



AUSTRALIAN RECORDING  
INDUSTRY ASSOCIATION

**ARIA SUBMISSION IN RESPONSE TO  
THE AUSTRALIAN LAW REFORM COMMISSION  
ISSUES PAPER:  
COPYRIGHT AND THE DIGITAL ECONOMY**

---

**30 November 2012**

## Contents

Executive Summary .....	1
Introduction .....	3
This Submission.....	3
The Inquiry .....	4
Guiding principles for reform .....	32
Caching, indexing and other internet functions.....	38
Cloud computing .....	40
Copying for private use .....	42
Online use for social, private or domestic purposes .....	47
Transformative use .....	50
Libraries, archives and digitisation .....	54
Orphan works .....	55
Data and text mining .....	56
Educational institutions .....	57
Crown use of copyright material .....	60
Retransmission of free-to-air broadcasts.....	60
Statutory licences in the digital environment .....	62
Fair dealing exceptions .....	64
Other free-use exceptions .....	66
Fair use.....	67
Contracting out.....	71
Annexure A .....	74
Annexure B .....	80
Annexure C .....	84

## Executive Summary

The Australian Recording Industry Association Limited (**ARIA**) is pleased to be provided with the opportunity to submit a response to the Australian Law Reform Commission (**ALRC**) Review of Copyright and the Digital Economy.

The Australian music industry is an active participant in and contributor to the digital economy. The music industry and the wider creative industries are contributors to the creation of innovative business models and are also significant investors in Australia. Content, such as the copyright material that is produced and created by our members and artists, is a primary driver of the digital economy. ARIA's members have responded to changes to the digital landscape and the increasingly converged digital environment through the introduction of responsive and innovative voluntary licensing models. These existing and emerging voluntary licensing models enable our members' content to be made widely available to consumers via a diverse range of legitimate channels and platforms. Any changes that are introduced to the existing copyright framework will have an impact on these models, with the potential to create uncertainty and disrupt the development of this market. ARIA is supportive of the ALRC and this inquiry, and we note that it is of immense importance that this review fairly balances the rights of users of copyright and rights holders. In ARIA's view, no additional exceptions or statutory licences should be introduced without direct evidence and analysis that demonstrates that changes are imperative.

The protection of copyright is essential to ensure that there is a continuing stream of creative output – as copyright provides incentive and reward to creators of copyright material and those that invest in the creation of such content. It also provides a framework for innovation amongst service providers in the digital economy. It is only through a strong copyright framework that creative endeavour can flourish and be rewarded.

Any changes to the Copyright Act 1968 (Cth) (the **Copyright Act**) must be based on a clear demonstrated need. It is a misnomer that the introduction of further exceptions to the Act will promote innovation. ARIA has not seen any credible evidence that the Act impedes innovation or in any way stifles Australia's participation in the digital economy. ARIA does not believe that cloud services, "user generated content" which is disseminated across commercial and public online platforms, or "transformative uses" should attract the protection of exceptions for infringement under the Act. The introduction of exceptions for these types of platforms and uses would undermine established business models for the licensing of content and diminish the rights of content creators.

Furthermore, ARIA does not believe that there is compelling evidence to support the introduction of additional statutory licences. Notwithstanding this, ARIA supports the implementation of changes to certain statutory licensing provisions in the Copyright Act, namely the removal of the statutory caps set out in section 152 of the Copyright Act and the removal of the exception set out in section 199(2) of the Copyright Act in relation to the reception of sound recording broadcasts.

It is also important that any changes to the Copyright Act are considered in light of Australia's international obligations. A cautious approach must be adopted if changes are implemented at a domestic level that do not accord with our international obligations. The Three Step Test (as it is commonly referred to), must be an integral factor in the consideration of the introduction of additional exceptions under the Copyright Act.

In order to ensure that Australia remains an active and competitive participant in the digital economy, it is imperative that a strong copyright framework is in place. It is only with a strong copyright framework that there will be continued investment in Australian performers, recording artists and further investment in new technologies.

## Introduction

ARIA is a national association representing the Australian recorded music industry. We have over 100 members who range from small “boutique” record labels typically run by 1-5 people, to medium size organisations and to very large companies with international affiliates.

One of our core roles is to represent the industry, both domestically and internationally. We are proud to support Australian music and create opportunities for it to be heard.

Many will be familiar with the highly prestigious annual ARIA Awards which is an event that ARIA stages each year to recognise the achievements of Australian artists. However our work is much broader and also encompasses the collection of statistical information, the compilation and publication of the ARIA Charts, and the preparation of submissions, information and views from the entire industry.<sup>1</sup>

We are well placed to provide a current picture of the recorded music industry and its place in the digital world. We are also able to provide key perspectives from the industry itself as to the ways in which Copyright laws are the cornerstone for recording artists and enable the recording industry more broadly to survive and grow in the digital economy. We are also able to share perspectives in respect of the Issues Paper for the Australian Law Reform Commission (**ALRC**) and the questions the ALRC asks in the Issues Paper.

ARIA looks forward to reviewing and carefully considering the submissions of other parties that have provided submissions to this inquiry. ARIA would welcome the opportunity to work cooperatively with the ALRC and would be pleased to provide the ALRC with additional information in respect of any aspect of our submission.

## This Submission

The Terms of Reference from the Attorney General of Australia referred “*the matter of whether the exceptions and statutory licences in the Copyright Act, 1968 are adequate and appropriate in the digital environment*” to the ALRC.

The Issues Paper<sup>2</sup> states that the Attorney-General of Australia asked the ALRC “*to inquire into and report on the current and further desirable uses of copyright material in the digital economy.*” The Issues Paper in turn raises many questions of wide breadth in respect of the Copyright laws generally.

ARIA is supportive of a process in which aspects of Copyright law in Australia are to be reviewed to assess whether they are adequate and appropriate in the current digital economy.

---

<sup>1</sup> <http://www.aria.com.au/home.htm>

<sup>2</sup> Issues Paper “Copyright And The Digital Economy” at paragraph 2

ARIA is however concerned by a range of assumptions, attitudes and perceptions expressed more generally that Copyright law is not already providing a framework for innovation, new opportunities, creativity and growth, including in the so called digital economy.

In our view, in contrast to the suggestions raised in the Issues Paper, the Copyright framework in this country continues to provide the bedrock for innovation, opportunities, creativity and growth. ARIA believes that at least insofar as the music industry is concerned, it is essential for policy makers and stakeholders more broadly to have an accurate picture of why that is the case in the context of this review.

This submission will therefore set out to provide a clear picture of the current industry, to provide context for the answers to the many specific questions framed by the Review. The answers to each of the 55 questions raised by the ALRC will address the technical aspects of Copyright laws with reference to the reality of the digital economy that the current music industry initially found itself in, and then, in turn, created along with many others.

This submission is made on behalf of ARIA's members. ARIA members may also make separate submissions to the Commission in respect of specific issues that may be of relevance to them. ARIA also acknowledges that it supports the submissions that have been made separately to the Commission by Music Rights Australia and Phonographic Performance Company of Australia (PPCA).

## The Inquiry

### Question 1:

**The ALRC is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. For example, is there evidence about how copyright law:**

- (a) affects the ability of creators to earn a living, including through access to new revenue streams and new digital goods and services;**
- (b) affects the introduction of new or innovative business models;**
- (c) imposes unnecessary costs or inefficiencies on creators or those wanting to access or make use of copyright material; or**
- (d) places Australia at a competitive disadvantage internationally.**

## The Music Industry in 2012

ARIA strongly believes that it is critical in the context of this review that those who engage in the broader dialogue take time to understand the current dynamics of the music industry, and the recent, rapid changes in the marketplace.

Those who do will find that the music industry has grasped the opportunities offered by the digital world. They will find dynamic, innovative, evolving business models and successful Australian businesses which rely heavily on existing strong copyright laws for their existence.

They will find that the music industry is already a dynamic contributor to the digital economy. It can deliver sustainable growth and jobs, not through innovation and licensing alone, but through clear government support for strong laws that enable the entire industry to grow and develop in even more innovative ways.

There are a range of easy assertions that we see being made in some quarters that suggest that copyright laws are in some way outdated, or stifling innovation and creativity, or preventing the creation of new business models and ideas.<sup>3</sup>

This is not the experience of ARIA or its members.

*In the digital economy, I don't think we're at any competitive disadvantage in Australia apart from our distance in a retail sense – the disadvantages we suffer in digital have nothing to do with copyright law, and more to do with the structural inefficiencies such as broadband data costs, and broadband speeds. There are huge costs for consumers in downloading costs compared to US and Europe. Our research shows the immediate anxiety and concern from customers (and it is immediate) is about cost of download and cost – we have found that consumers are very skeptical about hidden costs and that is a huge barrier for us to get over, namely the costs involved in downloading.*

*Our biggest fear would be a dilution of the copyright laws. We are one of the strongest music markets in the world. We are number 6 globally, and measured per capita, we are no 2. As a country, we punch above our weight in terms of people listening to and adopting music. We wouldn't want to see a loosening of copyright laws. Without strong copyright laws, it would make it very difficult to continue to invest and create the business model we are creating. The fact that people are building these businesses and making them available in Australia makes that clear.*

**Scott Browning – Marketing Director, JB Hi Fi**

The music industry has evolved and invested in change to enable it to embrace the opportunities and address the challenges inherent in the digital economy. Existing players have had to evolve, innovate and invest, while new investors and partners have emerged. There is a sense of vibrancy and discovery.

The current copyright framework, which is consistent with international best practice, has led to this innovation and will continue to foster, advance and protect innovation and growth.

Australian copyright law has acted as an enabler of change.

---

<sup>3</sup> For example: [http://www.afr.com/p/opinion/time\\_to\\_innovate\\_and\\_build\\_our\\_silicon\\_t1qgTaBMKTddkEgl2FFN0H](http://www.afr.com/p/opinion/time_to_innovate_and_build_our_silicon_t1qgTaBMKTddkEgl2FFN0H); and <http://www.smh.com.au/technology/technology-news/copyright-stuck-in-horse-and-buggy-era-20120821-24jrl.html>

It is a framework under which digital businesses have been able to grow and has provided one of the strongest platforms for Australia to participate globally in the digital world. Australia is the sixth largest recorded music market in the world<sup>4</sup> - behind the US, Japan, Germany, the UK and France and ranks significantly higher on a per capita basis. It is also the sixth largest market in the world for digital music revenues.

Recorded music is more ubiquitous than ever. For the first time in history, more people are accessing recorded music through digital channels than any other means.

All those involved in the creation of recorded music – including artists, musicians, music publishers, managers, record companies, distributors, technology providers, rely on the robust enforcement of fair copyright laws to recoup their investment of time and money. The digital world offers these creators a platform to reach consumers in Australia and around the world, but only a robust copyright framework will ensure that consumption of their work will be directed to licensed channels that pay them for their music.

Digital channels enable Australian creators and innovators to build on their strong tradition of exporting repertoire around the world. A strong copyright framework will support the sustainable development of an indigenous creative digital economy which will act as a platform for exporting content. Some countries, such as South Korea, where robust laws have recently been implemented and strong protection measures adopted to turn around a flagging sector, are good examples of how this can be a reality.<sup>5</sup>

The music industry has embraced technology and helped drive Australia's creative digital economy, largely due to the existence of a tried and tested copyright regime that has been developed over time. The challenges of the past remain the challenges of the digital era – the need for strong laws and strong enforcement.

## **The Industry Embraces technological change**

The recorded music industry has transformed itself in the last 10 years.

The digital economy has opened up vast opportunities for creative companies and individuals that depend on a fair and strong copyright framework.

Consumers are listening to music in unprecedented numbers and can access it in more ways than ever before. They can continue to buy music in physical CD or vinyl formats, as well as accessing download stores, subscription services, video streaming websites or advertising-supported offerings.

---

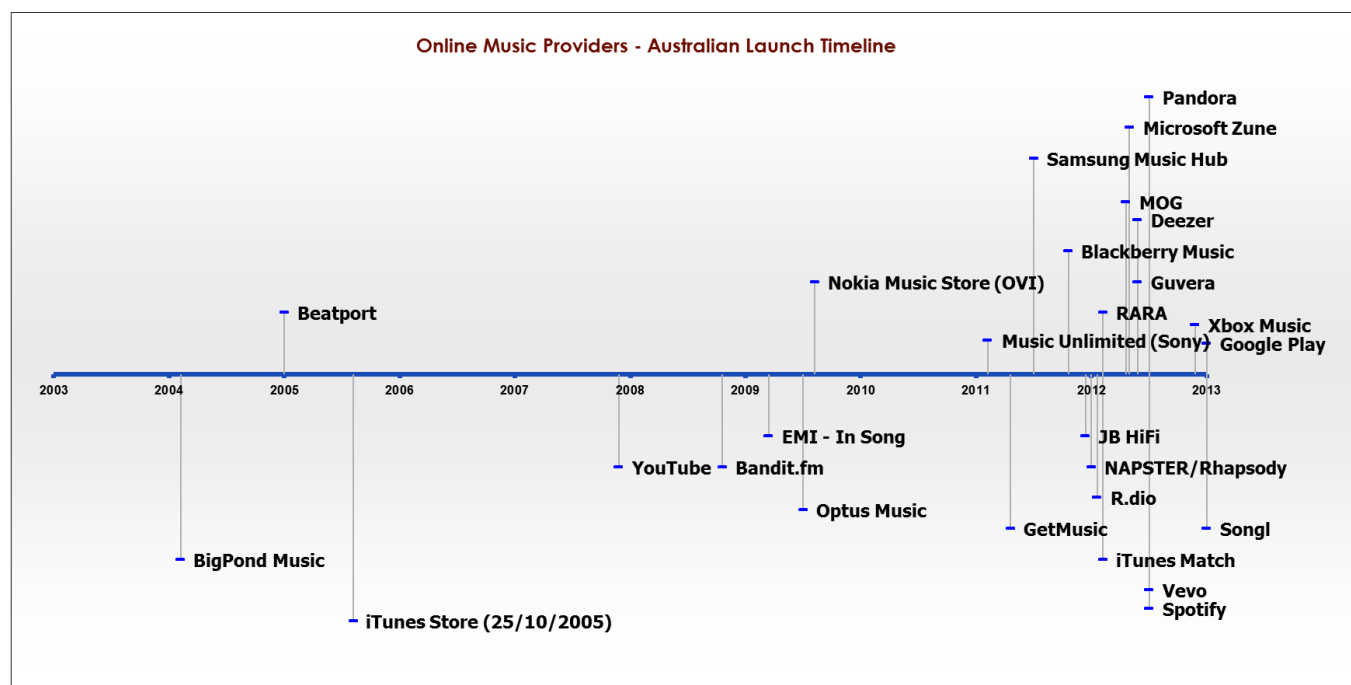
<sup>4</sup> International Federation of the Phonographic Industry (IFPI) Report "Recording Industry in Numbers, 2011" page 77 and 93.

<sup>5</sup> See Case Study 3 on page 30, of this submission.



The global surge in consumer demand for smartphones and tablets, along with steadily growing broadband penetration, are major factors in the increased uptake of digital music services. Broadband speed and download costs are also critical to the continued growth of the sector. Globally, the uptake of mobile smartphone devices is predicted to continue and some estimates are that numbers of those devices will far overtake PC numbers in the next few years.<sup>6</sup>

Recorded music has helped drive the demand for new digital services and hardware. Music videos have helped fuel the growth of YouTube, leading artists have developed huge numbers of Twitter followers, thereby attracting people to the service. The music industry has licensed more than 26 million tracks and more than 500 diverse digital music services worldwide. Other creative industries are now adapting to the digital economy as improved broadband connectivity and a new generation of smartphones and tablets make it easier for consumers to access their content.



**Figure 1 Timeline of the introduction of digital services in Australia**

The timeline above shows some distinct phases in the development of music distribution. Essentially, since the introduction of MP3 and other file compression formats, CDs have been displaced as the favoured means of listening, collecting and acquiring music over a timeframe beginning in the late 1990s. These are described in more detail below, but to understand the Figure 1 above in a high level sense, the following descriptions may be useful:

<sup>6</sup> There are many predictive reports, one example is <http://m.cnet.com.au/worldwide-smartphone-user-base-hits-1bn-339342073.htm>. Another [http://www.businessinsider.com/state-of-internet-slides-2012-10?op=1&utm\\_source=buffer&buffer\\_share=28bcf](http://www.businessinsider.com/state-of-internet-slides-2012-10?op=1&utm_source=buffer&buffer_share=28bcf)

<b>File Sharing:</b>	These are music-focused online services operating as peer-to-peer file sharing Internet services in which audio files, typically music, were shared and encoded in MP3 format. Many of these companies grew into prominence in the late 1990s. Napster, Gnutella, Grokster and Kazaa are examples. Many online service providers at the time such as AOL, Microsoft and Yahoo moved to related instant messenger technologies. Some, such as Napster, were challenged for copyright infringement and either ceased operations or their business models evolved into some of the subsequent business models that worked within legal frameworks.
<b>Download:</b>	Some examples include Apple iTunes Store, Zune Marketplace, Amazon MP3 and JB Hi Fi. These are services that allow users to download music from an online “music store”. Audio files are downloaded, essentially tracks or albums, which users pay for online. Other content, such as books and video, is made available in the same way. Users are licensed in different ways to use the files. There were many evolutions of these kinds of services in the early 2000s as various companies sought to solve pricing, Digital Rights Management, media player technology and other related issues. It is generally acknowledged that the commercial launch of the Apple iTunes Store in April 2003 in the US to Apple users was a key milestone in the commercial success of this phase which remains in a significant global growth pattern.
<b>Streaming Services:</b>	These services take a wide range of forms and identities. In essence, a music store offers an actual music file, while streaming services offer listening without actually owning or being licensed the source file or music file. Simplistically, these are “cloud” services that provide access to a library of music (millions of songs). Examples include Spotify and Rdio.

