fallen from roughly 300 to about 30.

Digital retail, by contrast, is growing rapidly and also undergoing considerable innovation with the development of new online consumption channels for music. It includes all revenues generated by the legal consumption of music through online and mobile channels, including:

- on-demand and streaming services such as Spotify, Apple Music, YouTube and SoundCloud
- digital retail services such as iTunes.

New Zealand music retail has been heavily affected by the emergence of new internet distribution channels for music. These distribution channels are in competition with traditional physical retail. On the one hand, illegal use has provided consumers with an effectively free source of music, which has led to a drop in sales and is likely to have reduced the price point at which consumers are willing to purchase music. On the other hand, new services for digital music consumption, from on-demand services such as Spotify or internet radio such as iHeart, have emerged as rapidly-growing alternatives to physical retail. In addition, the internet has given musicians more and better channels to reach new audiences and communicate directly with their fans.

4. Public performance (non-radio)

Overall public performance subsector

In 2017, the music industry in New Zealand earned $50m in royalties for non-radio public performance.

We estimate that these gross revenues resulted in a direct impact on the New Zealand economy of $16m in GDP and 194 FTEs within the music industry. After accounting for multiplier effects, non-radio communication and public performance had a total economic impact of $39m in GDP and 350 FTEs.

Table 11 Estimated economic contribution through non-radio public performance, 2017

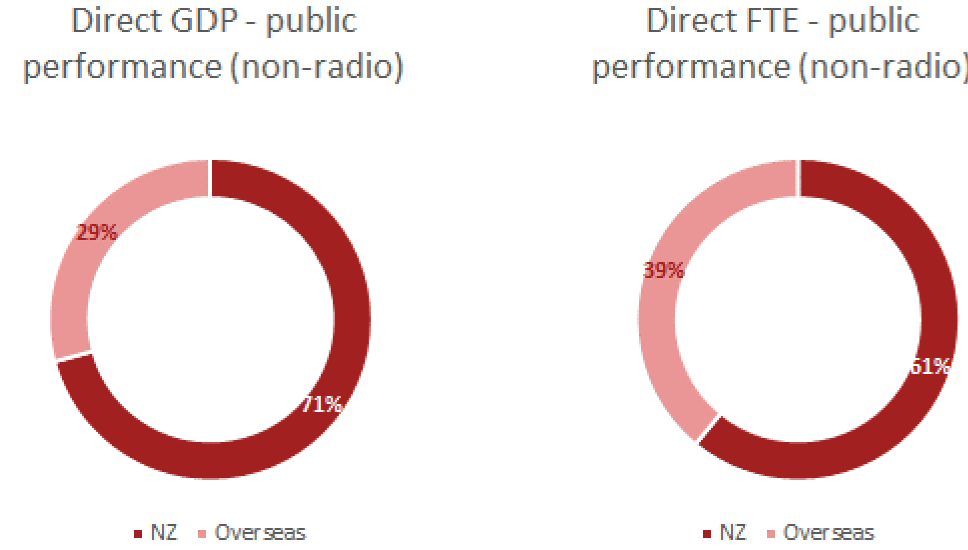
Public performance (non-radio)	Direct economic impacts		Total economic impacts	
	All music	NZ music only	All music	NZ music only
Gross output (sales)	$50m	$12m		
Value Added (GDP)	$16m	$11m	$39m	$27m
Employment (FTEs)	194	118	350	214

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Split between New Zealand and offshore generated content

- New Zealand generated content is responsible for 71% of the direct GDP impact and 61% of the direct employment impact for the communication and public performance subsector.
- New Zealand music was responsible for a large share of the economic impact due to the significant role of royalties earned for New Zealand music.
- In 2017, the direct GDP impact from non-radio public performance from New Zealand content was $11m, and 118 FTEs were supported by New Zealand generated content from this subsector.

Figure 15 Share of the non-radio public performance economic impact from New Zealand generated content, 2017

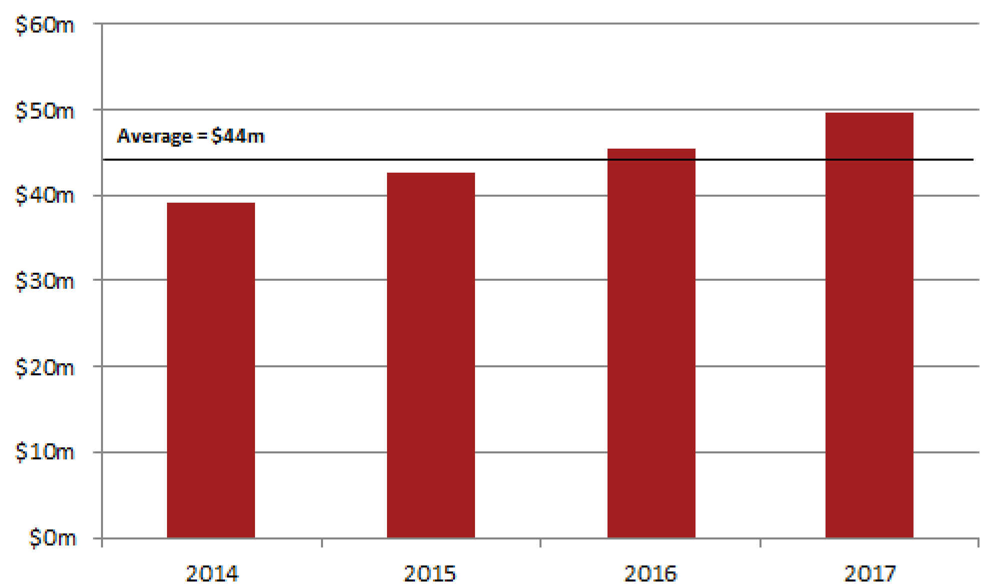


Source: Recorded Music New Zealand, APRA AMCOS, PwC calculations

Trends over time

- The non-radio public performance subsector has been growing. Figure 16 shows the upward trend in royalties earned from this sector. The subsector experienced growth in revenue, supported by the collective work of OneMusic.