The importance of content to all these services is crystal clear. Simply, without music content, there is no reason for, or at the least, less appeal for some of the services. Conversely, the reason the technologies exist is to help consumers access and use content in new and exciting ways.

Without content driving demand for these technologies, much of the consumer incentive to acquire the new technologies, and the services and products is gone. Conversely, without the technology, it may be possible that consumers will no longer access certain forms of content, in favour of other forms of content.

Consumer demand for instant access to content (including news, TV, music, film, games and books) has helped to drive growth in many domestic and global technology businesses – including Internet Service Providers, search engines, social networks and even mobile devices and tablets.

*The reputation of the music industry for many years was that we were initially slow to address the new technologies. However as an industry and as individual businesses it's long been in our interest to adapt and diversify in order to make the most of the many opportunities digital technology represents for us, for our artists and for consumers. To that end, we've invested in people and infrastructure, in gaining new skills and in pioneering new approaches and business models. As a result, innovation is now central to our industry and we are watched by other businesses and sectors who want to see what technology can enable.*

**Beth Appleton – Director of Marketing, Warner Music Australia**

## **The Industry provides new services in the Digital Economy**

Record companies have licensed a diverse range of services to help monetize their content in the digital environment. Many of these services are referred to in Figure 1. There are a range of new and innovative technologies being developed that help support the distribution of music in the digital economy.<sup>7</sup>

*In terms of digital consumption, Australia was the first market in the world where our growth in digital outpaced our fall in physical sales, even prior to the uptake of music streaming subscription services Spotify, Deezer and Rdio.*

**Australia Council for the Arts: Art Facts: Music (<http://artfacts.australiacouncil.gov.au/>)**

The continuing licensing of new services and development of new technologies is leading to a further widening of consumer choice.

Developments in cloud technology are transforming the way consumers manage and store their music. Many of the cloud services are early in their adoption curve. Increasingly, services are offering a bundled array of offerings to their consumers that will change over time.<sup>8</sup> Even as this inquiry proceeds, new services such as the Xbox (Microsoft) music service are being launched or expanding into new territories.<sup>9</sup>

In 2003, the Pro-Music website was launched as a global guide to finding and accessing licensed digital music ([www.pro-music.org](http://www.pro-music.org))<sup>10</sup>. When it launched, Pro-Music listed just 20 services in the whole of Europe and iTunes had just launched in the US. Consumers could choose from up to 200,000 tracks. Today, the site lists more than 500 services worldwide and consumers can choose from more than 26 million tracks.

<sup>7</sup> For example, file tagging technologies such as Echonest and Gracenote

<sup>8</sup> For example, see JB Hi Fi Now Case Study 1 in this submission

<sup>9</sup> For example, <http://www.theaustralian.com.au/australian-it/microsoft-offers-free-music/story-e6frgakx-1226496472977?sv=fba6f000672cc79dea31e9b63026879c>

<sup>10</sup> As described on the Pro-Music website, Pro-music is a coalition of musicians, performers, managers, artists, major and independent record companies and retailers across the music industry who are working together to promote the different ways in which people can enjoy music safely and legitimately online.

*Today, consumers from over 100 countries worldwide can choose from more than 26 million tracks, across around 500 different services. They have unprecedented choice in how they access music: buying on-demand, streaming, subscription or listening free with ads, on myriad digital music players. Digital music now accounts for one-third of recorded music revenues globally, valued at \$5.2 billion in 2011.*

**IFPI Press Release, Pro-Music Website Re-Launched – An Essential Global Guide to Getting Digital Music: 11 October, 2012.**<sup>11</sup>

Australia is in the vanguard of countries worldwide that are attracting new digital services. Global services such as iTunes, Deezer and Spotify launched in Australia because their international business strategies determine that it is an important market to operate in. The timing of any Australian launch is not impacted by local copyright or licensing frameworks.

A table of the Australian legal digital services is annexed to this submission (**Annexure A**). The table gives the name and web links of the digital distribution channels of legal content in Australia as at the date of this submission. It also provides the nature of the primary activity of each service and a general description of the service. There are at least 39 digital music services available to Australians, of which at least 16 are streaming services and 20 are full or partial download stores. This means that Australia has a volume of services that is comparable to other top 10 recorded music markets.

Of the 39 digital music services, 3 are local streaming services created in the last 9 months (JB Hi Fi, Samsung Music Hub, Songl). Of the international streaming services, several services have some form of local presence in Australia (e.g. Spotify, Deezer, MOG, Rdio).

#### **Case Study 1 – JB HiFi NOW**

*We are Australia's largest music retailer. We are hovering around top 10 music retailers globally. Put another way you could say that we are actually globally the largest per capita – on that measure, bigger than iTunes!*

*JB Hi Fi have a very strong heritage of breaking local artists in the local market and being a platform for sales of their music. We are number 1 in the world and in Australia for Australian catalogue and for focusing demand on local musicians and bands.*

*With just a six month standing start, we have already managed to achieve a very competitive position against major global players such as Rdio & MOG. For example, the daily iOS rankings for free Music apps on the Australian iTunes store shows JB Hi-Fi NOW app downloads consistently in the top 10-20 positions and consistently 20-30 ranking positions in front of MOG & Rdio.*

*We have had to make the transfer across to the digital world to stay relevant and competitive. The biggest impediment to date was the cost of broadband, and the speed of download. In that regard, timing is and has been critical. We have been aware that we have had to make the move, and*

<sup>11</sup> see [http://www.ifpi.org/content/section\\_news/20121011.html](http://www.ifpi.org/content/section_news/20121011.html)

wanted to for many years, but it hasn't been until 3G and 4G that we have been capable of doing so. We had very real concerns that if we tried to launch any earlier, we would not have been able to establish a successful and profitable business with the conditions current in the market. 3G and 4G LTE high velocity in mobile broadband was the key.

We think that consumers ultimately will want greater choice and innovation and flexibility, and our hope is that they will move to platforms like ours. We want to be device agnostic. Our plans also include video, movies and other content at some point. We are focused on the domestic market and not international yet. We have a long way to go before we did that. But it is a feasible target.

We have been operating a music streaming service which sits well with our business. For us, as Australia's biggest music retailer, we need a model we can compete from, on a global basis, and with global organisations, and streaming is the way we can do that. It is likely that we will also introduce a download service to complement the offer.

We see this as 5 – 7 year program. We think it will be tough initially. Despite large uptake for streaming in other parts of the world, Australia is still early in the uptake curve for reasons associated with broadband cost and speed. We hope that people will ultimately consume more music, not only online, but overall. That is the point that we will then peg back losses.

It is also even harder in the digital world for creators to get noticed and for mainstream public to find and buy in the online world. We are trying to design a total ecosystem where the local talent can also get exposure. We work with all the local record companies and labels – majors and independents – to make sure we have local talent available.

Our longer term plans are that they want people to buy music in any way they want - music CDs in stores, or online. Downloads in store or online. Streaming as well. Music is the cornerstone of our business model and we want to sell music to consumers in every and any way we can. We want to provide music on demand to anyone, at any time, in any way and on any device.

Copyright laws don't impede these plans, in fact they help by providing a platform to build from. Our biggest competitor currently for the business generally is illegal downloads. It's simply not realistic to separate illegal downloads and enforcement out from any discussion of copyright law review generally because illegal downloads and piracy are a real problem at many levels in the industry. There are many vested interests who want to be able to push content, or allow it to be pushed, and who seem to want to take little or no responsibility for enforcement.

**Scott Browning – Marketing Director, JB Hi Fi**

Today, licensed digital music services operate in more than 100 countries worldwide, a number that has almost doubled in the last year. In Australia, the adoption of those kinds of services is shown clearly by Figure 1 and reflects a similar growth pattern.

## A. Guide to some Business Models of the Digital Economy

Record companies have licensed more than 500 digital services worldwide and almost 40 in Australia alone. They operate on a range of business models, including download stores, subscription services, bundled deals, advertising-supported offerings and video streaming services. A full list of services operating in Australia is available in Annexure A. The text below sets out some further details of how these business models operate.

### Download – a la carte

Download stores traditionally replicated the physical format market, with consumers choosing to buy albums or singles on an à-la-carte basis. Today, they are pioneering the use of cloud technology to enable their customers to access their music collections anywhere, anytime and on any device.

Apple iTunes first launched in Australia in 2005, and, since 2006, more than 200 million individual tracks have been downloaded in Australia<sup>12</sup>. Online music download stores account for a large proportion of digital revenues and for the majority of the legitimate services in Australia and worldwide. Some stores, such as JB Hi Fi, are amongst the largest music retailers in the world (<http://www.jbhifi.com.au/> - see Case Study 1 above). In the case of others, recent trends show that smaller “boutique” music stores and services, with a focus on “curating” music that cater to specific audiences are growing in numbers and popularity (e.g. Cartell (<http://cartellmusic.com.au/>); and the soon to be launched planetofsound service from Inertia which is described in Case Study 2 in this submission), DanceMusic Hub (<http://dancemusichub.com/>)). A number of record companies run local download sites (e.g. Bandit.fm, Get Music, The InSong). Other download sites act as engines for third parties. Some locally developed services are available internationally, such as Bandit.fm which is available to customers in Australia, New Zealand and some countries in South America.

*A great example of the diversity of approach is our own <http://www.getmusic.com.au/> service which UMA set up to provide a range of ecommerce services in the digital space. There is a huge amount more in terms of promotions, clothing, merchandising, content, traditional and new media, and other information such as update information about touring artists.*

*Businesses and consumers can buy music in a range of different ways generally – physical product is still crucial and our team manages logistics and order fulfilment processes, both B to C and B to B. One of those fulfilment channels is through the Get Music web site. We don't just provide our own product through that site, consumers can also buy physical content from other labels. We make a whole range of special editions and deluxe product sets available as well. Consumers can buy in CD, DVD, Blu Ray and vinyl formats. They can order through the site and fulfilment and delivery is made from our warehouse through our current transport vendor, Australia Post.*

<sup>12</sup> See <http://www.aria.com.au/pages/documents/physdigsalesxvalueunit.pdf>



*Another format is the download service - the Get Music site is an easy way for people wanting music to download tracks or albums or videos to their digital music players. We offer popular tracks or albums for purchasers of music who can select from a range of menu options, such as by genre or artist. We call these “a la carte download services”. Really simply, the acquirer simply chooses the track or tracks that they want, then pays for it via the on line check out, just as for any other online purchase. The product is then downloaded onto their device of choice in MP3 format rather than delivered through physical channels.*

**Gavin Merriman – Head of Ecommerce, Universal Music Australia**

## **Streaming Services - Free**

Streaming services enable consumers to listen to music without downloading a permanent copy of it. In many cases, consumers can use the services for free as advertising revenue supports the running of the service. Services such as Guvera and Spotify enable their users to access vast libraries of millions of tracks licensed by record companies.

A screen shot of the various models offered by a selection of streaming services is reproduced in Annexure B to this submission.

## **Streaming Services – Subscription**

Subscription services enable their users to access vast libraries of millions of tracks licensed by record companies, uninterrupted by advertising, for a low monthly fee. Subscription is a recent and fast expanding business model. In Australia, as Annexure A and Figure 1 show, the majority of these services have launched in recent years. As an example of how transformative this model is likely to be, the number of consumers subscribing to music services globally is estimated to have increased by nearly 65 per cent in 2011, reaching more than 13 million, compared to an estimated 8.2 million the previous year.<sup>13</sup>

Subscription services typically provide different tiers of membership. Many, such as Spotify, JB HiFi NOW and Rdio are available on a full range of devices and consumers are able to access the services through a range of packages and platforms – computer browser, mobile telephone and smartphone platforms, through to home entertainment devices such as home music and entertainment systems.

Many home entertainment systems now access streaming services and create a “virtual loop” for mainstream music access. For example, the Sonos music system is a wireless home music and entertainment system geared to provide top quality audio for people who want to listen to music in the home. Sonos claims to provide “*all the music on the earth, in every room, wirelessly*”<sup>14</sup>. Sonos provide bundled links to their customers to services such as JB Hi Fi NOW, Spotify, iTunes and MOG (operated by Telstra in Australia) so they can access those services. The services available can be added over time through online updates to the Sonos system. The Sonos music system in turn can be operated by applications that can be downloaded and

---

<sup>13</sup> IFPI Digital Report 2012 page 10.

<sup>14</sup> <http://www.sonos.com/>

installed on smartphones, tablets, and personal computers - completing the virtual loop of music access.

The tiers of membership available through subscription services vary from service to service. Some have a “Freemium” model, aimed at attracting customers with a “free” advertising-supported offering at a base tier, with the option of migrating customers to a more sophisticated monthly subscription tier. Some only have a base subscription model that allows basic streaming, perhaps with better sound quality. Others have supplemental premium tiers at a higher monthly fee that allow a form of caching<sup>15</sup> of music to mobile devices, so that playlists and favourite tracks can be stored and accessed for those times when users may not be online. Each of these tiers is backed by licences from rights holders, and they are able to be negotiated based on use.

*Some of the more recent business models where premium subscription tiers allow consumers to access content in different ways on their mobile devices would be absolutely broken if search providers were allowed to extend caching and buffering too far. That innovation would be at an end.*

**Beth Appleton - Director of Marketing, Warner Music Australia**

Subscription services are another example of the marketplace adapting and innovating to new technologies within the current legal framework. Music subscription offers a different model of return on investment for artists and record labels. In the licensed download environment, an album or track is downloaded once and paid for. In the streaming environment, a track or album may be listened to hundreds of times, each triggering a payment to rights holders.

## **Dedicated Subscription Services**

Other home entertainment systems and platforms provide dedicated subscription services to existing customers.

For example, Sony’s Music Unlimited service<sup>16</sup> is based on the population of connected PlayStations and connects to other Sony devices. It provides millions of tracks to be enjoyed on any PC or Playstation device. Sony Vidzone streams free music videos to PS3 or PSP devices. Xbox has recently announced a relaunch of its music offering as Xbox Music, a broad service offering available on windows enabled devices.<sup>17</sup>

In the mobile devices market, Samsung Music Hub is an Australian designed and built subscription based streaming service<sup>18</sup> available on select Samsung mobile devices. BBM have a global music streaming service that can be accessed only through Blackberry devices.<sup>19</sup>

<sup>15</sup> It is important to note that the use of the word “caching” has a broad range of meanings in a commercial context, and can refer to copies made on a range of devices. This differs from the very specific meaning given to the word in various sections of the copyright legislation.

<sup>16</sup> <https://music.sonyentertainmentnetwork.com/>

<sup>17</sup> <http://www.microsoft.com/en-us/news/Press/2012/Oct12/10-14XboxMusicPR.aspx>

<sup>18</sup> <http://www.samsung.com/au/mobile/featured-applications/music-hub-teaser/index.html>

<sup>19</sup> <https://appworld.blackberry.com/webstore/content/36110/>



*EMI have worked with Samsung to put in place a fully interactive streaming site for Australia called the Samsung Music Hub. The majors are signed up, and we're now working to include independents (some are direct locally, some are large global).*

*There are a couple of unique points. First is that it is a different tiered model to the other streaming models. Because it is providing a service that has a lot of focus on mobile, Samsung has a basic tier of mobile only, and the premium is PC and TV plus video on demand. The reason simply is because it is intended as a supplemental app on mobile at this point. It is available in Beta on Samsung Smart TVs at the moment. Currently that service is \$12.99 per month.*

*Second, is that EMI has taken a "middle man" role – we were talking with Samsung about 18 months ago and encouraged them to do streaming – but they didn't want to have to deal with everyone. So EMI did all the work. We went to all the majors and got their buy in and sign up. This hasn't happened in any other market – we effectively designed and built the service in Australia, for Australia.*

*The Samsung Music Hub was designed for and is available exclusively in Australia. It has an a la carte download service as well priced at \$9.99 per month. 5 million tracks at the moment. The service currently offers caching, currently to a maximum of around 500 designated because of capacity challenges on the handsets. By caching I mean playing from the memory of the phone, rather than from a server.*

*All use is tracked online and off line, so how much it is played gets tracked and this means the artists and other royalties can be paid. The bulk of revenue comes from hard bundling. EMI is the service provider locally – Samsung use 7Digital everywhere else, other than Australia. Samsung owns the result.*

**Roddy Campbell – VP Commercial Development, EMI Australasia**

## **Music Video Streaming**

Music video streaming services enable consumers to watch a huge number of films created to accompany individual tracks, as well as other dedicated content featuring artists. MySpace, YouTube and Vevo are examples of music video offerings which are streamed to users. YouTube has its own copyright management system ([http://www.youtube.com/t/copyright\\_center](http://www.youtube.com/t/copyright_center)) and relevantly, has a process to help track uses of legitimate content. Rights holders are able to provide the audio files with metadata included in the file. YouTube has implemented fingerprinting technology which accesses that metadata and then automatically finds and detects when that content is used. This fingerprinting technology offers the rights holder the option to block or alternatively share in the advertising revenue otherwise paid to YouTube.