Figure 16 Total sales from non-radio public performance rights, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC calculations

Box 2: Definition of public performance

The public performance subsector of the music industry includes all instances in which recorded music is communicated to the public or played in a public venue. It includes:

- communication via radio, television, pay TV, and internet channels
- public performance in premises such as but not limited to retailers, hospitality outlets (bars and cafes), educational institutions, and gyms.

In our analysis, we have split the public performance subsector into radio (radio broadcasting) and non-radio (public performance (non-radio)) which includes television, pay TV, internet channels, hospitality premises etc. The analysis in Table 11 and Figure 16 relate to non-radio channels.

When music is publicly performed, recording artists, record companies, songwriters, and music publishers earn money from royalties paid for this use. These royalties are calculated on a blanket basis and distributed mostly on a per-use basis. Data is obtained from Recorded Music NZ and APRA AMCOS.

5. Radio broadcasting

Overall radio broadcasting subsector

In addition to the above definition of the public performance sector is music radio broadcasting, which we present as a separate category because of its size and impact.

In 2017, the radio broadcasting sector earned revenue of $240m. We estimate that these gross revenues resulted in a direct impact on the New Zealand economy of $96m in GDP and 891 FTEs within the music industry. After accounting for multiplier effects, music radio broadcasting had a total economic impact of $279 million in GDP and 2,481 FTEs.

Figure 17 Estimated economic contribution from radio broadcasting, 2017

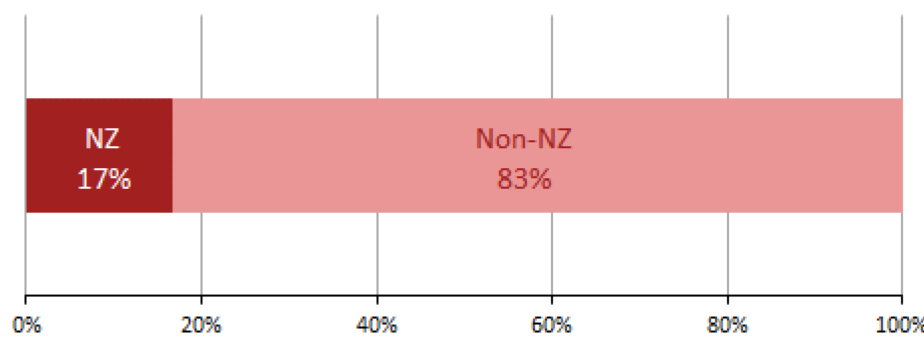
Radio broadcasting	Direct economic impacts		Total economic impacts	
	All music	NZ music only	All music	NZ music only
Gross output (sales)	$240m	$40m		
Value Added (GDP)	$96m	$16m	$279m	$46m
Employment (FTEs)	891	148	2,481	414

Source: Recorded Music, APRA AMCOS, PwC analysis

Split between New Zealand and offshore generated content

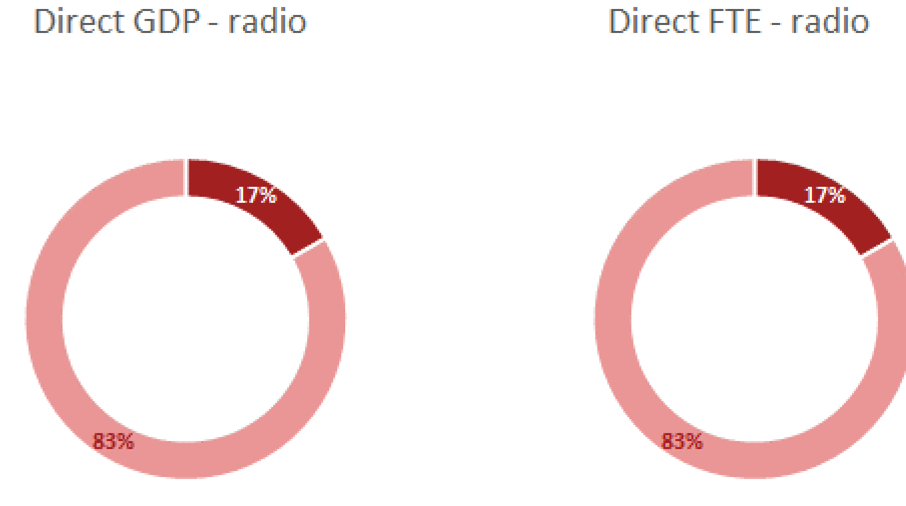
- Figure 18 shows that 17% of total radio plays in 2017 were New Zealand music. This figure is based on RadioScope figures for all radio, including commercial radio, student radio, iwi radio and Pacific Community radio, but does not include Radio New Zealand.
- This proportion is substantially greater than the New Zealand shares of both physical and digital retail. This is due in part to the voluntary NZ Music Code agreement between the Radio Broadcasters Association (on behalf of its commercial radio members) and the Minister of Broadcasting, which has been in place since 2002, and in part to the efforts of NZ On Air in promoting New Zealand music on radio.
- The 17% share of total radio plays is used to estimate the **share of the subsector's direct GDP and FTE** that arises from New Zealand generated content. It is equivalent to $16m of GDP and 148 FTEs for the 2017 year.

Figure 18 New Zealand share of total radio plays, 2017



Source: RadioScope

Figure 19 Share of the radio economic impact from New Zealand generated content, 2017

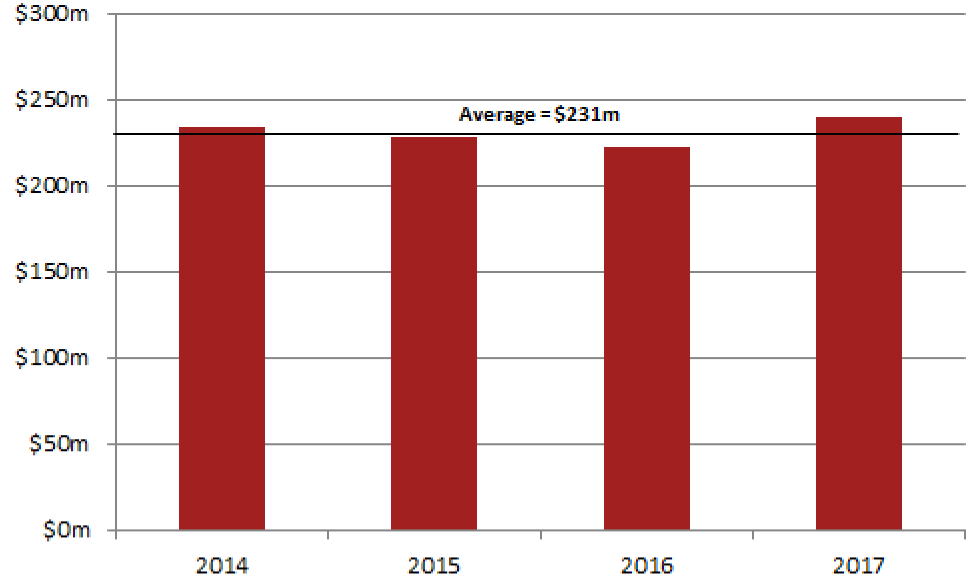


Source: Recorded Music New Zealand, APRA AMCOS, PwC calculations

Trends over time

- The music radio subsector expanded in 2017, following a small contraction between 2014 and 2016. Figure 20 demonstrates the trend over the past four years.

Figure 20 Total sales from music radio, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

6. Live performance

Overall live performance subsector

In 2017, the music industry in New Zealand earned an estimated $126m in live performance revenues, based on public performance royalties collected by APRA AMCOS.

We estimate that these gross revenues resulted in a direct impact on the New Zealand economy of $68m in GDP and 1,132 FTEs within the music industry. After accounting for multiplier effects, the live performance subsector had a total economic impact of $168m and 2,050 FTEs.

New Zealand content was responsible for contributing about a quarter of these impacts.

Table 12 Estimated economic contribution from live performance, 2017

Live performance	Direct economic impacts		Total economic impacts	
	All music	NZ music only	All music	NZ music only
Gross output (sales)	$126m	$35m		
Value Added (GDP)	$68m	$19m	$168m	$47m
Employment (FTEs)	1,132	317	2,050	574

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

One notable feature of the live performance subsector is that it accounts for a greater share of the sector's direct employment (45%) than its GDP impact (22%). This suggests that it is more labour-intensive than other subsectors, as seen in Table 13.[5]

Table 13 Percentage split of live music impacts, by revenue channel, 2017

Industry sector	Total sales ($m)	Value added (GDP, $m)		Employment (FTEs)	
		Direct impact	Total impact	Direct impact	Total impact
Retail	23%	29%	18%	11%	9%
Public performance (non-radio)	9%	5%	6%	8%	6%
Radio broadcasting	42%	33%	44%	35%	45%
Live performance	**22%**	**23%**	**26%**	**45%**	**37%**
Synchronisation	1%	1%	1%	1%	1%
Overseas earnings	4%	9%	6%	-	2%
Total	100%	100%	100%	100%	100%