*We thought the ALRC might appreciate this insight into how the YouTube notification/claim process works for Shock content.*

*Firstly, we claim ANZ rights in all videos and provide YouTube with the audio of all music we control which Google store to fingerprint (ie via Shazam-style recognition software) and to recognise when our content is used in UGC or uploaded by other users.*

*When our music is used in UGC or uploaded by third parties, we receive a standard form email. A recent example was one that related to the use of the Shooter Jennings video - this pending claim from the YouTube CMS is shown on the first page of the attached document (see Annexure C). Under this process, Shock can release the claim or confirm it which is then communicated to the user via their YouTube account.*

*The user then has the opportunity to provide reasons why the content should be allowed (ie released from a claim). You can see the reasons given by a user on the second page in relation to the use of the AWOLNATION track used as a soundtrack to the UGC/video - in this example, we will 'Reinstate The Claim' via the highlighted tab.*

*If someone does not respond to or address a claim, their channel is blocked and the video/content is removed by YouTube. We might only use the 'Takedown' option when we or the licensor label wants to drive traffic to one location or the use of the content is offensive. For the most part we are happy for our controlled content to be used and 'monetised' via the platform.*

**Andrew Fuller - General Manager, Business & Legal Affairs | Digital Services, Shock Records**

VEVO is a dedicated online music video platform providing high quality videos, original music programming and live events. It was launched in Australia in April 2012 partnering with the local company MCM Entertainment Group. Australia is the fourth country (after the US, Canada and the UK) to receive the service which was initially launched in December 2009. It generates revenues through advertising and brand sponsorship. Integration with social networks is vital for the service – it is the primary channel for legitimate, licensed video content on YouTube and 7,500 artists have the 'VEVO for artists' application on their Facebook pages helping them to power and monetize their videos. VEVO has more than 1.5 million Facebook Fans.<sup>20</sup>

## **Bundling Music**

Increasingly, licensed music services are being provided to consumers as part of a bundle of services from ISPs and fixed and mobile telecommunications companies. Examples in Australia include Vodafone, Virgin Mobile and AAPT (now iiNet) download services. These companies have the commercial footprint and billing structure necessary to enable music services to reach a broad audience.

---

<sup>20</sup> See IFPI Digital Report 2012 at page 13.

There are a number of international examples of subscription services being hard bundled into mobile and wireless telecommunications plans. Telecommunications customers of specific services will be able to enjoy unlimited song downloads, ringtones and ring back tones and unlimited national talk, text and web access. A local example is the MOG service, which is offered to Telstra customers on an unmetered basis<sup>21</sup>.

## **Other Cloud Streaming Services**

New services arrived for streaming from the cloud in 2011, with new systems that enhanced the way consumers managed and stored their music. Leading the way, Apple launched its iTunes Match service in November, 2011 which enabled users to access their music libraries across the full range of devices they owned. The service is available in Australia for a yearly fee.<sup>22</sup> The service, licensed by various record companies, effectively upgrades a user's music collection and dispenses with the need for them to physically transfer music files they have bought across the full range of their families' devices. Other major players are following – Amazon Cloud Drive, and also Google Music which was launched in November 2011 for the Android platform. Consumers can purchase music which is then delivered to the cloud from where it can be streamed to multiple devices. Cloud locker type services which compete to be the archive for online digital music collections are fast becoming part of streaming offerings. The fact that these services provide price mechanisms and service offerings with associated pricing structures that allow access by multiple devices is very relevant too, for people wanting practical solutions for storage, library management, back up and archive.

## **Integration with other forms of digital services**

Social networking services are integrated into music services at multiple levels. Increasingly, subscription and other services have partnerships with Facebook or Twitter that enable new sign ups through those services as part of their core service offering. The music service providers not only fully integrate with the social network, but allow users to import their Facebook friends and share music or music playlists with them.

Typically social media sites link into content sites so that many of them will have arrangements with sites such as YouTube. Social media sites are effective ways for consumers to gain access to performers and creators and to provide pathways to consumers.

MySpace recently relaunched in September 2012 and has an even greater emphasis on music in its fourth major redesign. In 2005, when it had hundreds of millions of users, it was a one stop social networking site directly competitive with Facebook. Now part-owned by Justin Timberlake, the current iteration will focus on a narrower social network for musicians, artists, celebrities and their audience. The site also appears to offer the ability for users to log in via either Facebook or Twitter and offers a high degree of integration with those services.

---

<sup>21</sup> See <http://bigpondmusic.com/mog>

<sup>22</sup> See <https://www.apple.com/au/itunes/itunes-match/>

## Music Apps

There are many mobile applications that can be purchased or downloaded for free. These help people enjoy their music and relate to music in different ways. They include music discovery apps, gig guides and remix tools. Some are capable of expansion into different forms of content as consumers worldwide explore “second screen” capabilities. Shazam, for example, is a music discovery sampling tool that helps people identify and buy music when they hear some music being played close by on another device.<sup>23</sup> The technology available through Shazam, which was initially focused on music, is now being used as a base to expand into other “second screen” capabilities. Although there are many apps, written for a number of different platforms, the iTunes app store itself provides a good insight into the diversity and opportunities available globally in this sector.<sup>24</sup> Many of the platforms have applications available from the Apple store.

## B. The Record Industry in the Digital Economy 2012

### The Role of the Record Industry in the Music Business

Record companies remain the principal investors in artists’ careers and the creation of new music. In 2011, record companies invested US\$4.5 billion in discovering, nurturing and promoting artistic talent. Recent research from Germany and the UK suggests that between 70 and 80 per cent of unsigned artists would like a recording contract<sup>25</sup>. Many artists say they want to tap into the promotional skills and expertise of record companies, despite the increasing ease of online self-publication and self-promotion. Investing in artists remains a competitive and risky business, with only around one in five signings going on to be a commercial success. The revenue from successful campaigns is reinvested by record companies in the continuing search for new talent.

*One of the biggest myths of the digital age is that artists no longer need record labels. The internet allows them to reach their public directly, the myth goes. Live music and other revenue sources, like merchandising and advertising, will do the rest.*

*Yet the reality is in fact completely different. A very small minority of artists, mostly well known, established acts, are achieving success through this DIY route – they deserve good luck. But the vast majority are not. The truth is that artists are generally much better served by a record deal. They want the funding and the specialist support that indie and major record labels provide.*

*Put another way, whilst the direct route afforded by the internet is open to all, mixing the talents of business and creativity is often a minefield, with creativity often compromised by the challenges of running a business, which requires totally different skills. Artists generally prefer to leave the complex administration of a rights based business to someone else.*

---

<sup>23</sup> <http://www.shazam.com/iphone>

<sup>24</sup> <https://itunes.apple.com/au/genre/ios-music/id6011?mt=8>

<sup>25</sup> IFPI Investing in Music Report 2012 at page 6

*A few years into the digital revolution, it has now become clear that the internet is by itself no guaranteed route to commercial success. MySpace has more than 2.5 million registered hip hop acts, 1.8 million rock acts, 720,000 pop acts and 470,000 punk acts. The gulf between acclaim and anonymity, where record labels do their essential work, has never been greater than today.*

**Introduction to “IFPI, Investing in Music: how music companies discover, develop and promote talent” published by IFPI 9 March, 2010**

The IFPI report “Investing in Music 2012” found that:

- Record companies invested approximately 26 per cent of industry revenues – around US\$4.5 billion – in artists and repertoire combined with marketing<sup>26</sup>
- The 16 per cent of revenues record companies invest in A&R<sup>27</sup> alone is a proportion that significantly exceeds R&D expenditure of virtually all other industries;
- There are more than 4,000 artists signed to the major international record companies alone and tens of thousands more on the rosters of independent labels.
- One in four of these artists is a new signing, as fresh talent remains the lifeblood of the industry
- Advances (US\$200,000), recording (US\$200-300,000), tour support (US\$100,000), video production (US\$50-300,000), marketing and promotional costs (US\$200-500,000) are the biggest items of record company spending on artists;
- Record companies typically spend up to US \$1.4 million dollars to break successful pop acts in major markets.

No other player in the music sector invests so heavily in the development of new artistic talent. The investment made by record companies fuels a wider music industry; developing artists that promoters want to book for live shows, songwriters to write songs for, radio stations want to play to attract audiences, merchandisers want to feature on specifically created products and brands want to use to promote existing products.

The core purpose of a record company remains discovering, developing and promoting talent, which can be extremely expensive. These are the major costs and investments shouldered by music companies, yet they are largely invisible to the consumer. The main visible elements are in the distribution of music – the packaged CD or the delivery of a downloaded or streamed track – however these represent a small share of the overall cost of bringing recorded music to consumers.<sup>28</sup> The investment breaks down into areas such as:

- Support and expertise to help plan a road to success
- Financing of recording costs
- Production support – choice of songs, recording in the studio
- Artworks and video
- Manufacturing and distribution support, online and CDs

<sup>26</sup> IFPI Investing In Music Report 2012 at page 5

<sup>27</sup> Artists and Repertoire. This are teams within record companies that are responsible for finding new talent and for guiding the career and artistic development of artists.

<sup>28</sup> “IFPI, Investing in Music: How Music Companies Discover, Develop and Promote Talent (March, 2010) at page 9

- Tour support
- Marketing and promotion
- Advances to the artist
- Royalties and royalty accounting
- Licensing
- Negotiation of distribution deals

**As a result, the digital era has not substantially reduced record companies' costs of doing business.**

*When an artist signs to UMA we invest in a range of activities to record, market and promote them.*

*Recording, mastering and mixing the music, which includes producers, engineers, studios, rehearsals, etc. Imagery such as logos, record covers, publicity photos and suchlike.*

*Content creation around the recordings like EPKs<sup>29</sup>, videos, behind the scenes footage/photos, studio visual footage, exclusive songs for on-line, retail and media partners, favourite recordings lists for streaming and media partners, webisodes, signed merchandise and so on.*

*We invest in social media such as Facebook, Twitter, pinterest, tumblr and the artist's own website which includes imagery, strategies for branding and consumer connectivity/dialogue, statistical analysis, advertising investments to drive social numbers up and, on occasion, training for the artist in these spheres. Our GetMusic site enables artists to sell products direct to fans and creates a generic database from which to promote the artist.*

*Promotions which include the traditional areas of securing media (TV, Radio, Print) and new media online which involves artist promotional tours around the country conducting interviews, performances, exclusive recordings, IDs for the media partner, etc. We also, where necessary, give the artist media training.*

*There is no "one size fits all" in terms of execution for the artist. Some artists retain more control than other. Our strategies and campaigns are bespoke to meet the needs of each artist and involves many debates and planning sessions with the artist, their management, media (old and new), retail (physical and digital), touring agent, designers and others.*

*The range of investment and resource associated with content creation for online and social media use is extensive and a significant part of UMAs commitment to the digital economy*

**Tim Kelly - General Manager Marketing, Universal Music Australia**

---

<sup>29</sup> Electronic press kit



The negotiation and licensing of distribution and other rights are clearly a core role of record companies. In respect of the kinds of music services in the digital economy described in this submission, there is no one preferred model, the industry preferring to be adaptable and flexible to each situation. In some cases, rights deals are negotiated on a global basis, in other cases they are negotiated by country under a local agreement, and other times supplemental and country specific arrangements are adopted in conjunction with overarching global arrangements.

All the record companies and labels have had to invest in a range of delivery mechanisms (e.g. Songl, VEVO) including music delivery stores (e.g. The InSong, Bandit.fm, Inertia, GetMusic). Some of these stores have a broad range of traditional and newer fulfillment mechanisms so that consumers can buy physical product as well as digital product. Orders placed for physical product will be fulfilled and delivered via traditional fulfillment channels from warehouse facilities.

*Content creation is our core business. Content storage and/or distribution is supplemental to our business. Traditionally music companies have relied on others to sell content to consumers. The eco-system being artist>label>retail/media platform>consumer. In that respect, we are open for business; we want to see as many services as possible delivering our content to consumers and this is a prime driver for the business. Universal is quite prepared to license content to as many different businesses under as many different business models as possible as the breadth and depth of our paths to the consumer demonstrates.*

**Tim Kelly - General Manager Marketing, Universal Music Australia**

Some record companies have also invested in underlying technologies in an effort to streamline use of music in the digital economy. One example is *Open EMI*, which is a partnership with web based “music intelligence platform” the Echo Nest.<sup>30</sup> Another is Gracenote, a company, which claims to provide the largest database of music and video metadata<sup>31</sup> in which Sony Music has an interest.

*EMI have been working on an interesting initiative based out of the UK.*

*At this point, we think there is likely to be a continuing high growth globally in the market for mobile apps via online stores, as we have been seeing already in the past few years. Those apps, in relation to music, are continuing to develop in new and different ways and already include a huge diversity of applications.*

*There is an associated developing demand for licensed music content in this space - EMI also wanted to support app developers in their access to labels and marketing generally to create those apps.*

<sup>30</sup> <http://www.emimusic.com/openemi/api/>; <http://developer.echonest.com/sandbox/emi/>

<sup>31</sup> <http://www.gracenote.com/about/>

EMI decided to partner with The Echo Nest (<http://the.echonest.com/> <<http://the.echonest.com/>> ) to bring developers a unique opportunity to work with content from some of the biggest artists in the world. The Echo Nest provides the technical platform for the initiative.

The initiative is called OpenEMI (<http://www.emimusic.com/openemi/api/> <<http://www.emimusic.com/openemi/api/>> ). The intention is to make music content available to 3rd party developers to allow them to build apps.

*This means that for the first time ever, a major label, EMI, is distributing top-tier content directly to developers so they can build commercial apps without negotiation of additional terms or license arrangements. They sign up to the program, and can then access great content via one of the sandboxes.*

*It is very early days and very innovative. The initiative was launched only a few months ago, and we believe has had quite a lot of positive comment and acknowledgement. Apps are likely to be launched shortly. EMI hope that the initiative will result in innovative commercial apps for iOS, Android and the Web.*

**Roddy Campbell – VP Commercial Development,  
EMI Australasia**

## Record Companies working in the Digital Economy

Record companies and artists have an enduring and evolving partnership in the digital economy. The close association between music and technology means that roles more broadly have evolved and the distinction in roles, more blurred. Record companies and labels can act as distributor, artist managers can act as labels, and the roles and functions of each are much more transferable and flexible than before. Consequently, there is no one single model for the deals done between artists and labels.

An example of the evolution of record companies is Inertia. From its humble beginnings in early 2000 as a tiny operation run out of founder and CEO Ashley Sellers' lounge room, Inertia has grown into one of the country's most dynamic and multifaceted independent music companies<sup>32</sup>.

### Case Study 2 – Inertia

*Probably the best way for me to respond to the copyright questions, is to look at the reasons we're doing what we're doing. The obvious thing is that the copyright laws currently support our growth and innovation.*

*We started as an Australian distributor of music, and then morphed into a truly 21<sup>st</sup> century company with multiple diverse revenue streams in distribution, then as a record label, up to where we are now a full-service music company also doing licensing, product management, marketing, promotions, merchandise and rights management. We are now working on the soft*

<sup>32</sup> <http://www.inertia-music.com/about-inertia>



*launch of a new on line service as a separate brand at the moment called **planetofsound.com**.*

*There is so much music and other content out there on the web that it is very hard to find exactly what I want or anyone else wants. The punters are faced with questions about “how do I find it, do I go to iTunes, do I go to a record store, or a retailer, via streaming services, do I rely on friends direct or on Facebook or some other way”. They are asking “where’s my filter, where’s my online friend to help me find and get to the stuff I want to listen to”.*

*A strong editorial vision is a therefore a key part of our focus. What we want to do with planetofsound.com is to act as taste master, a curator, for anyone who is interested in specific kinds of music and we have become one of Australia’s largest and most influential independents in doing that.*

*Planetofsound.com is a boutique on line music store for genuine music fans – curated by Inertia, with bespoke editorial and hand-picked releases. The fact we have a curated offering means that we have cherry picked product from all record companies, available in physical CDs, vinyl, DVDs, and digital downloads as well as merchandise, tickets for events and possibly other stuff in the future.*

*Our key strategy is that it is a one stop shop – we are a trusted partner who acts as your filter in this space. For anyone who wants to hear great music recently released, we suggest the top 3 albums or so that they might be interested in and want to buy. And maybe another classic release you may not have heard that you need to. We’re your local record store, on-line.*

*We have other features. We have a weekly album streaming function. We are offering vinyl plus free downloads, bundling and purchasing via Paypal. We have pages for each of the record labels, so you can find out more about the label, their history and the acts – and other things that others don’t offer, such as links to the full catalogue of that label which is also available through the site.*

*We need certainty more than anything. No one wants any more confusion that there already is at the moment in the market. Everyone is still getting used to the environment. Any major changes to the basic copyright laws would be of concern having just invested a lot of money in the new service.*

**Ashley Sellers, CEO, Inertia**

The artist promotional process has also evolved with a heightened focus on brand partnerships and synchronization deals and a greater use of digital and social media to run targeted campaigns. Labels also work with artists to support a greater range of artist activities including live performance and merchandising. Record companies have recruited experts in all these areas to help them develop their offering to artists. The ability to derive revenues from a greater number of channels means that record companies do not have to recoup their investment from music sales alone.