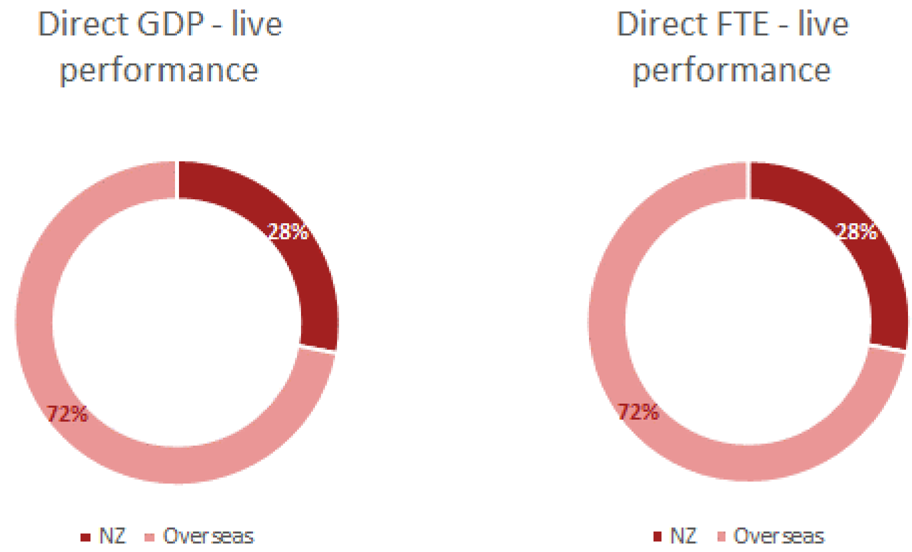
Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

[5] The numerical result is partly due to the treatment of Overseas Earnings, which make a contribution to GDP but have no labour content. However, even accounting for this issue, Live Music is still more labour-intensive than other subsectors.

Split between New Zealand and offshore generated content

Approximately 28% of the subsector's direct contribution to GDP and employment is derived from New Zealand generated content. This is equivalent to $19m of GDP and 317 FTEs.

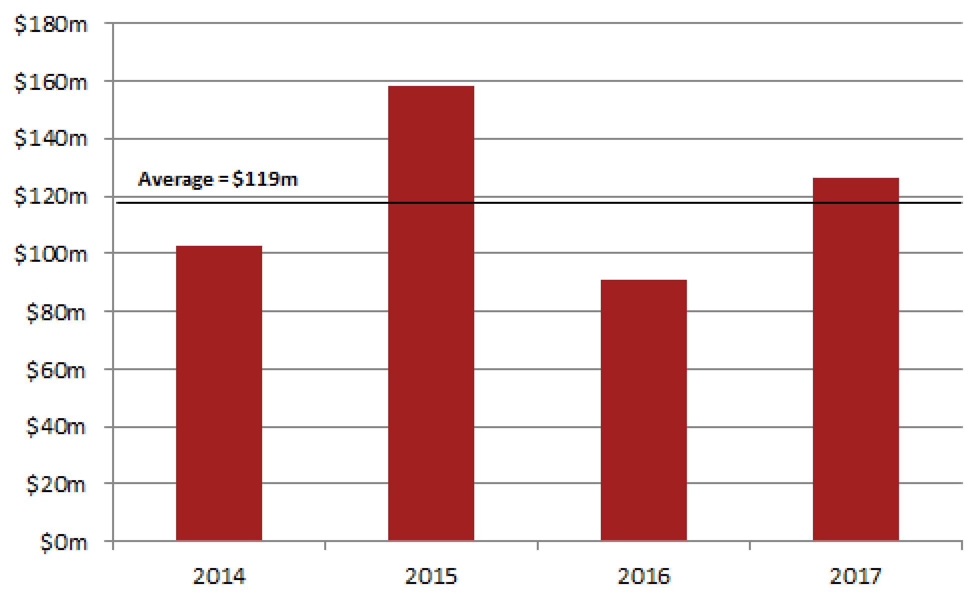
Figure 21 Share of the live performance economic impact from New Zealand generated content, 2017



Trends over time

- The live performance subsector has been relatively volatile over recent years, primarily as a result of the scheduling of different tours. 2017 was significantly better than 2016, but not as strong as the extraordinary year in 2015.
- The average revenue for the last four years was $119m per year.

Figure 22 Total sales in live performance subsector, 2014-17



Source: Recorded Music New Zealand, APRA AMCOS, PwC calculations

Box 3: Definition of the live performance subsector

The live performance subsector of the music industry in New Zealand includes all types of live music played in New Zealand by local and overseas artists. These include:

- concerts and music festivals
- live music at music venues (ie door sales)
- orchestras
- music in theatre (excluding grand right musical plays).

7. Synchronisation

Overall synchronisation subsector

In 2017, the music industry in New Zealand earned an estimated $4m in annual synchronisation fee revenue.

We estimate that these gross revenues resulted in a direct impact on the New Zealand economy of $2m in GDP and 28 FTEs. After accounting for multiplier effects, synchronisation had a total economic impact of $5m and 51 FTEs.