*The mix of marketing effort has changed significantly in terms of focus and budget allocation. Record companies tend to rely on social media and active communications management that can bring direct dialogue with audiences and link the chain more generally. This has in some areas changed the nature of spend from broad marketing efforts, though that is still core to the work. There is much more information available to help segment markets and identify which consumers might like particular bands and genres of music, understand what drives those consumers and what interests them and to market to audiences based on their preferences. It is much more efficient and more sophisticated than ever before.*

**Roddy Campbell – VP Commercial Development,  
EMI Australasia**

Record companies' content is used to drive audiences for many social media platforms.

For example, many labels, or their individual artists, have channels on YouTube. In November 2012, nine of the top 10 most viewed videos on YouTube were music videos, led by the South Korean artist known as Psy's track *Gangnam Style*, which had over 800 million views<sup>33</sup>.

The Australian artist Gotye has 298,134 Twitter followers 1,197,918 'likes' on Facebook, 252,536 subscribers on YouTube and a massive 402,586,887 video views on YouTube. Similarly, the Australian artist Keith Urban has 506,764 Twitter followers, 3,104,123 'likes' on Facebook, 30,535 subscribers on YouTube and 14,083,997 video views on YouTube. Also, local performers the Janoskians have 275,374 followers on Twitter, 278,570 'likes' on Facebook, 424,407 YouTube subscribers and 45,777,445 views on YouTube.<sup>34</sup>

These figures indicate how artists and music are helping to drive interest and engagement with social media.

*Here at Sony Music Australia and across the music industry, social media is such an important part of our day to day operations that it is integrated across all areas of the business. Having a presence on key platforms such as Facebook and Twitter for both the Sony Music Australia brand and our respective artists is a necessity.*

*Maintaining an open dialogue with the general public through this medium is crucial in ensuring we keep consumers informed and pleased. Promoting our artists with written and visual content (such as artist images and music videos) helps to engage fans and certainly impacts sales. Further, advertising releases on these social platforms has become a staple of every marketing plan.*

*We have a dedicated team in the Digital Marketing and Promotions department including Community Content Managers who provide strategy for our artists in the social network space as well as monitor and react to artist-fan interaction every day of the week.*

**Cameron Price - Digital Marketing and Promotions Manager, Sony Music Entertainment**

<sup>33</sup> Source: YouTube. See also <http://www.reuters.com/article/2012/11/26/entertainment-us-psy-idUSBRE8AN0BT20121126>

<sup>34</sup> Current as at 30 November 2012.

One important and powerful way to help promote music is the “free” give away for new releases. In every week of the year, record companies give out “free” music for marketing purposes. The methods of doing so are varied, and depend on the audience. In a promotional sense to industry, copies are made available to journalists and bloggers, broadcasting and radio networks and some streaming services. In the case of consumer promotions, free copies tend to be case by case depending on the artist. Some artists will make one or more tracks available free online for a limited time pre-release. Some more successful bands might plan an ‘event’ and give away a significant amount of material for free on a once off basis to obtain a broader penetration. Independent labels and others might have “streams” for a week for marketing purposes. Download sites, such as iTunes, might have “singles of the week” which are free for limited periods. “Legitimate” free music for promotional purposes remains, as it always has been, part of the industry— the difference is that there are so many different ways now, including digital distribution of part tracks, some full tracks and albums.

Record companies are also working with other businesses which use music for promotional activity, even distributing it as a product. For example, some credit card companies offer downloaded music in return for consumers’ accumulated loyalty points; other companies provide access to download music services to encourage new members for their loyalty programmes. Beverage companies offer voucher codes on packaging and containers for purchases to use to download “free” content from the internet. Retail chains with point programmes and other specific promotional and incentive programs will offer music to their customers.

This demonstrates that there is legitimate free content available, but it is at the discretion of the rights holder as to timing, and is aligned with desired marketing and distribution outcomes.

## **Record companies contribution in the Digital Economy**

The digital music sector is showing strong growth. 2010 was considered “the year when digital music went mainstream” with digital sales in Australia constituting more than a quarter of recorded music revenue.<sup>35</sup>

In the following year, 2011, digital music revenue grew by a healthy 51.2 per cent<sup>36</sup>, and comprised 41 per cent of recorded music trade sales revenues which helped ensure Australia was the sixth largest recorded music market in the world, behind France and ahead of Canada.

Overall, Australians embraced the ever-increasing number of legal digital offerings available in 2011, as digital sales grew in number by 36.7 per cent, with digital track sales units increasing by 39.2 per cent and digital album units up 45.9 per cent on 2010.

Some artists and record companies are now experiencing situations where they have a Number One album on the charts that has up to 90 per cent of its sales in digital formats.

---

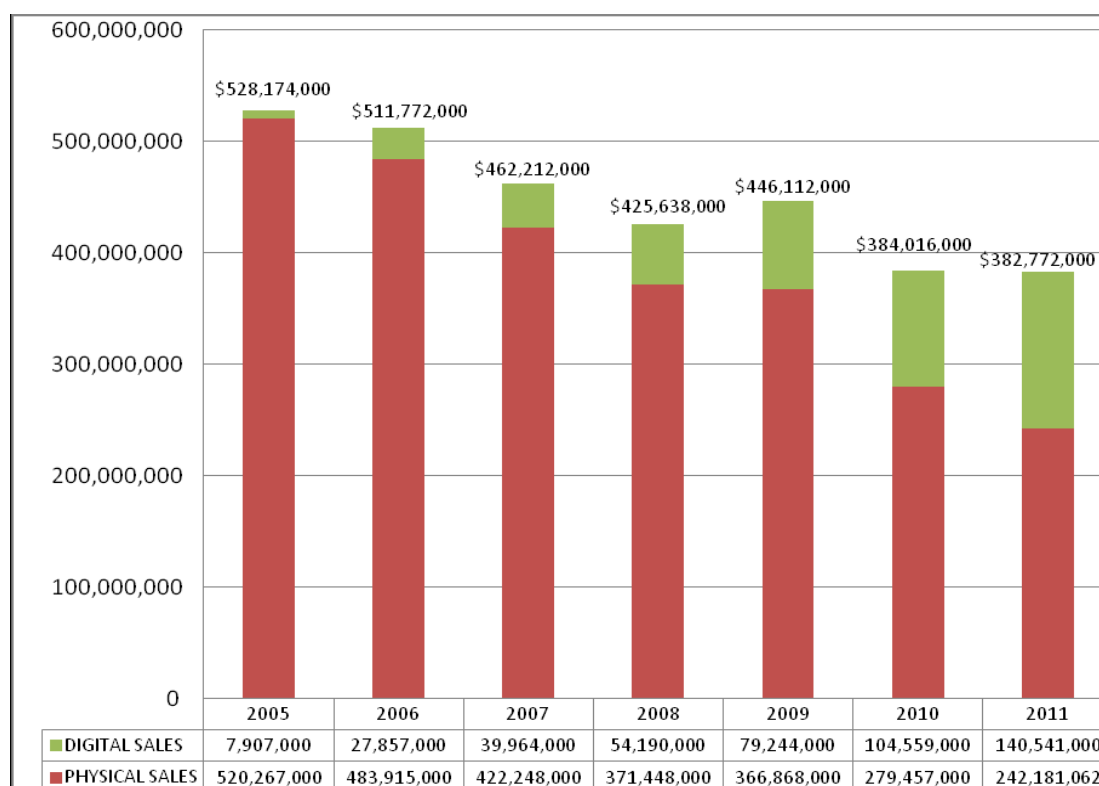
<sup>35</sup> Reaching an estimated \$105,000,000, see <http://www.aria.com.au/pages/documents/physdigsalesxvalueunit.pdf>.

<sup>36</sup> “Recording Industry in Numbers – The Recorded Music Market in 2011”. IFPI. 2012 Edition at page 30

Further growth in the digital market is expected in 2012, due in part to a number of new music subscription services entering the Australian streaming market, including Spotify, Deezer and Rdio, joining existing services such as JB Hi Fi NOW and Samsung Music Hub.

However, it is important to place this recent growth in context. This is because, whilst these figures represent an improvement compared to the immediately preceding year, the industry in Australia shrank by 32 per cent in the past 10 years, on the back of ever growing piracy. The current overall industry value of \$382.7 million is a drop of 25.2 per cent on the \$511.8 million generated in 2005<sup>37</sup>. Figures released by IFPI estimated that one in every four internet users accesses unlicensed services online in Australia every month which costs the recorded music industry potential sales and revenue.<sup>38</sup> These trends are shown clearly in Figure 2 below. The shift to digital music clearly demonstrates the impact of innovation.

**Figure 2: ARIA Wholesale Figures 2005 to 2011 – Total Dollar Value<sup>39</sup>**



<sup>37</sup> <http://www.aria.com.au/pages/documents/physdigsalesxvalueunit.pdf>

<sup>38</sup> Digital Music Report 2012 - IFPI

<sup>39</sup> See <http://www.aria.com.au/pages/documents/2011wholesalefigures.pdf>

## Ripple Effect from the Contribution of Record Companies

The Price Waterhouse Cooper report “*The Economic Contribution of Australia’s Copyright Industries: 1996-97 to 2010-11*” (**PWC Report**) prepared for the Australian Copyright Council, found that copyright industries as a whole contributed 6.6 per cent of GDP – or \$93.2 billion - which was slightly higher than the retail trade, but less than manufacturing industries. In the year 2010 – 2011, 8 per cent of the Australian workforce was employed in copyright industries. The methodology adopted the World Intellectual Property Organization (**WIPO**) classification of particular industries as being within the copyright industries<sup>40</sup>.

Clearly, these figures demonstrate the importance of copyright industries for the Australian economy more broadly.

As one of the key contributors to one of those copyright industries, record companies help finance the careers of recording artists, but they also drive a far wider music economy, bringing jobs, trade and cultural benefits in an even broader way than even the PWC Report captures. The “ripple effect” helps generate a sector, a broad music economy, which includes the music retail sector, marketing and radio advertising, publishing and audio equipment industries.

In practical terms, record labels’ investment touches an enormously broad music community. They directly purchase services from songwriters, music publishers, recording studios, video directors, PR and advertising firms. They buy advertising space on television and radio stations, in newspapers and magazines and from outdoor advertising companies. In this way, the impact of recorded music companies’ investment is felt across the media and technology industries.

This investment indirectly benefits online and physical music retailers, concert venues, live music promoters, ISPs, music listening device manufacturers and those who use recorded music to attract and retain customers, from retailers to nightclubs. Success in the music industry also generates economic activity and jobs in other sectors as well, such as films, television and games.

The combined success of record labels and those upstream and downstream generates economic activity and jobs in other sectors as well, such as film, television and games. Central to that success is the certainty which the Australian copyright system brings to investors and others.

In respect of the Australian music industry:

- *Almost all Australians intentionally listen to music weekly or more, and 57% attend live music events each year, making music the biggest art form in Australia.* (Australia Council for the Arts: Art Facts: Music (<http://artfacts.australiacouncil.gov.au/>))

---

<sup>40</sup> *The Economic Contribution of Australia’s Copyright Industries: 1996-97 to 2010-11* prepared for the Australian Copyright Council by Price Waterhouse Coopers

- *Australians continue to spend \$2 billion on music each year. In 2009/10, each Australian household spent an estimated \$380 on music-related goods and services, totaling over A\$2 billion economy-wide. That's more than they spent on internet charges, dental fees or domestic holiday airfares. (Australia Council for the Arts: Art Facts: Music (<http://artfacts.australiacouncil.gov.au/>))*
- *Australians buy 3 recordings per second.....Australians purchased almost 100 million sound recordings in 2011, including CDs, vinyl, digital tracks and music ringtones. Audience demand for major music performances reached over 10 million tickets in 2010/11 – generating sales of more than \$1 billion. This means Aussies are consuming music faster than ever. (Australia Council for the Arts: Art Facts: Music (<http://artfacts.australiacouncil.gov.au/>))*
- *The first ever national study of the value of live music found that in 2009/10 the Australian live music industry injected \$1.21 billion into the national economy, with total profits and wages of \$652 million and supporting almost 15,000 full-time jobs. (Report by Ernst & Young: "The economic contribution of the venue-based live music industry in Australia")<sup>41</sup>*

## C. The Copyright Framework in the Digital Economy

### Copyright Laws Drive Investment in the Music Business

In the music business, record companies are the major investors in the creation of new content. They invest in multiple ways and have adapted to the digital economy in support of their artists.

Copyright frameworks support and drive investment in the music business, in the ways set out in this submission. Copyright is the mechanism by which creators secure a financial return on the creation of new content.

These are important areas for Australian organisations. The laws must not be eroded in the absence of very clear and significant evidence of the laws being unable to meet current challenges in the digital economy. The certainty required in this fast moving digital world should also not be overestimated as business models are created, tested, adapted and expanded.

Copyright is the lifeblood of the commercial models currently being rolled out. The innovators and creators that sit behind the content, the technology and the business models that comprise today's music industry and that of the future rely on its strength. Exceptions under a copyright regime can run the risk of puncturing an otherwise healthy atmosphere of innovation, development and growth.

---

<sup>41</sup> <http://www.liveperformance.com.au/site/content/document/00000198-source.pdf> at page 3

## Copyright Laws Must Be Kept Robust To Support Innovation and Competitiveness

It is critical that Copyright is not weakened, intentionally or otherwise. To do so, will damage the competitiveness of Australia on the global stage, and will also negatively impact the opportunities available to local creators to participate successfully in the digital economy. A strong copyright regime can in turn foster growth and innovation in other industries. As the European Union Commission noted in a recent communication<sup>42</sup>:

These sectors (cultural and creative) have an important impact on innovation. The Commission indicates that innovation is increasingly driven by non-technological factors such as creativity; and

- Creative sectors are a key element of competitiveness. The communication refers to other countries investing significantly in the cultural and creative sectors, such as the US, and China, where public investment in culture has grown by 23 per cent annually since 2007, and which plans to raise the sectors' share of GDP from 2.5 per cent to 5-6 per cent by 2015;

There are examples to learn from - South Korea is an example of success because a strong copyright regime was put in place. The tie between growth and strong enforcement mechanisms is inescapable - there is a serious threat to Australia's online music future without strong enforcement provisions. The digital music market continues to expand whilst also experiencing significant levels of illegal downloading<sup>43</sup>. ARIA is happy to provide the ALRC with more information about illegal downloads if requested. Any failure to act with strength on illegal downloading will undermine the potential for the digital music sector to expand, eroding value for investors, creators, entrepreneurs and innovation in general.

*K-Pop is a phenomenon and is exploding throughout Asia. It can only be a matter of time until a Korean act breaks globally. These developments came out of a solid and sustained music business turnaround that started with Soribada turning legal and the anti-piracy laws rolled out by the government.*

**Rob Wells, President, Global Digital Business, Universal Music Group.<sup>44</sup>**

---

<sup>42</sup> Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions, September 2012. [http://europa.eu/rapid/press-release\\_IP-12-1012\\_en.htm](http://europa.eu/rapid/press-release_IP-12-1012_en.htm)

<sup>43</sup> IFPI Digital Music Report 2012, at page 4

<sup>44</sup> IFPI "Recording Industry in Numbers 2011" at page 29



### Case Study 3: South Korea

South Korea illustrates how good legal services, combined with strong repertoire and a healthy legal environment can lead to significant market growth. The recorded music market in South Korea grew by 6 per cent in value in the first half of 2011, following a 12 per cent increase in 2010. In 2005 it was ranked as the 33rd music market in the world. Today, it ranks as the 11th largest market.

One of the key rewards of South Korea's improved legal environment is more investment in local artists. Domestic repertoire used to account for around 60 per cent of recorded music sales, but this figure has climbed to around 80 per cent in 2011. Around 70 per cent of the revenue from "K-pop" repertoire comes through digital channels, compared with 55 per cent across the market as a whole.

Q Chung, managing director, Sony Music Entertainment Korea, says: "South Korea is committed to being the most advanced digital economy in the world. Our government understands that a fair legal environment is an essential foundation for such an ambition. This means we have been able to concentrate on what record companies do best: discovering, signing and promoting great local talent both at home and overseas."

South Korea's improved copyright landscape did not happen overnight. The government began to update its copyright law in 2007, requiring online service providers to filter illegal content on request from rights holders. In July 2009, graduated response measures were introduced and in April 2011 a new law required cyberlockers and P2P services to register with the government and implement filtering measures. South Korea operates a range of measures to tackle digital piracy, overseen by the Ministry of Culture, Sports and Tourism (MCST) and largely implemented by the Korea Copyright Commission (KCC).

Graduated response is integral to South Korea's copyright enforcement system. The KCC has sent around 100,000 "recommendation notices" to service providers, requiring them to tell infringing users to stop breaking the law.

South Korea placement in global market rankings	
2007	23
2009	14
2011	11

Source: IFPI, based on total music revenues.

The government says 70 per cent of infringing users stop on receipt of a first notice and 70 per cent of the remaining infringers stop on receipt of a second notice. If users refuse to stop following three notices, this triggers a further series of "correction orders" issued by the MCST. Only a small percentage of users continued to infringe once they received repeat notices backed by a sanction.



*South Korean copyright law also requires online service providers, including P2P services, to block the illegal distribution of infringing material. Unauthorised P2P services and overseas blogs and cyberlockers are targeted through a programme of website blocking. The Korea Communications Commission reports that 17 mostly international sites were blocked in the first five months of 2011.*

**Evidence Supplied by IFPI (2012)**

## Conclusion

In Question 1 of the Issues Paper, the ALRC noted that it is interested in evidence of how Australia's copyright law is affecting participation in the digital economy. Through the information and case studies that we have provided above, it is clear that from the music industry's perspective, the Copyright framework that is in place has enabled new business models and digital services to develop and flourish. These new business models and services have developed both internationally and locally because of our Copyright laws – not in spite of these laws.

These new services have emanated from a range of sources – from major record companies (e.g. Bandit, GetMusic), collaborations of major record companies with broadcasters (e.g. Songl), independent record companies (e.g. planetofsound), hardware manufacturers (e.g. Samsung Music Hub, iTunes), traditional retailers (e.g. JB HiFi Now), telecommunications providers (e.g. Telstra BigPond) and through entrepreneurial endeavor such as Guvera. These services demonstrate a mix of both locally developed and international services and, overall, provide concrete evidence that the Australian copyright framework has not negatively impacted the introduction of new or innovative business models into the market. There are assertions that Australia's copyright laws are too strict and prevent Australia as being the next Silicon Valley. Market and labour issues aside – such an assertion is unfounded. As Annexure A demonstrates, the wealth of digital services that have launched in Australia is a clear indication that our copyright laws are not an impediment to innovation. In fact, streaming services such as the Samsung Music Hub, Songl and Guvera were designed and launched from Australia<sup>45</sup>.

However, as Figure 2 illustrates, the overall Australian music market in dollar terms has decreased substantially over the last ten years, despite the growth in revenues from digital services in recent years. In this context of reduced revenues it is even more important that the rights of creators are protected and not diminished, in order to ensure that recording artists are fully rewarded for their creative effort and record labels rewarded for the risk capital that they invest. Any additional exceptions will not merely affect multinational record companies, but all individual artists and record labels, large and small, whose livelihoods depend on the protection the copyright regime affords.

---

<sup>45</sup> see [http://samsung.com.au/news/articles/general\\_news/australia/samsung-launches-a-music-revolution-samsung-music-hub](http://samsung.com.au/news/articles/general_news/australia/samsung-launches-a-music-revolution-samsung-music-hub) and <http://info.guvera.com/about/>

## Guiding principles for reform

### Question 2:

**What guiding principles would best inform the ALRC's approach to the Inquiry and, in particular, help it to evaluate whether exceptions and statutory licences in the Copyright Act 1968 (Cth) are adequate and appropriate in the digital environment or new exceptions are desirable?**

ARIA will respond to each of the eight principles set out in the Issues Paper.

### ***Principle 1: Promoting the digital economy***

*Reform should promote the development of the digital economy by providing incentives for innovation in technologies and access to content.*

In ARIA's view, as currently articulated, this is not a suitable principle for the reform of the Copyright Act. As indicated in our response to Question 1 of the Issues Paper, ARIA's members are active participants in the digital economy and ARIA fully supports lawful access to content. Copyright provides the foundation on which creative industries such as the music industry are based. The availability of legitimate content is a key driver for the development and growth of the digital economy. However, Copyright law is not by its very nature a legal framework intended to encourage or provide incentives for "innovation in technologies". The protection and encouragement of innovation is the role of industrial property and Competition law such as Patent law, the protection of trade secrets and confidential information. ARIA submits that very different policy considerations apply to the protection of innovation, to those necessary for the ongoing investment in creativity by the creative industries.

That is not to say that copyright does not, in fact, provide incentives for innovation as a by-product of its primary mission of incentivizing creativity. As evidenced in our submission, there is of course, a natural synergy between technology and content. In the digital environment the availability of licensed content enables the development of new platforms for the delivery of that content. Any reform should support this synergy and not undermine the ability of the creative industries to license their content on new platforms to meet consumer expectations. Any reform that undermines the copyright-based incentives to create would ultimately put a brake on technological innovation. To the extent that authors no longer find it worthwhile to create works because the rewards are insufficient, the demand for technologies that provide ease of access to such works will inevitably decline.

The property rights embodied in copyright, not the exceptions to those rights, facilitate the access to content by providing a basis on which to license the use of content and the incentives to create that content. The commercial licensing of exclusive rights underpins the capacity of innovative business models to deliver content to consumers in the digital environment. The returns from the licensing of

content on new platforms support both further investment in the creation of new content, and provide a revenue stream for delivery platforms to continue and grow.

In light of the above, ARIA proposes that Principle 1 could be better expressed as follows:

***Revised Principle 1 Promoting the digital economy:***

*Reform should promote the development of the digital economy by encouraging and protecting creativity to ensure the public has access to a diverse range of legitimate content.*

***Principle 2: Encouraging Innovation and competition***

*Reform should encourage innovation and competition and not disadvantage Australian content creators, service providers or users in Australian or international markets.*

As noted above, any reforms of copyright should be focused on encouraging creativity; while Copyright does in fact provide incentives for innovation, that is not the mission of Copyright. Copyright is, at its heart, a bundle of property rights; it is not concerned with competition or the regulation of competition. The regulation of competition is more appropriately dealt with through other legislative measures such as the *Competition and Consumer Act 2010*. It is also important to understand that Copyright is not the appropriate vehicle for promoting the welfare of service providers. Consumers and service providers benefit from copyright while it is able to support the creation and distribution of legitimate content to consumers. Factors which adversely affect consumers and service providers should be addressed through other regulatory mechanisms.

Service providers such as search engine providers that facilitate access to content have built their business models to generate income based on advertising and internet traffic levels. To sustain advertising and internet traffic levels service providers argue, on behalf of consumers, that access to content should be free or at low cost. The easier or cheaper the access to content, the higher the internet traffic and the more revenue flows back to service providers. However, as service providers and consumers do not contribute significantly to creating or commercialising content themselves, the sole effect of the exceptions urged by service providers would be to increase their revenues at the expense of the creative industries whose capacity to license content is undermined by additional exceptions. This result, a decline in the capacity to invest in the discovery and development of new creative talent, is not in the public interest. Ultimately, it does not serve the interests of service providers when consumers who use their services to access content find that there is less content – and certainly less desirable content – because the creators are unable to receive the rewards for their efforts that copyright has always offered.

However, ARIA acknowledges it is important that service providers are able to operate in an environment where they can facilitate access to legitimate content and in such a way that their activities do not facilitate the unauthorised access to content. Any reforms should ensure they do not undermine investment in the ongoing creation of content nor the returns to creators from the licensing of their works. The current law provides a mature and working legal basis for licensing access to content including a framework of protections for service providers, to protect them where

infringements of copyright occur that relate to certain of their online activities. It is essential that any proposals for reform do not undermine the normal exploitation of copyright materials through licensing, nor create barriers to the development of new business models in the digital environment.

Strong copyright laws coupled with effective enforcement measures are an important part of ensuring Australian creators are not disadvantaged in the Australian and international markets. Copyright laws and effective enforcement measures underpin and protect the establishment of business models for the distribution of legitimate content. This benefits consumers by ensuring the availability of a diverse range of high quality content in those markets.

In light of the above comments, ARIA proposes that Principle 2 would be better expressed as follows:

***Revised Principle 2: Encouraging Innovation and competition***

*Reform should encourage creativity and should not undermine competition nor disadvantage Australian content creators, service providers, or users in Australian or international markets.*

***Principle 3: Recognising rights holders and international obligations***

*Reform should recognise the interests of rights holders and be consistent with Australia's international obligations.*

ARIA supports this principle as drafted, and notes that the existence of the rights of creators provides an environment in which creative content can continue to be produced, and Australian culture developed and preserved. The Copyright Act gives effect to the international copyright framework. The key multilateral copyright agreements are:

- the Berne Convention for the Protection of Literary and Artistic works;
- the Rome Convention for the Protection of Performers;
- the Producers of Phonograms and Broadcasting Organisations;
- the Geneva Phonograms Convention;
- the Agreement on Trade Related Aspects of Intellectual Property Rights;
- the WIPO Copyright Treaty;
- the WIPO Performers, and Producers of Phonograms Treaty; and
- the Australia-US Free Trade Agreement.

That framework embodies the balancing of the interests of creators against the public interest that has been struck at the international level and to which Australia is a party.

The international framework sets out what specific “free use” exceptions are permitted and identifies the circumstances where additional exceptions might be granted. These are limited to a small number of clearly expressed exceptions, possible additional exceptions that comply with the “Three Step Test”, as set out in Article 9(1) of the Berne Convention, and a limited number of statutory

licences where rights may be exercised subject to the payment of equitable remuneration to the copyright owner.

The international framework also recognises the central importance of technological protection measures and rights management information in protecting the rights of copyright owners in the digital environment.

ARIA submits that any recommendations arising from the review must be consistent with the existing international framework which gives rise to Australia's international obligations.

***Principle 4: Promoting fair access to and wide dissemination of content.***

*Reform should promote fair access to and wide dissemination of information and content.*

It is unclear what is meant by the words "fair access". Access to content should be licensed. In certain special cases where individual licenses are impractical, limited statutory licences such as those set out in Parts VA, VB, and VC of the Copyright Act may be appropriate. However, if "fair access" is a reference to pricing of copyright materials, ARIA notes that this is not a matter that should be addressed through exceptions. Unfair pricing is a competition issue which falls outside the Commission's terms of reference.

Copyright does not protect information - it protects the original expression of ideas or information. Consequently, copyright reform should have no role in that regard. For this reason the issue would seem to fall outside the terms of reference.

ARIA's view is that "fair access" means access in accordance with permitted exceptions or on the terms of commercially negotiated licences. Any reforms should seek to create an environment in which the distribution of legitimate content is not undermined by commercial piracy, and the unauthorised distribution of content on a scale that prejudices the legitimate interests of the copyright owner.

In light of the above comments, ARIA proposes that Principle 4 could be better expressed as follows:

***Revised Principle 4: Promoting access to, and wide dissemination of, content.***

*Reform should facilitate legitimate access to, and the wide dissemination of, copyright materials.*

***Principle 5: Responding to technological change.***

*Reform should ensure that copyright law responds to new technologies, platforms and services.*

A key issue for copyright law reform is to ensure that the legislation is technology neutral. The Issues Paper suggests at paragraph 37 that "*copyright law needs to be able to respond to changes in technology, consumer demand and markets*". ARIA disagrees with the premise on which this statement is based. It suggests that copyright has a regulatory role. As already stated, copyright is a property right. It does not have a regulatory role. It is the licensing of that property which must respond to changes in technology, consumer demands and markets. It is in every creator's interest

to do so. It is only if the law is drafted in a technologically neutral manner that licensing will have the flexibility to respond to changes in technology and consumer demands.

In ARIA's view the basic rights of copyright owners have shown themselves to be able to accommodate and keep pace with changes in technology. In the digital environment those rights have underpinned the development of many new and innovative business models which provide platforms and services for the delivery of content to consumers. As discussed in our response to Question 1 of this submission, digital music services such as Spotify, MOG and download and locker service such as iMatch have developed through licensing agreements which respond to consumer demand.

However, the different nature of copyright protected subject matter, such as books, film and music, and importantly, the different ways that they are consumed means that they are necessarily made available through different business models. Copyright law must recognise those differences and not undermine or put barriers in the way of the development of business models tailored to the delivery of different forms of content.

In light of the above comments, ARIA proposes that Principle 5 could be better expressed as follows:

***Revised Principle 5: Responding to technological change.***

*Reform should ensure that copyright law is technologically neutral to facilitate the use of new technologies, platforms and services for the delivery of legitimate content.*

***Principle 6: Acknowledging new ways of using copyright material.***

*Reform should take place in the context of the "real world" range of consumer and user behaviour in the digital environment.*

ARIA submits that this principle, as drafted, incorrectly suggests that the current copyright framework does not allow consumers to readily access copyright material. The "real world" includes not only the interests of consumers in fast and cheap access to content, but also the business models which have developed in response to those consumer demands. The development of those models can, in some circumstances, be a necessarily lengthy process as it involves both the clearance of rights and commercial negotiations over licence fees. Many of those business models now license the consumer use of content in circumstances where it previously would have been infringing. A clear example of this is the emergence of "cloud services" and digital lockers as described in Question 1 of this submission.

Technological developments have made it much easier for consumers to access content without permission and payment. This does not mean we should cease to try to balance ease of access with the rights of creators. Now more than ever it is crucial that protection exists so that new business models can be developed to recompense creators for their work.

The "real world" also includes the limitations placed on the scope of permissible exceptions by the international copyright framework. Reform should look to identify only those special cases where there is no conflict with the normal exploitation of the copyright material, and where the legitimate interests of the rights owner are not unreasonably prejudiced. In particular reform should not

undermine the development of new services by providing exceptions where licensing models already operate.

In light of the above comments, ARIA proposes that Principle 6 could be better expressed as follows:

***Revised Principle 6: Acknowledging new ways of using copyright material.***

*Reform should take place in the context of the “real world” having regard to both consumer behaviour and the new business models that have arisen, and continue to develop, in the digital environment.*

***Principle 7: Reducing the complexity of copyright law.***

*Reform should promote clarity and certainty for creators, rights holders and users.*

ARIA supports this principle as expressed. Ensuring the law is simple to understand and more coherent should be part of the goal of any reform process. However the existing provisions of the Copyright Act, in many cases, reflect a careful balance that has been struck by the legislature. In simplifying the Copyright Act care should be taken not to accidentally disturb that balance.

ARIA is concerned by the statement in paragraph 42 of the Issues Paper that “ . . .an incapacity to contemplate reform because it causes uncertainty is undesirable . . .”. This seems to be at odds with the principle as stated. ARIA would be very concerned if reforms led to increased uncertainty. Such an outcome would benefit neither consumers nor copyright owners, and would impose additional costs on copyright owners wishing to protect their rights.

***Principle 8: Promoting an adaptive, efficient and flexible framework.***

*Reform should promote the development of a policy and regulatory framework that is adaptive and efficient, and takes into account other regulatory regimes that impinge on copyright law.*

As previously noted the Copyright Act does not create a regulatory framework. Copyright is a private property right. The Copyright Act reflects the international framework for the protection of copyright to which Australia is a party. It defines the bundle of property rights that creators enjoy and sets out the limits to those property rights. Various creative industries have arisen through the use and licensing of those rights. The regulation of those industries is not a matter for the Copyright Act but properly the role of industry and competition regulators.

ARIA notes the reference in the Issues Paper to the OECD Guiding Principles set out in the “*Australian Government Best Practice Regulation Handbook*”. ARIA agrees that these principles provide useful guidance for the development of regulatory governance arrangements. However, it is clear from the language used, that these are high level principles which should only provide the backdrop against which regulative measures are scrutinised. The principles are not suited or intended to be applied directly to the development of legislative proposals which are not regulatory in nature, such as the property rights provided under the Copyright Act.

Paragraph 45 of the Issues Paper refers to a guiding principle for government regulation being to “*deliver effective and efficient regulation – regulation that is effective in addressing an identified*

problem and efficient in terms of maximising the benefits to the community, taking account of the costs". ARIA is of the view that issues such as the price and availability of copyright materials cannot, and should not, be sought to be addressed by undermining the exclusive rights of copyright owners. While such an approach may appear to offer a short term solution to these issues, in the longer term it would undermine existing business models, stifle the creation and development of new business models in the digital environment, and impact adversely on the capacity to invest in the creation and development of new content for consumers. It would significantly undermine the ability of content owners to effectively operate in the digital economy.

In light of the above comments, ARIA proposes that Principle 8 could be better expressed as follows:

***Revised Principle 8: Promoting an adaptive, efficient and flexible framework.***

*Reform should promote the development of a legislative framework that encourages and supports the development of content and facilitates access to legitimate content while taking into account the regulatory regimes that impinge on copyright law.*

## **Caching, indexing and other internet functions**

**Question 3:**

**What kinds of internet-related functions, for example caching and indexing, are being impeded by Australia's copyright law?**

ARIA is not aware of any evidence that copyright law has impeded internet-related functions such as caching and indexing. The scope of the current exceptions in s.43A and 111A of the Copyright Act has given rise to, at most, only a theoretical or academic issue for ISPs providing search engine functionality where material is cached. As set out in response to Question 4, the definition of "caching" and even "indexing" is open to various interpretations. ARIA suggests that a glossary of defined terms is provided to ensure a uniform understanding of the issues under discussion.

**Question 4:**

**Should the *Copyright Act 1968* (Cth) be amended to provide for one or more exceptions for the use of copyright material for caching, indexing or other uses related to the functioning of the internet? If so, how should such exceptions be framed?**

It is important to note from the outset that it is ARIA's view that the balance established under the safe harbour scheme should not be undermined by either a broad general exception or a specific narrowly drafted exception. To do so would be inconsistent with Australia's obligations under Article 17.4.29 of the Australia- US Free Trade Agreement. If some entities are not protected by the safe



harbour scheme in respect of their caching activities this issue should be addressed through the review of the scope of the safe harbour scheme. Any such review should also develop a code of conduct to apply to all ISPs requiring them to take steps to address all types of copyright infringing activities on their networks or through the use of their services. Such a review is not within the ALRC's current review of exceptions.