Table 14 Estimated economic contribution from synchronisation, 2017

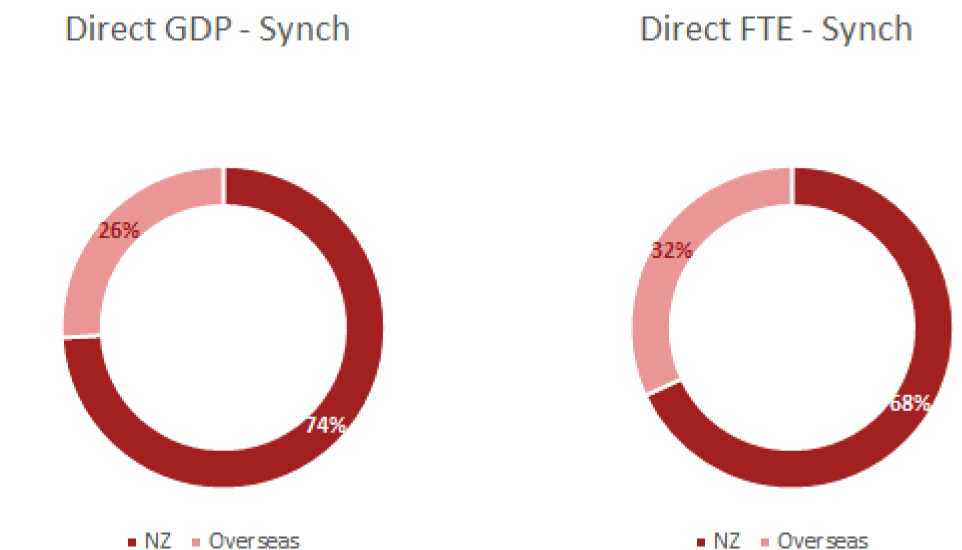
Synchronisation	Direct economic impacts		Total economic impacts	
	All music	NZ music only	All music	NZ music only
Gross output (sales)	$4m	$2m		
Value added (GDP)	$2m	$2m	$5m	$4m
Employment (FTEs)	28	19	51	35

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Split between New Zealand and offshore generated content

Approximately 74% of the **subsector's direct GDP contribution is derived from New Zealand generated content and 68% of the subsector's direct employment.** This is equivalent to $2m of GDP and 19 FTEs.

Figure 23 Share of synchronisation economic impact from New Zealand generated content, 2017



Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Trends over time

Figure 24 demonstrates that the contribution of this sector has been broadly constant in the past four years with gross output at approximately $4 million each year.

Figure 24 Total sales in the synchronisation sector

Source: Recorded Music New Zealand, APRA AMCOS, PwC analysis

Box 4: Definition of the synchronisation subsector

The synchronisation subsector of the music industry in New Zealand includes all royalties earned from licensing music for use in advertisements, games, films, and television programmes.

8. Overseas earnings

New Zealand music income earned overseas represent funds that flow back into the economy and contribute to gross national income. For official purposes, overseas royalties are considered direct contributions to GDP.

Overseas income is earned for the music industry in the form of:

- royalties received from the sale of physical music overseas
- royalties received from online sales and streams, that are purchased overseas
- radio royalties received as a result of airplay overseas
- synchronisation royalties from countries other than New Zealand
- earnings from live performances overseas
- earnings from other endorsements and appearances.

There is no required reporting or official statistics for exports relating to the New Zealand music industry. However, in 2017 Recorded Music NZ conducted a survey of New Zealand artists and provided an estimate of the total overseas earnings based on those artists surveyed, along with a combination of data sources related to earnings from international sales, live performances and any government grants received for international purposes. An estimate of the GDP impact from overseas earnings was included for the first time in our previous report using 2016 data.

Due to the relatively small number of artists with significant offshore earnings, the lumpy nature of earnings, the potentially significant impacts associated with individual artists and the fact that some artists may have been underreported or missed completely, we utilise a multi-year average of overseas earnings data to derive our annual estimate.

We used a four-year average (2013-16) in last year's report. This year, we do not have updated data (since another survey was not undertaken). We have elected to use a three-year average (2014-16) to derive this year's estimate. This method retains the historical averaging, while at the same time rolling out of the least recent data point. We expect this method to be conservative in terms of the GDP impact, particularly given recent growth in this subsector.

These estimates have been used to calculate overseas earnings results shown below in Table 15. As set out in our previous report, the music industry estimates that between 2014 and 2016 the New Zealand music industry generated $25m in average overseas earnings. For this report, we use this four-year average as an estimate of the contribution of overseas earnings in the recorded music industry to annual value added (GDP).

Table 15 New Zealand music industry overseas earnings data

	2014-16 average
Royalties	$22m
Live performances and appearances	$4m
Total	**$25m**

Source: Recorded Music New Zealand and industry organisation data

Appendix A: Glossary

The table below provides a glossary of music industry terms, industry associations, and commonly used acronyms.

Term	Definition
APRA AMCOS	The Australasian Performing Right Association The Australasian Mechanical Copyright Owners Society The New Zealand branch licenses music users, on behalf of its members, and collects fees where music is used for communication or public performance. APRA licenses premises such as (but not limited to) retailers, hospitality, education, and gyms, and venues for live music performance. These fees are then distributed directly to songwriters or to music publishers to whom songwriters have assigned their rights. APRA also now licenses public performance rights for both Recorded Music NZ and itself via the new joint venture licensing brand OneMusic. (www.onemusic.com)
Communication	The performance of recorded music via mediums including radio, television and the internet.
Music Publisher	While music publishers historically made money by reproducing and selling sheet music, today they invest in, promote and represent songwriters (or song catalogues) and are responsible for ensuring payments are made when their songwriters compositions are reproduced.
On-demand	On-demand music services are businesses that provide access to music as opposed to selling digital music files. Examples include Spotify, Apple Music and Tidai. These services can have different tiers of revenue collection: eg ad-supported, where the customer has free access but is subjected to audio advertising; and premium subscription which provides ad-free access via both computers and mobile devices such as handsets and tablets.
Public Performance	Public performance refers to two uses of music. First, the playing of music in premises such as retailers, hospitality outlets (bars and cafes), educational institutions, and gyms. Second, the live performance of music in venues. Rights associations representing songwriters and recording artists licence the public performance of recorded and live music. In this report, we use the term 'public performance' to include other revenue streams, as explained on page 19.
Record Company	A business that invests in, promotes, and represents recorded music made by recording artists. Record Companies typically represent a mixture of recorded music in which they own the copyright outright and recorded music in which they hold the copyright under exclusive licence from the owner. Often called a "record label".
Recorded Music New Zealand	Recorded Music New Zealand represents the rights of New Zealand recording artists and Record Companies. Activities include the production of The New Zealand Music Awards, the weekly compiling and publishing of the Official New Zealand Music Chart and anti-piracy activities. Additionally, Recorded Music New Zealand is a music service