In order to properly consider Question 4, it is important that participants in this review are all operating under the same understanding as to the meaning of "caching". Caching has a variety of meanings depending on whether it is viewed from a purely technical perspective or whether it is viewed from a commercial perspective. As outlined in our response to Question 1 from a commercial, licensing perspective, ARIA members have established commercial models for the access of content which enables consumers to cache or store content. For example, many of the streaming services that are available to consumers provide the consumers with the ability to 'cache' content that has been streamed as a part of the service on to their mobile devices, under an arrangement where that content can be retained while the consumer's subscription to the service continues. These new licensed services not only provide consumers with greater flexibility in the way in which they choose to access such content, but they also provide consumers with a legitimate means to consume such content. In light of this, it is difficult to reconcile that further exceptions are required for such purposes.

ARIA questions the need for an amendment to the Copyright Act to provide a further or broader exception. To the extent that automated caching as part of a technical process constitutes the unauthorised reproduction of copyright owners' materials, it does not appear to have given rise to serious concerns by copyright owners in Australia. However, the Issues Paper at paragraphs 56 to 66 contemplates a number of options for reform. The Issues Paper flags a possible amendment to expand the scope of the existing provisions in s.43A and s.111A, a new coverall provision for technical functions in the digital environment, or an undefined broad flexible "fair use" style exception.

However, there is already protection provided under the safe harbour scheme for carriage service providers in Part V of the Copyright Act. Under the safe harbour scheme the availability of remedies is already limited for Category B activities, i.e. the caching of copyright material through an automatic process (where the carriage service provider does not manually select the copyright material for caching). Importantly s.116AH(1) Item 3 sets out the conditions which a carriage service provider must comply with including the terms on which cached material can be accessed and removing access to cached material on notice that the material has been removed or access has been disabled at the originating site. Those conditions are designed to protect the rights of the copyright owner and represent the balance that is struck for limiting the remedies in the case of an infringement. ARIA is not aware of any difficulties arising from the existing provision or of any inadequacies in that provision.

Paragraph 55 of the Issues Paper states "*In relation to s.200AAA it is unclear why only educational institutions are provided protection for system level proxy caching*". ARIA submits the reason for this is simply because educational institutions are not carriage service providers and cannot come under the protection of the safe harbour scheme. It is likely that the Government considered facilitating educational institutions' teaching activities warranted this specific protection.

## Cloud computing

### Question 5:

**Is Australian copyright law impeding the development or delivery of cloud computing services?**

### Question 6:

**Should exceptions in the *Copyright Act 1968* (Cth) be amended, or new exceptions created, to account for new cloud computing services, and if so, how?**

The above questions refer to “cloud computing services”, commercial services that enable a consumer to access remotely stored content on demand via multiple devices through the internet or a mobile network. Access to the content may be by way of streaming and/or download. Our response focuses on cloud music services.

Consumer demand for cloud services is driven by various factors, including consumers’ desire to back up and access music. Just as broadband companies benefit from greater audio-visual traffic on their networks by being able to sell higher capacity broadband, cloud service companies benefit from storage of music content, because they can sell storage services to consumers who attach value to this activity. For this reason the cloud services constitute an important emerging digital licensing market, based on the use of copyright content.

ARIA submits that the current provisions of the Copyright Act provide a robust framework for the delivery of cloud based services.

The scope of the exceptions in the Copyright Act does not need to be amended to account for cloud computing services. The current provisions in the Copyright Act provide the necessary safeguards and protections to ensure that licensed cloud based services can operate in the digital environment.

Cloud services, or digital lockers, are a developing market and income stream being licensed on a commercial basis. The licensing of remote storage of legitimate content by consumers is already a reality with services such as Apple’s iCloud enabling content to be readily available to consumers wherever they are through a variety of mobile devices. Cloud services are an example, of the normal exploitation of copyright materials in the digital environment. ARIA is of the view that not only is an additional exception to the exclusive rights of copyright owners to encourage these services unnecessary, but it could also be inconsistent with Australia’s obligations and the Three Step Test, depending on the actual function and use in question.

Paragraph 68 of the Issues Paper refers to comments by K. Weatherall that “*Australia’s very technology specific exceptions inhibit the cloud computing model....*”. ARIA disagrees with this assumption. It is not supported by the growth in cloud services in Australia.

Paragraph 64 of the Issues Paper also recognises that cloud computing services are already being used to store and deliver copyright content to consumers. However, the paragraph suggests that it is copyright owners who are using this technology to make their materials available. This does not accurately reflect the nature of these services and the way in which music business models operate in the digital environment.

Music content owners typically license their content for sale, reproduction and communication in the digital environment. Those transactions are typically on a business to business basis and involve the negotiation of access to large catalogues of materials held by different content owners. It is usually third parties who establish the platforms or business models for the delivery of content, whether that is by sale, by providing cloud storage or by providing access to streamed content. Examples of these types of services have been previously discussed in this submission at Question 1.

As commercial, on demand music services, cloud services do not and should not fall within the scope of an exception. Where a consumer transfers content to a third party cloud service operator, the result is that the copy is no longer under the control of the initial owner, and that copy is therefore not a "private copy".

Commercial cloud service providers, with ongoing knowledge and control of the content on their servers, are in a fundamentally different position from the manufacturers of hardware devices that may be used for storage of music files, and should not be taken out of the ambit of copyright law under a "private copying" exception. If copying to cloud services were included in such an exception, it would be much harder for record producers to strike licensing deals with service providers, and as a result fewer services could be offered to consumers and licensing revenues for the content producers would decline. Cloud services have different functionalities, including the ability to automatically stream and to re-download multiple copies of music files purchased from the applicable online stores. According to these functionalities, the licenses therefore have specific constraints as part of the commercially negotiated contract. Record companies should be able to continue to make such commercial deals. A copyright exception would override this ability.

Record producers have already licensed a number of paid 'Scan & Match' services, such as Apple's iMatch. These services automatically scan the user's music collection and enable the user to access all matched content from a specified number of authorised devices. Matched content may include recordings that correspond to a record producer's digitally authorised library. If a consumer has originally obtained the music other than by way of purchase from the cloud service operator, e.g. ripping from CDs, tracks that are not authorized for digital distribution will not be eligible for scanning and matching. However, the user can still upload tracks manually to their licensed cloud locker, making it in practice very difficult to distinguish between a purely value adding service and a cloud service that offers private copying functionalities. In reality cloud services are hybrid in that they are offering elements of both. Any assessment of cloud services would have to look at the underlying functions and the types of uses concerned.

## Copying for private use

### Question 7:

**Should the copying of legally acquired copyright material, including broadcast material, for private and domestic use be more freely permitted?**

Section 109A of the Copyright Act currently provides that the copying for domestic and private use of sound recordings, and the works embodied in the sound recordings, does not infringe copyright, subject to certain conditions provided for in s.109A(3). In considering the need for an exception for copying for private domestic use it is important to be aware of the time and the context in which this exception was introduced. The provision was introduced primarily to facilitate the private and domestic copying of legitimate copies of sound recordings purchased as CDs or LPs, so that the content could be transferred to portable devices and onto computers. Since 2006 there has been an explosion in the services from which consumers can purchase and access licensed music content in a digital form. As recognised in paragraph 77 of the Issues Paper, the normal practice or use of copyright materials in the digital environment is to ensure that consumers are able to make back-up copies and play purchased content on multiple devices. As an example, itunes allows customers to store downloads on five authorized devices at any time, and burn an audio playlist up to seven times for personal non commercial use<sup>46</sup>. Against this background, it is clear that s.109A has become a provision of limited utility as many acts of copying are now covered under licensing provisions.

Any inquiry by the Commission into whether the copying of legally acquired copyright material should be more freely permitted must be conducted having regard to Australia's international obligations under Article 9 (2) of the Berne Convention, Articles 9 and 13 of the Agreement on Trade Related Aspects of Intellectual Property Rights (**TRIPS**), Article 10 of the WIPO Copyright Treaty, Article 16 of the WIPO Performances and Phonograms Treaty, and Article 17.4.10 (a) of the Australia – US Free Trade Agreement. All of these international treaties, to which Australia is a party, effectively limit the scope of the permissible additional exceptions to the reproduction right to *“certain special cases provided that such reproduction does not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder”*.

---

<sup>46</sup> <http://www.apple.com/legal/itunes/au/terms.html#SERVICE>

The meaning of the Three Step Test is discussed in some detail in the WIPO publication “*Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and related Rights Terms*”<sup>47</sup>. The Guide notes that the origin of the expression “Three Step Test” may be found in the way Main Committee 1 of the Stockholm revision conference described how to apply paragraph 2 of Article 9. The Committee stated:

*“If it is considered that the reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment.”*<sup>48</sup>

It is also important to note that, under the first step of the Three Step Test, if the scope of the proposed exception is broader than just a special case it is not permitted at all.

In relation to the meaning of “normal exploitation”, the Guide notes that in 1964 a report by the Study Group set up for the preparation of a revision to the Berne Convention prepared an annotated basic proposal (document S/1). In 1965 a Committee of Government Experts adopted the draft text of Article 9 of the Berne Convention in accordance with the annotated basic proposal. According to the annotations to the basic proposal the Study Group observed that “*it was obvious that all forms of exploiting a work which had, or were likely to acquire considerable economic or practical importance must in principle be reserved to authors; exceptions that might restrict the possibilities open to authors in these respects were unacceptable.*”<sup>49</sup> The Guide goes on to note that the term “normal exploitation” is a normative condition<sup>50</sup>: an exception conflicts with the normal use of a work if it covers any form of exploitation which has or is likely to acquire such importance that those who make use of it may undermine the exploitation of the work by the author.

Other countries that do permit broader private copying exceptions do so within a framework of a remunerated scheme. Whilst ARIA does not advocate the introduction of a private copying levy, it is important to note that as the Australian exception does not provide for any remuneration, the Australian exceptions are by necessity narrower in scope.

ARIA submits that in light of the developments in the digital market for music, the normal use of sound recordings in the digital environment has for some time now included the licensing of copies to consumers for use on multiple devices. This makes their purchase more attractive. Accordingly, on a proper application of the Three Step Test, additional exceptions to permit the additional free copying of sound recordings are not justified and would be inconsistent with Australia’s international obligations.

---

<sup>47</sup> see <http://www.wipo.int/cgi-bin/koha/opac-detail.pl?bib=14057>

<sup>48</sup> At page 56, para BC9.12

<sup>49</sup> At page 58, para BC 9.20

<sup>50</sup> At page 59, para BC 9.21

**Question 8:**

**The format shifting exceptions in the *Copyright Act 1968* (Cth) allow users to make copies of certain copyright material, in a new (eg, electronic) form, for their own private or domestic use. Should these exceptions be amended, and if so, how? For example, should the exceptions cover the copying of other types of copyright material, such as digital film content (digital-to-digital)? Should the four separate exceptions be replaced with a single format shifting exception, with common restrictions?**

There is no basis or “special case” that would justify an exception for format shifting of sound recordings in the digital environment. However, it must be noted that s.109A of the Copyright Act already permits sound recordings to be format shifted from a physical carrier medium such as a CD, LP, or audio cassette onto a computer hard drive or other form of electronic storage.

As outlined above current commercial licensing practices that operate in the digital environment permit multiple copies to be made of legitimately purchased content so that it can be accessed on multiple devices. Given these practices are part of the normal exploitation<sup>51</sup> of sound recordings in the digital environment there does not appear to be any justification for such an exception. In the current market, such an exception would be inconsistent with the Three Step Test as it would undermine the current business practices for the licensing of content that is delivered online.

Continuing technological developments mean that new forms of reproduction keep emerging. When they are applied for the first time it may be difficult to describe them as a “usual”, “typical” or “normal” use of the copyright material. However, these new forms of reproduction are very important to copyright owners to extract market value from their works because they often replace some other more traditional forms of exploitation. The growth of the digital market for sound recordings and the decline in sales of physical carriers such as LPs and CDs clearly illustrates this.

ARIA does not support merging the existing exception into a single format shifting exception. We note the comments at paragraph 80 of the Issues Paper which recognises that the markets for various types of copyright materials are different. The considerations that apply to determine what constitutes a “normal use” of different copyright materials are specific to the different markets for those materials. As each type of copyright material is commercialised, or made available to consumers differently, the need for exceptions needs to be examined on a case by case basis. Any exceptions should be confined, in accordance with the Three Step Test to “*certain special cases provided that such reproduction does not conflict with a normal exploitation of the work, performance or phonogram and does not unreasonably prejudice the legitimate interests of the right holder*”.

---

<sup>51</sup> See Annexure A, Column 6 (‘Devices’)

**Question 9:**

**The time shifting exception in s 111 of the *Copyright Act 1968* (Cth) allows users to record copies of free-to-air broadcast material for their own private or domestic use, so they may watch or listen to the material at a more convenient time. Should this exception be amended, and if so, how? For example:**

**(a) should it matter who makes the recording, if the recording is only for private or domestic use; and**

**(b) should the exception apply to content made available using the internet or internet protocol television?**

ARIA does not consider any case has been made out for broadening the scope of the time shifting provision in s.111 of the Copyright Act.

Paragraph 85 of the Issues Paper asks the question how this exception should operate with new technologies and services such as the cloud. ARIA notes that in relation to sound recordings, the exception applies to copies made on a device that can be used to cause the sound recording to be played, and is owned by the person making the copy. A copy uploaded by a consumer onto a cloud service is typically made on the consumer's computer connected to the internet. Section 109A does not address where the copy is stored so it does not preclude a copy of a sound recording being lawfully stored on a cloud service by a consumer, provided that the the copy is made in compliance with the other provisions in s.109A.

However, this is a very different situation to that where copies are made by a third party and stored remotely. This is the situation contemplated by Question 9(a) of the Issues Paper. This type of service can, and should, be licensed as the third party in making the copy is exercising the exclusive rights of the copyright owner for the third party's own commercial purposes. This is properly a matter for commercial negotiation, not an exception. Given the existence of licensed cloud and streaming services for the storage of music, it is also unlikely that an exception to allow third parties to make copies for consumers would comply with the Three Step Test.

Question 9 (b) of the Issues Paper asks if the exception should apply to "content" made available using the internet. ARIA strongly opposes any such proposal. The exception to infringement contained in s.111 of the Copyright Act, which has its origins in s.14 of the UK *Copyright Act 1956*, was drafted in an era of analogue broadcasts where programming and time constraints meant that the opportunities to catch up on a missed broadcast program were limited. Section 111 is primarily intended to facilitate the recording of missed radio and TV *programs*. Recognising that broadcast programs often include other copyright materials, the exception to infringement necessarily extends to those copyright materials that are copied with the broadcast. Section 111 also makes it clear that the copying must be temporary (i.e. only for the purpose of catching up with the program that has been missed), and not for archiving, or adding to a private collection<sup>52</sup>.

---

<sup>52</sup> See Copyright Amendment Bill 2006 Supplementary Explanatory Memorandum at paragraph 18



Today, the delivery of sound recordings over the internet is fundamentally different from their use in broadcasts as contemplated under s.111. There has been a rapid growth in the number of digital services for the streaming and delivery of sound recordings. Licensed services such as those set out in Annexure A to this submission, provide consumers with the ability to access music on mobile devices and, for example, to listen to “artist radio” which streams music by performers similar to an artist selected by the consumer. They also enable consumers to create their own libraries of materials, and to share their music with friends. In addition, in another content area, the FOXTEL IQ service provides a further example of consumers being provided with the ability to stream content and record content to a consumer’s set top box<sup>53</sup> under a licensed arrangement. Accordingly, there is no case for the exception to be extended beyond its current application to broadcast. An extension of the operation of s.111 to material delivered over the internet would undermine existing licensing models and would be inconsistent with the Three Step Test.

**Question 10:**

**Should the *Copyright Act 1968* (Cth) be amended to clarify that making copies of copyright material for the purpose of back-up or data recovery does not infringe copyright, and if so, how?**

As already discussed s.109A of the Copyright Act already permits the making of a copy of a sound recording for private domestic use, which would include the making of a back-up copy. We recognise that as consumers are increasingly relying on digital copies of their music, rather than physical discs, they want to know that their music is safe if their computer or other device fails. It is of course also in the interests of the record industry that consumers have confidence in digital copies. ARIA believes this concern is already addressed through the commercial models already operating in the market, with download stores allowing consumers to make additional copies of recordings under the terms of the licensed service. Therefore an additional exception for this purpose is unnecessary and unjustified.

No amendment to the Copyright Act is needed to make back-up copies of data. Data itself is not protected under the Copyright Act. Original compilations of data may be protected as literary works. The issue of an exception for the making of back-up copies of compilations raises the same issues as an exception for making a back-up copy of any copyright protected work. Any such exception could only be justified if it were to satisfy the Three Step Test and confined to:

*“certain special cases provided that such reproduction does not conflict with a normal exploitation of the work, performance or phonogram and do not unreasonably prejudice the legitimate interests of the right holder”.*

In relation to sound recordings, the various business models for the delivery of sound recordings to consumers online, which permit the use of copies of sound recordings on multiple devices, there is simply no need for such an exception. It is also unlikely that such an exception could be considered a special case for the purpose of satisfying the first step of the Three Step Test. The fact that copying of legitimately purchased sound recordings for use on multiple devices is already licensed

---

<sup>53</sup> See: <http://www.foxtel.com.au/discover/foxtel-on-demand-old/how-to-connect-your-iQ/default.htm>

under successful business models also suggests that an exception would fail the second step of the Three Step Test as it clearly conflicts with the normal use of the sound recording. The ability to license sound recordings for use on multiple devices is a key element in making the sale of those recordings attractive to the consumer and represents a response to market forces. Lastly, providing an exception to make a “back-up copy” clearly undermines the value of that licence and prejudices the legitimate interests of the copyright owner and so fails to satisfy the third step of the Three Step Test.

## Online use for social, private or domestic purposes

### Question 11:

**How are copyright materials being used for social, private or domestic purposes—for example, in social networking contexts?**

The definition of user generated content referred to in paragraph 97 of the Issues Paper does not provide sufficient detail to identify the copyright issues associated with user generated content that appears in the online environment. In the social networking context, copyright materials are used in three ways:

1. **User authored content:** this generally does not raise any copyright issues for other rights owners, as the use of this material by the author does not involve any unauthorised copying, derivation, or adaptation. There may of course be issues in the contracts the creator has with user generated content (**UGC**) empowering sites such as YouTube and Facebook.
2. **User copied content:** The copyright issues arising from the use of this material are straightforward, the unauthorised reproduction and communication to the public of copyright material is an infringement of copyright. Communicating that material via an online social network involves making the material available to the copyright owner’s public.
3. **User derived content:** In some cases this may constitute a new original work, or may be an adaptation of the original work, or it simply reproduces a substantial part of another’s copyright material. It is this third category of user derived content that gives rise to the most difficult copyright issues.

As referenced in Question 1 of this submission the Australian music industry embraces social networking. A recent campaign undertaken by Warner Music Australia is described below:

*Warner Australia wanted to build a digital campaign to promote the launch of singer/songwriter Christina Perri’s debut single “Jar of Hearts”. The label decided to build on the incredibly strong message of the song by constructing a microsite that would enable users to anonymously place their stories of heartbreak in a virtual jar, while other visitors to the site could offer personal advice, setting these hearts free.*

*Integrating the microsite into social networks was crucial for the success of the campaign. As people could see other stories being placed in the virtual jar, they were encouraged to open up about their own experiences. Users directed their friends to the site through links on Facebook and Twitter in particular.*

*Christina Perri was so struck by the idea that she promoted the microsite through her own online social networks, helping the site gain legitimacy and momentum. Warner Music Australia also persuaded journalists and media personalities to try the site, offering advice to those who had placed their hearts in the virtual jar. This helped ensure coverage for the story across broadcast, online and print media outlets.*

*Users could click through to iTunes to buy a copy of Jar of Hearts, which plays as a background track while they explored the microsite. Thanks to the digital campaign and offline promotional activity, the single went to number two in the ARIA charts and Christina Perri's album, lovestrong, went top five.*

**IFPI Digital Music Report 2012<sup>54</sup>:**

Apart from social networking, copyright materials are being used for other social, private and domestic purposes – and there are existing licensing solutions that are already in existence for this purpose. For example, ARIA has in place a joint licensing scheme with the Australasian Mechanical Copyright Owners Society Limited (**AMCOS**) called the *Domestic Use Video Licence*. Under this licence, consumers are able to obtain a low cost licence from a single source (AMCOS on behalf of both ARIA and AMCOS) which enables the consumer to synchronise sound recordings and musical works into videos for domestic viewing.<sup>55</sup>

**Question 12:**

**Should some online uses of copyright materials for social, private or domestic purposes be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that such use of copyright materials does not constitute an infringement of copyright? If so, how should such an exception be framed?**

Paragraph 102 of the Issues Paper refers to a suggestion by K. Weatherall that an exception should be introduced to allow individuals to make user generated content where it does not unjustifiably harm copyright owners. However this suggestion ignores the fact that any exception must be consistent with the Three Step Test. It must:

- only apply to a certain special case;
- the reproduction must not conflict with a normal exploitation of the work, performance or phonogram; and
- not unreasonably prejudice the legitimate interests of the right holder.

<sup>54</sup> IFPI Digital Music Report 2012 at page 15

<sup>55</sup> See <http://www.apra-amcos.com.au/MusicConsumers/MakingRecordingsPersonalUse/VideoRecordingforDomesticViewing.aspx>

The proposal as outlined in paragraph 102 does not address the need to meet the other two limbs of the Three Step Test. As previously stated in this submission, what constitutes the normal use of a particular copyright material will depend on the nature of the material and also the market for that material. For this reason it is unlikely that a broad exception could be framed in a manner that satisfies the Three Step Test as it would likely not be confined to a “certain special case” and also conflict with the “normal use” of one or more different categories of copyright materials. This would be the case even where it did not unreasonably harm, or in the words of Article 9(2) of the Berne Convention, “unreasonably prejudice the legitimate interests of the copyright owner”.

As discussed above in the response to Question 11, the first category of the use of user created material does not give rise to any issues for the owners of copyright in sound recordings. ARIA assumes in relation to the second category of use (i.e. copied content), that the Commission is not suggesting that an exception should be made for unauthorised copying or distribution of copyright materials for private or domestic use or for social purposes. Such activities are currently infringements, the wide scale unauthorised distribution of this content seriously prejudices the legitimate interests of the copyright owner. An exception which permitted such activity would be completely at odds with Australia’s international copyright obligations, the exclusive rights of copyright owners and the Three Step Test.

In relation to the third category of use, the principal issue for the owners of copyright in sound recordings has been the use of snippets or extracts of sound recordings in samples, remixes and mash-ups. This is particularly important to certain genres of music, and is an area where increasingly, licences are being granted for the use of sound recordings in these circumstances.

Paragraph 107 of the Issues Paper includes a quote from US Law Professor Pamela Samuelson, that “*ordinary people do not think copyright applies to personal uses of copyrighted works and would not find acceptable a copyright law that regulated all uses they may make of copyrighted works*”. Education is the key to changing such perceptions and is integral to supporting the development of new music services. The Australian music industry has initiated several educational campaigns to educate consumers of the ways in which they can access and enjoy legitimate music. An example of a recent (and ongoing) educational initiative is called *Music Matters*<sup>56</sup>. As a part of this initiative, ARIA has worked with Music Rights Australia and various other organisations right across the Australian music industry including retailers (traditional and digital), publishers, record labels and the Australia Council. The initiative is aimed at reminding consumers of the value of music through short animated films, encouraging consumers to support their favourite artists and consume music legitimately.

In ARIA’s view the use of content in an online context such as YouTube or Facebook is not comparable to use in a private and domestic context, as the online dissemination of copyright material has the capacity to substantially and negatively impact the existing market for such material.

---

<sup>56</sup> See <http://anz.whymusicmatters.org/?referredBy=eu>

**Question 13:**

**How should any exception for online use of copyright materials for social, private or domestic purposes be confined? For example, should the exception apply only to (a) non-commercial use; or (b) use that does not conflict with normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?**

ARIA notes that the question as drafted presupposes that an exception for a social, private, or domestic purpose would be consistent with the Three Step Test. As previously noted, any exception must be consistent with all three parts of the Three Step Test. On their own, the uses identified in the question are not special cases and clearly conflict with the normal use of copyright materials such as music.

Music has always been used in social circumstances at functions, ceremonies, sporting venues and the like. These uses are already licensed under well established licensing models. Similarly the sale and distribution of music for private use is the fundamental way in which recorded music is used by the copyright owner. The same is the case in relation to the use of music in domestic circumstances. For these reasons, exceptions for such purposes would clearly be inconsistent with the Three Step Test. The existing exception in s.109A is drafted very differently, it is confined to “private *and* domestic use” (emphasis added). This is an essential qualification which limits the prejudicial impact of the exception on the Copyright owner.

The Issues Paper does not set out specific instances of creative usages that are prohibited under the Copyright Act and as such should be subject to an exception – especially in circumstances where licensing solutions are available.

For the reasons given above ARIA does not consider that an exception for sound recordings is justified, this is a use which can and is being licensed. Further, this type of exception would remove the creator’s ability to determine the range of uses of their material, and the context in which it might be used.

However, ARIA would welcome the opportunity to review and comment on any evidence provided to the Commission supporting the introduction or extension of such an exception.

## **Transformative use**

**Question 14:**

**How are copyright materials being used in transformative and collaborative ways—for example, in ‘sampling’, ‘remixes’ and ‘mashups’. For what purposes—for example, commercial purposes, in creating cultural works or as individual self-expression?**

Paragraph 111 of the Issues Paper notes that the ALRC has been asked to consider whether exceptions should allow “transformative, innovative and collaborative” use of copyright materials. ARIA submits that the Copyright Act currently does not prevent the transformative, innovative or collaborative uses of copyright materials. The Copyright Act does not prevent the use of other’s ideas. New, original creative works are constantly being created and in many cases they are based on the ideas of others. However, where a substantial portion of another person’s copyright material is used in another work, the use of that material can be licensed. The Copyright Act also recognises, and provides for, the protection of collaborative works as it protects works of joint authorship.

Paragraphs 117 of the Issues Paper identifies parodies as “a classic example of this kind of transformative work”. The Copyright Act contains an exception in s.41A for parody or satire so this particular type of “transformative use” is already covered under the Copyright Act. This fact does not support the need for a broader exception for transformative uses.

It appears that the real focus of Question 14 is on various uses of sound recordings that have become possible through the development of digital audio editing software. It identifies them as “sampling”, “remixes” and “mash-ups”. For the purpose of the following discussion the terms are taken to mean:

- **Sampling:** the use of a small piece of a sound recording that is representative of the whole.
- **Remix:** the recombination of sound recordings to produce a new or modified sound recording.
- **Mash-up:** a sound recording that is a composite of samples from other recordings.

The making of mashups, remixes and the sampling of sound recordings is prevalent in particular genres of music. Artists working in those genres are able to license samples and sound recordings for their work. Large libraries of samples and loops are also commercially available for musicians and consumers to purchase and use for their own creative purposes. An example is the Sony ACID Pro software which provides purchasers of the software with access to a database of loops and sound recordings clips that can be used as a part of a new recording.<sup>57</sup>

In the Commonwealth Attorney-General’s Department’s 2005 Issues Paper: “*Fair Use and Other Copyright Exceptions*” the Department noted:

*“Current copyright law envisages that viable markets can be maintained for digital entertainment products if copyright industries provide business models that reflect changing user expectations and users accept the need to pay an appropriate amount for lawful uses. Allowing markets the flexibility and time to adapt may provide benefits for both owners and users.”*<sup>58</sup>

ARIA agrees with this statement. Since 2005, the music industry has negotiated numerous licensing agreements which enable intermediaries to offer consumers flexibility and facilitate the use and access to their purchased content. ARIA is also of the view that market based solutions produce the right balance between the rights of copyright owners and the interests of consumers to make reasonable use of their purchased content without the need for an additional exception.

---

<sup>57</sup> see <http://www.sonycreativesoftware.com/acidpro>

<sup>58</sup> <http://www.ag.gov.au/Documents/FairUseIssuesPaper050505.pdf> at paragraph 12.7

As noted in Question 12 above ARIA believes that, once placed online, content (even user generated) cannot be considered non-commercial and has the ability to negatively impact the market for the right's holders content.

**Question 15:**

**Should the use of copyright materials in transformative uses be more freely permitted? Should the *Copyright Act 1968* (Cth) be amended to provide that transformative use does not constitute an infringement of copyright? If so, how should such an exception be framed?**

As discussed above in the response to Question 14, ARIA does not support an exception for transformative uses. The unauthorised reproduction of a substantial proportion of a sound recording should remain an infringement of copyright. Further, in relation to the works embodied in the sound recording, such an exception would not only be inconsistent with the Three Step Test but would also be contrary to the "Right of Adaptation, Arrangement and Other Alteration" provided in Article 12 of the Berne Convention

In the commercial context there are existing and longstanding models to deal with licensing the use of samples and remixes, and it is appropriate that the creators of the original material are fairly compensated in this way. In our view the dissemination of sound recordings via the internet or social media generally moves any use from a private or domestic to a commercial and very public context.

**Question 16:**

**How should transformative use be defined for the purposes of any exception? For example, should any use of a publicly available work in the creation of a new work be considered transformative?**

ARIA finds Question 16 is problematic for a number of reasons. The first being that it presupposes an exception for transformative uses could be drafted consistently with Australia's international obligations. Secondly, it also appears to misunderstand the concept of transformative use as it applies under US law.

Paragraph 115 of the Issues Paper states that the concept of a transformative use is derived from US law concerning the doctrine of "fair use". It is important to understand how "fair use" operates in US law. First, the allegedly infringing material that is the subject of the transformative use must itself be a new work of authorship- the "transformation" must create an original work. However, it is not the case under US law that all transformative uses which create a new work will be a fair use. The transformative use of the pre-existing copyright material is only one factor to be taken into account



by the court, alongside a number of other factors. The other factors to be considered in the court's overall evaluation include<sup>59</sup>:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

As the question of whether a use is transformative is not determinative of a non-infringing use, it is not clear what purpose a definition of transformative use would serve. We note that, while the concept of 'transformative' use has been taken up in the past few years by the US Supreme Court, the word 'transformative' is nowhere to be found in the statutory statement of the fair use doctrine.

ARIA is also not aware of any other country which provides an exception to copyright infringement for transformative use solely on the basis that a new original work is created. The reason for this is most likely because such an exception would be inconsistent with both Article 9, the reproduction right and Article 12, the adaptation right, of the Berne Convention. Article 12 of Berne provides:

*Authors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works.* (emphasis added)

**Question 17:**

**Should a transformative use exception apply only to: (a) non-commercial use; or (b) use that does not conflict with a normal exploitation of the copyright material and does not unreasonably prejudice the legitimate interests of the owner of the copyright?**

ARIA does not, for the reasons discussed above, support the introduction of a transformative use exception, as it would be likely to be inconsistent with both Articles 9 and Article 12 of the Berne Convention.

Even if this were not the case, any exception could not apply, as suggested, only to: (a) non-commercial use; or (b) use that does not unreasonably prejudice the legitimate interests of the copyright owner. The correct test, consistent with Australia's international obligations, and Article 9 of the Berne Convention would be that it applied to: "*certain special cases provided that such reproduction does not conflict with a normal exploitation of the work, performance or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder*".

---

<sup>59</sup> Copyright Law of the United States of America, s107

**Question 18:**

**The *Copyright Act 1968* (Cth) provides authors with three ‘moral rights’: a right of attribution; a right against false attribution; and a right of integrity. What amendments to provisions of the Act dealing with moral rights may be desirable to respond to new exceptions allowing transformative or collaborative uses of copyright material?**

ARIA does not consider that any transformative use justifies an exception to the moral rights of the creator or maker of the copyright material. Due to the pervasive nature of the online environment, where content and information can be disseminated rapidly and widely, we would oppose any changes to provisions impacting existing moral rights.

## **Libraries, archives and digitisation**

**Question 19:**

**What kinds of practices occurring in the digital environment are being impeded by the current libraries and archives exceptions?**

**Question 20:**

**Is s 200AB of the *Copyright Act 1968* (Cth) working adequately and appropriately for libraries and archives in Australia? If not, what are the problems with its current operation?**

**Question 21:**

**Should the *Copyright Act 1968* (Cth) be amended to allow greater digitisation and communication of works by public and cultural institutions? If so, what amendments are needed?**

**Question 22:**

**What copyright issues may arise from the digitisation of Indigenous works by libraries and archives?**

We propose to deal with questions 19 to 22 below together.

ARIA is not aware of any practices occurring in the digital environment that are being impeded by the current libraries and archives exceptions. In this regard it notes that library and archive access to digital content is readily licensable. ARIA believes that the current arrangements in the Copyright Act facilitate digitisation projects and that the scope of the current provisions is adequate to meet the preservation requirements of public and cultural institutions. The music industry remains open to discussing any issues with libraries and other key cultural institutions with a view to establishing practical and reasonable arrangements. However we do see a distinction between digitising content for archival and preservation purposes (which ARIA wholeheartedly supports) and the potential subsequent uses of such material. As an example, ARIA would be extremely troubled if such a process resulted in the establishment of an online library resource of otherwise copyright protected sound recordings being made available to the general public.

Consequently, such uses can, and should be the subject of licence agreements and we do not think that additional exceptions should be provided.

ARIA supports the Australian Copyright Council's recommendation that a set of agreed industry guidelines be developed in respect of the practical application of section 200AB.

## Orphan works

### Question 23:

**How does the legal treatment of orphan works affect the use, access to and dissemination of copyright works in Australia?**

ARIA makes no comment on this question, as this is not an issue of major concern to the recording industry. All commercially released sound recordings include a copyright notice identifying the copyright owner, and in the few cases in which orphan works might be relevant, such as the copyright owning company having gone out of business, a scheme as outlined below under Question 24 could be considered.

### Question 24:

**Should the *Copyright Act 1968* (Cth) be amended to create a new exception or collective licensing scheme for use of orphan works? How should such an exception or collective licensing scheme be framed?**

ARIA does not support the establishment of a collecting society to administer a collective licensing scheme. Any scheme established to facilitate the use of orphan works should have the following features:

- It should apply only to published works. It should not apply to works which are merely out of commerce, nor to unpublished works as there is no way of determining whether the author or maker wished the material to be published. Although not recognised by the Berne Convention, in addition to the authors rights to attribution and integrity, two other rights are often referred to as constituting moral rights, the right to divulge or disclose, and the right to withdraw, repent or retract. Limiting the scope of the scheme in this way would respect those moral rights.