	company which licences sound recordings for use in communication, broadcast and public performance, and distributes the revenues to the relevant recording artists and record companies.
Royalty	Royalties are fees paid to songwriters and recording artists accruing from various uses including sale of recordings and public performance.
Synchronisation Right	A music synchronisation licence is required where a piece of recorded music is reproduced with a visual image, for example in a film, game, TV programme or advertisement. Often abbreviated as "synch right".

Appendix B: Approach and methodology

This section provides a detailed overview of our approach and methodology, including definitions of our main economic impact measures, a discussion of our main data sources, and an explanation of how we calculated direct and total economic impacts. Finally, it discusses some opportunities for improving music industry data collection or undertaking future analysis.

Measures of economic impact

This report uses three main indicators of economic impact: gross output, value added, and employment. It relies on input-output (multiplier) analysis to estimate the indirect and induced impacts of the music industry.

Gross output

The gross output of an industry is equal to its total sales revenue. This figure incorporates both value created within that industry and the value of intermediate goods (eg raw materials, real estate, equipment and machinery) purchased by the industry from other industries.

Although gross output or sales revenue is commonly used as a measure of the value of an industry, it is an imperfect measure due to its inclusion of inputs purchased from other industries.

Value added

The value added of an industry is equal to the total value created within that industry. It can also be described as the GDP impact of an industry. It measures the contributions of labour (through wages and salaries) and capital (through profits and depreciation) to the output produced by the industry, and the taxes paid by the industry. As a result, it is equivalent to the gross output of an industry, less the value of all inputs purchased from other industries.

When using our value-added estimates, it is important to understand what they include. GDP measures, including those reported in Statistics New Zealand's national accounts and in most economic impact studies, measure the total value of goods and services produced in New Zealand, rather than the net income of all businesses and individuals located within New Zealand. As a consequence, we will:

- include income earned by overseas musicians touring in New Zealand, as it represents production in New Zealand regardless of whether it is ultimately repatriated elsewhere.
- include royalty payments paid to New Zealand musicians by overseas sources, as they represent exports of goods and services produced in New Zealand.

These inclusions should be taken into consideration when using our estimates. The New Zealand music industry is relatively globalised – New Zealand consumers purchase a great deal of overseas-originated music, and New Zealand musicians tour and earn royalties overseas. We have excluded most music imports from our analysis by:

- measuring only economic benefits from New Zealand-originated music in digital retail and broadcasting
- including both New Zealand and overseas music in gross output figures for physical retail in the expectation that output multipliers will correct for any imported content.

There were two main reasons to measure value added in terms of GDP. First, GDP impact is the most commonly-used measure of total economic impact. It is used by Statistics New Zealand when reporting on

the size of the New Zealand economy and in many other economic impact studies. Although GDP does have some weaknesses, they are not unique to the music industry in New Zealand. Across the whole economy, there is a significant gap between GDP and gross national income (GNI) figures due to the large role of foreign investment and lending in the New Zealand economy. According to World Bank figures, New Zealand's GNI has been three to seven percent lower than GDP in recent years. The same is true for specific industries as well.

Second, recent changes to the development of New Zealand's national accounts mean that the treatment of these earnings now contribute to New Zealand's gross domestic product (GDP). As such, estimates for the overseas earnings of New Zealand musicians directly contribute to the music industry in New Zealand's GDP.

Employment

We measure employment on the basis of FTEs, rather than total (full-time and part-time) jobs or headcount. Under this measure, part-time jobs are counted as a proportion of a full-time job – so, for example, a job that involved working 20 hours a week would be counted as 0.5 of an FTE. This provides us with the most comparable measure of employment in an industry, as rates of part-time employment can vary between different industries.

Values are reported in New Zealand dollars of the day unless otherwise stated

All figures in this report refer to New Zealand dollars in nominal terms.

Data sources

Main quantitative data sources

Our estimates of the economic impact of the music industry in New Zealand are based primarily upon the following sources of data:

- Recorded Music NZ figures on physical and digital sales wholesale revenue
- APRA AMCOS data on songwriter royalties and Recorded Music NZ data on recording royalties
- Statistics New Zealand and other industry-level estimates of economic activity and input-output tables for New Zealand industries.

We used multiple sources of data for the overseas earnings study, including data from collection agencies, copyright owners, financial representatives, music managers, other industry organisations and surveyed musicians directly.

In each case, the data obtained related to:

- earnings from international sources from all sales, publishing and synchronisation
- earnings from live performances and touring internationally
- any government grants received for international purposes.

Where possible, other data was used to provide a sense check on estimates derived from these sources.

Our analysis combines the data from all sources. The overall data is comprehensive, and we understand that it covers the vast majority of the musicians who generate overseas earnings. Industry stakeholders believe that combined data will incorporate the bulk of the dollar value of overseas earnings.

The calendar years (year ended December quarter) have been selected as the basis for the economic impact calculations and these are the most recent full set of annual data available. All amounts in this report relate to impacts that occur in this period.

Avoiding double counting

In several cases, Recorded Music NZ and APRA AMCOS figures measured different components of the same market subsector. For example, Recorded Music NZ provided data on total physical and digital music sales, while APRA AMCOS provided data on mechanical royalties (ie royalties paid each time a piece of recorded music is reproduced) paid from physical and digital music sales. As royalties are paid as a proportion of retail sales, including both of these figures in our analysis would mean double-counting activity in this market subsector.

In order to avoid double-counting, we have examined the definitions of each measure of the market and discussed with data providers where necessary.

Multiplier analysis

Direct, indirect and induced impacts

Like any industry, the music industry has spillover effects on other parts of the New Zealand economy. For our purposes here, these impacts can be divided into two categories:

- indirect (or upstream) impacts
- induced impacts.

Indirect impacts occur as a result of purchases of goods and services from other industries. When a record is made or a concert is put on, businesses within the music industry purchase a range of inputs: advertising and marketing, transportation services, machinery and instruments, rented real estate, etc.

Induced impacts occur as a result of the wages and salaries paid out by the music industry. When a musician collects a royalty check, he or she will then spend some of that money on a range of goods and services, thereby stimulating further economic impact.

Estimating direct economic impacts

We estimate the direct impact of the music industry in terms of its contribution to gross output, value added, and employment as follows:

- For each market subsector, we start with figures on either gross output (eg total digital music sales, total estimated ticket sales) or value added (eg broadcasting royalties).
- We use data from Butcher Partners to estimate the ratios of value added (VA) to gross output (GO) and VA (or GO) to employment in these industries. These ratios were then used to estimate direct GO/VA and employment in each market subsector.

Estimating total economic impacts

Spending in the music industry has multiplier effects in other industries as a result of the way in which that spending flows through the economy. Every dollar that is spent directly on music will also stimulate or support other types of economic activity indirect and induced from the industry.

In order to estimate flow-on effects, we applied multipliers calculated using 2012/13 input-output tables for all New Zealand industries, which are the latest available. Multipliers were available for gross output, value added, and employment in these industries.

- Indirect impacts were estimated using Type 1 multipliers, which account for the first-round and indirect effect of purchases of goods and services by each industry.

- Induced impacts were estimated using Type 2 multipliers, which account for induced effects from wages and salaries paid by each industry.

Approaches followed for individual subsectors

Table 16 summarises the activities in each subsector of the music industry that are included in our GDP calculations.

Table 16 What is included and excluded from GDP calculations?

Industry subsector	Revenue earned in NZ		Revenue earned overseas
	From NZ artists	From overseas artists	
Retail	Included in GDP	Accounted for in GDP	Included
Public performance and radio	Included in GDP	Songwriter royalties not included, as they are earned offshore Recording artist royalties retained by record companies are accounted for in GDP	Included
Live performance	Included in GDP	Included in GDP, as performance occurred here	Included
Synchronisation	Included in GDP	Synchronisation fee revenues paid out to overseas artists are not included, as they are earned offshore Synchronisation fee revenue accruing to local agents (eg record companies, music supervision companies) are accounted for in GDP	Included

Table 17 below summarises the methodology and assumptions used to calculate the economic contribution of individual subsectors of the music industry.

Table 17 Methodology and assumptions for the different subsectors of the music industry

Subsector	Information base	Direct value added	Direct FTEs	Total value added and FTEs
Retail – physical music	Wholesale physical sales data provided by Recorded Music NZ	Estimated total retail sales revenue using Statistics NZ Annual Enterprises Survey (AES) data. Estimated split between retailer margin, wholesale (record label) margin, value of rights embodied in physical product, and manufacturing cost using AES data. Estimated value added from the retail margin using the average ratio of value added to gross margin in the "recreational, clothing, footwear, and personal accessory" and **"department stores"** industries. Estimated value added within record companies by applying the ratio of value added to gross output in the "heritage and artistic" **in**dustry and adding the total value of rights embodied in the physical product. Estimated value added from manufacturing using the **ratio of value added to gross output in the "printing", "publishing (except internet and music publishing)" and "polymer product and rubber product manufacturing"** industries.	Based on ratios of employment to value added as follows: • retailer margin – the average of the **"recreational, clothing,** footwear, and personal **accessory retailing"** and **"department stores"**, • record company margin - "heritage and artistic" • manufacturing - **"printing", "publishing** (except internet and **music publishing)" and "polymer product** and rubber product **manufacturing"**. No additional employment impact calculated for the value of rights embodied in the physical product, as this is likely to be repatriated overseas as profit. (Employment in record label activities is captured	Based on total (direct, indirect, induced) multipliers as follows: • retailer margin – the average of the **"recreational,** clothing, footwear, and personal accessory **retailing" and "department** stores" • record company margin - "heritage and artistic" • manufacturing - **"printing", "publishing** (except internet and music **publishing)" and "polymer product** and rubber product **manufacturing"**. No spillover impacts calculated for the value of rights embodied in

			elsewhere.)	the physical product, as this is likely to be repatriated overseas as profit.
Retail – digital music	Wholesale digital sales figures provided by Recorded Music NZ, plus data on songwriter royalties for digital sales provided by APRA AMCOS.	Estimated total retail sales revenue using information provided by APRA AMCOS. Estimated split between retailer margin, record label revenue, and royalty revenue using information provided by APRA AMCOS. Used AES data to estimate the value of the rights embodied in the digital product. Because online retailers primarily based overseas, the retailer margin was assumed to have no value added impact. Estimated value added within record companies by applying the ratio of value added to gross output in the "heritage and artistic activities" industry and adding the total value of rights embodied in the physical product.	Based on ratios of employment to value added for the "heritage and artistic activities" industries. No additional employment impact calculated for the value of rights embodied in the digital product, as this is likely to be repatriated overseas as profit. (Employment in record label activities is captured elsewhere.)	Based on total (direct, indirect, induced) multipliers for the "heritage and artistic activities" industries. No additional employment impact calculated for the value of rights embodied in the digital product, as this is likely to be repatriated overseas as profit.
Public performance rights	Data on songwriter royalties provided by APRA AMCOS and performer royalties provided by PPNZ for radio and TV broadcasts and public performance of music.	Estimated the share of royalties paid out to New Zealand songwriters and recording artists using Radioscope data on the New Zealand music share of total radio plays. All (songwriter and recording artist) royalties paid for New Zealand artists converted directly to value added as they represent direct income earned locally. Estimated that 50% of recording artist royalties paid for overseas-originated music would be retained by record companies as profits and funding for their New Zealand-based marketing activities, while the remaining 50% would be paid directly to overseas recording artists or repertoire owners. Estimated an economic impact related to the recording artist royalties retained locally by record companies	Based on ratio of employment to value added for the "heritage and artistic activities" industry.	Based on total (direct, indirect, induced) multipliers for the "heritage and artistic activities" industry.

		using the ratio of value added to gross output in the "heritage and artistic activities" industry. Songwriter royalties paid for overseas-originated music does not generate any value added in New Zealand.		
Radio broadcasting	Data on total radio licensing fees and licensing fee rate provided by APRA AMCOS	Estimated the total radio output that is related to the music industry based on the licensing fees as being the proportion of the total evidenced by the licensing rate. Output = Licensing fees/licensing rate	Based on ratio of employment to value added for the "motion picture and sound recording activities" and "broadcasting and internet services" industries.	Based on total (direct, indirect, induced) multipliers for the "motion picture and sound recording activities" and "broadcasting and internet services" industries.
Live performance	Data on songwriter royalties provided by APRA AMCOS for live performance of music and APRA AMCOS information on the royalty rate.	Gross output (ie ticket sales) estimated by dividing the value of songwriter royalties by the royalty rate applied to ticket sales. Value added in live performance estimated by applying the ratio of value added to gross output in the "heritage and artistic activities" industry to estimated gross output.		
Synchronisation rights	Estimated total songwriter and recording artist royalties earned from synchronisation deals in New Zealand provided by Recorded Music NZ.	Estimated the share of royalties paid out to New Zealand songwriters and recording artists using Recorded Music NZ estimate of the New Zealand music share of total synchronization revenues. All (songwriter and recording artist) royalties paid for New Zealand artists converted directly to value added as they represent direct income earned locally. Estimated that 50% of (songwriter and recording artist) royalties paid for overseas-originated music would be retained by negotiating agents as profits and funding for their New Zealand-based activities, while the remaining 50% would be paid directly to overseas rights-holders. Estimated an economic impact related to the recording artist royalties retained locally by record companies using the ratio of value added to gross output in the "heritage and artistic activities" industry.	Based on ratio of employment to value added for the "heritage and artistic activities" industry.	Based on total (direct, indirect, induced) multipliers for the "heritage and artistic activities" industries.

Appendix C: Restrictions

This economic impact assessment has been prepared for Recorded Music New Zealand Limited (Recorded Music NZ), the Australasian Performing Rights Association and the Australasian Mechanical Copyright Owners Society (APRA AMCOS) and the New Zealand Music Commission. This report has been prepared solely for this purpose and should not be relied upon for any other purpose.

To the fullest extent permitted by law, PwC accepts no duty of care to any third party in connection with the provision of this Report and/or any related information or explanation (together, the "Information"). Accordingly, regardless of the form of action, whether in contract, tort (including without limitation, negligence) or otherwise, and to the extent permitted by applicable law, PwC accepts no liability of any kind to any third party and disclaims all responsibility for the consequences of any third party acting or refraining to act in reliance on the Information.

Our report has been prepared with care and diligence and the statements and opinions in the report are given in good faith and in the belief on reasonable grounds that such statements and opinions are not false or misleading. In preparing our report, we have relied on the data and information provided by members of the sponsor group as being complete and accurate at the time it was given. The views expressed in this report represent our independent consideration and assessment of the information provided.

No responsibility arising in any way for errors or omissions (including responsibility to any person for negligence) is assumed by us or any of our partners or employees for the preparation of the report to the extent that such errors or omissions result from our reasonable reliance on information provided by others or assumptions disclosed in the report or assumptions reasonably taken as implicit.

We reserve the right, but are under no obligation, to revise or amend our report if any additional information (particularly as regards the assumptions we have relied upon) which exists at the date of our report, but was not drawn to our attention during its preparation, subsequently comes to light.

This report is issued pursuant to the terms and conditions set out in our engagement letter dated 30 June 2017.