- Any use must be preceded by a mandatory diligent search for the author, or rights owner..
- Following an unsuccessful diligent search for the author notification of the proposed use should be published on an orphan works register.
- The register to be maintained by the Copyright Tribunal.
- A diligent search should limit the remedies of the author, excluding an account of profits or other reasonable compensation.
- The moral rights of the author must be respected.
- The rights owner should retain the right to terminate the use of their work.
- Where the use is commercial and the owner comes forward or is otherwise subsequently identified, but chooses not to terminate the use of the work, in the absence of an agreement between the owner and the user, the Copyright Tribunal should be empowered to determine a reasonable licence fee.

## Data and text mining

### Question 25:

**Are uses of data and text mining tools being impeded by the Copyright Act 1968 (Cth)? What evidence, if any, is there of the value of data mining to the digital economy?**

### Question 26:

**Should the *Copyright Act 1968* (Cth) be amended to provide for an exception for the use of copyright material for text, data mining and other analytical software? If so, how should this exception be framed?**

### Question 27:

**Are there any alternative solutions that could support the growth of text and data mining technologies and access to them?**

We refer to our comments at Question 10.

ARIA is unaware of any current issues impeding data and text mining in the digital economy, and makes no further comment at this stage.

## Educational institutions

### Question 28:

**Is the statutory licensing scheme concerning the copying and communication of broadcasts by educational and other institutions in pt VA of the *Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed? For example, should the use of copyright material by educational institutions be more freely permitted in the digital environment?**

Paragraph 194 of the Issues Paper asks whether the statutory licensing schemes that apply to educational institutions are too complex and whether they should be simplified. ARIA is not aware of any specific problems or criticisms that the framework established in the Copyright Act is problematic due to the complexity of the drafting. However, any inquiry into simplification of the statutory licence provisions appears to clearly fall outside the Commission's terms of reference.

Paragraph 195 of the Issues Paper asks whether any uses of copyright materials covered by an educational statutory licence should be covered by a free use exception. The permissible exceptions for sound recordings are set out in Article 15 of the Rome Convention, which relevantly provides:

*"1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:*

*(a) . . .*

*(b) . . .*

*(c) . . . ;*

*(d) use solely for the purposes of teaching or scientific research.*

*2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention."*

The utilisation of other copyright materials for teaching purposes is set out in Article 10(2) of the Berne Convention, which provides:

*"2. It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice."*  
(emphasis added)

Under Article 10 (2) of the Berne Convention, what constitutes the "utilisation" of works for teaching may be determined by national legislation. For this reason Article 10(2) does not (and could not)

impose any quantitative limitation on the amount that may be used. However, the utilisation or use is qualified in two important aspects. First, it is only permitted to the extent justified by the purpose, and secondly the utilisation must be compatible with fair practice. It is generally acknowledged that the Three Step Test in Article 9(2) provides a reliable basis for determining the limits of the scope of this free use. Also any use must not go beyond what is justified by the purpose. If the use cannot be justified by the purpose it cannot be regarded as “fair”.

ARIA submits that having regard to the limitation placed on the scope of this exception, a blanket free use exception would not be consistent with Australia’s international obligations. The current statutory licences which provide for the payment of equitable remuneration are compatible with fair practice in the use of materials for educational purposes.

We note and support the submissions made by Screenrights in relation to this question.

**Question 29:**

**Is the statutory licensing scheme concerning the reproduction and communication of works and periodical articles by educational and other institutions in pt VB of *the Copyright Act 1968* (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?**

ARIA makes no comment on how the scheme in Part VB might be changed, but notes that increasingly, as content is moved into the digital environment, innovative licensing models are being used which more and more obviate the need for statutory licences. Any changes to the scheme in Part VB should be carefully considered in order not to inadvertently undermine these licences.

**Question 30:**

**Should any uses of copyright material now covered by the statutory licensing schemes in pts VA and VB of the *Copyright Act 1968* (Cth) be instead covered by a free-use exception? For example, should a wider range of uses of internet material by educational institutions be covered by a free-use exception?**

**Alternatively, should these schemes be extended, so that educational institutions pay licence fees for a wider range of uses of copyright material?**

It is important to note that existing licensing arrangements are in place (in relation to the use of sound recordings and musical works) as a part of a joint educational licensing scheme offered by ARIA, PPCA, Australasian Performing Right Association Limited (**APRA**) and the Australasian Mechanical Copyright Owners’ Society (**AMCOS**). Under this licensing arrangement, ARIA, PPCA, APRA and AMCOS license the use of sound recordings and musical works by participating educational institutions for a range of educational purposes<sup>60</sup> (such as creating a database of sound recordings, and communicating same)

---

<sup>60</sup> See: <http://www.apra-amcos.com.au/MusicConsumers/MusicinEducation.aspx>

Under this voluntary scheme participating institutions can perform, communicate and reproduce sound recordings beyond the constraints of existing exceptions and statutory licences.

In response to the first part of this question ARIA refers to its discussion of the scope of the permissible exception for educational use above in response to Question 28. A free use exception<sup>61</sup> for the purposes of Part VA would be inconsistent with the Three Step Test and not compatible with fair practice.

In relation to the second part of the question ARIA submits with the rapid development of licensing models for the delivery<sup>62</sup> and use of content by educational institutions an expansion of the statutory licence scheme is not justified. An exception could only be justified in special cases that satisfy the Three Step Test.

**Question 31:**

**Should the exceptions in the *Copyright Act 1968* (Cth) concerning use of copyright material by educational institutions, including the statutory licensing schemes in pts VA and VB and the free-use exception in s 200AB, be otherwise amended in response to the digital environment, and if so, how?**

The Part VA statutory licence is confined in its scope to the copying and communication of broadcasts by educational and other institutions. There is nothing in the “digital environment” that warrants a change to the operation of this scheme. ARIA makes no comment on the operation of Part VB beyond noting that the ease of licensing access to and copying of materials in digital form undermines any basis for the Part VB statutory licence to apply to electronic or digital copies.

In relation to the exceptions in s.200AB, ARIA considers that these provisions are properly structured to comply with the Three Step Test and provide useful flexibility for the relevant institutions to make copies in circumstances not already covered by the statutory licences or free use exceptions provided in the Copyright Act.

For many years, the Australian music industry has worked collaboratively to deliver a broad ranging blanket licence to educational institutions. For example, ARIA, AMCOS, APRA and PPCA jointly license the Universities sector (via Universities Australia) for the use of music (sound recordings and musical works) within the participating institutions. The licence has been amended over time to accommodate new uses and delivery mechanisms (for example, the on-line delivery of course content) and the music industry remains open to revisiting the scope of the licences should the sector’s needs change.

ARIA supports the Australian Copyright Council’s recommendation that a set of agreed industry guidelines be developed in respect of the practical application of section 200AB.

---

<sup>61</sup> Our response to this question is based on the assumption that the term ‘free use’ relates to non-remunerated exceptions, such as the existing exception covering parody or satire.

<sup>62</sup> For example the resources for educational institutions outlined in Screenrights response to Question 28



## Crown use of copyright material

### Question 32:

**Is the statutory licensing scheme concerning the use of copyright material for the Crown in div 2 of pt VII of the Copyright Act 1968 (Cth) adequate and appropriate in the digital environment? If not, how should it be changed?**

ARIA does not support the extension of Crown use provisions to local government. The music industry offers a range of licence schemes which can be utilised by such bodies and tailored to their particular requirements. We see no particular or additional impediments in the digital environment that would suggest that voluntary licensing is inappropriate.

### Question 33:

**How does the *Copyright Act 1968* (Cth) affect government obligations to comply with other regulatory requirements (such as disclosure laws)?**

ARIA supports the submission of the Australian Copyright Council in respect of this question.

### Question 34:

**Should there be an exception in the *Copyright Act 1968* (Cth) to allow certain public uses of copyright material deposited or registered in accordance with statutory obligations under Commonwealth or state law, outside the operation of the statutory licence in s 183?**

ARIA makes no comment in relation to this question at this stage.

## Retransmission of free-to-air broadcasts

### Question 35:

**Should the retransmission of free-to-air broadcasts continue to be allowed without the permission or remuneration of the broadcaster, and if so, in what circumstances?**

ARIA makes no comment, beyond expressing support for the submission of Screenrights in response to this question.

**Question 36:**

**Should the statutory licensing scheme for the retransmission of free-to-air broadcasts apply in relation to retransmission over the internet, and if so, subject to what conditions—for example, in relation to geoblocking?**

ARIA notes that the current limitation in the scope of the scheme excludes the retransmission of a free to air broadcast if the retransmission takes place over the internet. The policy reason for this limitation appears to be to avoid the possibility of retransmitted content intended for use by Australian educational institutions being accessed overseas. This would undermine broadcast markets internationally.

ARIA considers the policy justification for this limitation remains valid. ARIA's members would receive no equitable remuneration for the use of their sound recordings in other countries if broadcasts were freely available around the world over the internet simply to meet the convenience of Australian educational institutions. However, ARIA acknowledges that it may now be technically possible to restrict access to internet retransmission services to users located within Australia.

ARIA submits that any consideration of extending the scope of the licence scheme must be against solid evidence that any such retransmissions would be available only within Australia.

Further ARIA notes that the music industry already licences sites that communicate audiovisual material containing sound recordings over the internet, and believes that such voluntary licensing schemes are the optimal and preferred model.

**Question 37:**

**Does the application of the statutory licensing scheme for the retransmission of free-to-air broadcasts to internet protocol television (IPTV) need to be clarified, and if so, how?**

Any extension to the statutory licence scheme should only be considered on the basis of clear evidence that the geographical scope of the licence can be securely controlled. In ARIA's view, whilst the situation does warrant clarification, care must be taken to ensure that adjustments to accommodate technological developments do not undermine the original intent of the provisions.

**Question 38:**

**Is this Inquiry the appropriate forum for considering these questions, which raise significant communications and competition policy issues?**

ARIA supports the submission of the Australian Copyright Council in respect of this question.

**Question 39:**

**What implications for copyright law reform arise from recommendations of the Convergence Review?**

The general nature of the recommendations arising from the Convergence Review mean it is not possible to predict the implications of the recommendations for copyright reform until the details of the Government's response to the recommendations is known. The Government response will determine the scope of any overlap between changes in the broadband and communications environment and the scope or operation of any communications related provisions in the Copyright Act. The most obvious overlap is the use of definitions from the *Broadcasting Services Act 1992* in the Copyright Act.

## **Statutory licences in the digital environment**

**Question 40:**

**What opportunities does the digital economy present for improving the operation of statutory licensing systems and access to content?**

At paragraph 231 of the Issues Paper, the Commission indicates that it is interested in the value and operation of statutory licences in the digital environment more broadly. ARIA submits that statutory licences only add value where they address a particular case where voluntary licensing of content is not available. Consistently with the limitations permitted under the relevant international agreements there must be a public policy interest in facilitating access to the material for the purposes of that special case. Issues such as price and availability do not, in themselves, constitute a special case. Setting a market price is consistent with the normal use of the material by the copyright owner, and determining how and when to best market that material is clearly within the legitimate interests of the copyright owner.

Record companies have progressively licensed their repertoire to a diverse number of digital music services. They also often make music available to the public directly through artists' websites, such as <http://gotye.com> for the artist known as Gotye. It is in record companies' interests to ensure their catalogues are available to the public for licensed download or streaming through many services so that they can monetize them effectively. When licensed third-parties, whether download stores such as GetMusic or iTunes, or streaming services, such as Guvera or Spotify, make music available to their customers, they establish contractual relationships and license the use of that content by their users. Statutory licensing has no role to play in these circumstances. In relation to sound recordings there is already in place a vast range of licensed options that enable consumers to enjoy recorded music.

ARIA submits that in the digital economy there is no role for a statutory licence to improve access to commercially available sound recordings.

**Question 41:**

**How can the *Copyright Act 1968* (Cth) be amended to make the statutory licensing schemes operate more effectively in the digital environment—to better facilitate access to copyright material and to give rights holders fair remuneration?**

ARIA believes that the current statutory licensing schemes, confined to the special cases identified in the Copyright Act, provide the right balance of ensuring access and providing for the payment of equitable remuneration to the copyright owner. Any review of the operation of the existing schemes should maintain that balance and ensure that copyright owners are entitled to receive equitable remuneration for the use of their materials.

Where voluntary licensing arrangements are working effectively, as evidenced by the development of digital music services in Australia, there is no imperative for the introduction or expansion of statutory licensing schemes.

**Question 42:**

**Should the *Copyright Act 1968* (Cth) be amended to provide for any new statutory licensing schemes, and if so, how?**

As stated above, ARIA is strongly of the view that, in the digital economy, there is no role for a statutory licence to improve access to commercially available sound recordings. When considering any extension to statutory licences, it is ARIA's view that voluntary licences (including collective licensing), freely negotiated between the parties, should be the primary licensing model. There needs to be a clear and demonstrated need to implement statutory licences especially in circumstances where commercial models exist.

We note that the submission of the Australian Copyright Council contains a suggestion that the introduction of a 'license it or lose it' statutory licence in respect of user generated content may be appropriate. ARIA does not support this proposal, as such a broad-brush provision would override legitimate business interests of artists and producers, forcing them to contract and waive both their economic and moral rights.

**Question 43:**

**Should any of the statutory licensing schemes be simplified or consolidated, perhaps in light of media convergence, and if so, how? Are any of the statutory licensing schemes no longer necessary because, for example, new technology enables rights holders to contract directly with users?**

Media convergence does not appear relevant to the question of simplification or consolidation of the statutory licence schemes. The schemes apply to specific uses of copyright materials that are independent of media and technology. Seeking to combine separate schemes that operate in respect of very distinct uses is likely to increase uncertainty and cause confusion.

ARIA has already indicated its views regarding the need for statutory licences in relation to the sale and distribution of sound recordings. Statutory licences should increasingly become unnecessary as the licensing of digital content grows.

**Question 44:**

**Should any uses of copyright material now covered by a statutory licence instead be covered by a free-use exception?**

ARIA does not support the conversion of any existing statutory licences into a free use exception

As discussed earlier in this submission, any free use exception would need to comply with the Three Step Test. The current statutory licences comply with the Three Step Test, or are “compatible with fair practice” because they provide for the payment of equitable remuneration.

## **Fair dealing exceptions**

**Question 45:**

**The *Copyright Act 1968* (Cth) provides fair dealing exceptions for the purposes of:**

- (a) research or study;**
- (b) criticism or review;**
- (c) parody or satire;**
- (d) reporting news; and**
- (e) a legal practitioner, registered patent attorney or registered trade marks attorney giving professional advice.**

**What problems, if any, are there with any of these fair dealing exceptions in the digital environment?**

ARIA is not aware of any practical problems with the operation of these fair dealing exceptions in the digital environment. The scope of the provisions listed above is clearly set out in the Copyright Act and apply to materials in both hard copy and electronic (digital) form.

**Question 46:**

**How could the fair dealing exceptions be usefully simplified?**

Paragraph 252 of the Issues Paper discusses the recommendations of the CLRC for the simplification of the fair dealing provisions. ARIA has one concern with the proposal. It notes that while it would achieve a modest degree of simplification, it would do so in a way that is at odds with the structure of the Copyright Act. The repetition of provisions in the Copyright Act is in accordance with the distinction it makes between works, and subject matter other than works. The rights and exceptions applying to these different categories of copyright material are set out in Part III and Part IV respectively. In the absence of any proposal to merge these two parts, there seems little reason to disturb the structure of the Copyright Act to merge a handful of provisions. For the reasons outlined below in the discussion of the issue of *fair use*, ARIA does not support the introduction of an open ended fair dealing model. If an open ended model were introduced it would need to be drafted in such a way that it complied with the Three Step Test.

**Question 47:**

**Should the *Copyright Act 1968* (Cth) provide for any other specific fair dealing exceptions? For example, should there be a fair dealing exception for the purpose of quotation, and if so, how should it apply?**

Paragraph 262 of the Issues Paper states that article 10(1) of the Berne Convention “*imposes a mandatory obligation to provide a specific exception for quotation*”. ARIA does not believe it is entirely clear that the article makes this an obligation. The nature of Article 10, and whether it imposes an obligation is discussed in the WIPO “*Guide to the Copyright and Related Rights Treaties Administered by WIPO*”. The Guide notes<sup>63</sup> that where the Berne Convention permits free uses and non-voluntary licences, in general it does so by leaving this to the legislation of Berne members, whether or not they make use of the provision. However, from a plain reading of the English text it is clear that the word “permissible” can only mean there is a possibility to permit, it does not impose an obligation to allow the act of quotation. Further, it is only permissible for parties to the Berne Convention to introduce such an exception if it is subject to the conditions stipulated in Article 10.

The other important consideration that points against Article 10 imposing an obligation is that it follows from several provisions in the Berne Convention that parties cannot provide beneficiaries under the Convention a level of protection that is lower than that prescribed in it. There is no provision however, which prohibits the granting of a higher level of protection. An obligation to provide an exception is inconsistent with the principle embodied in the Berne Convention that it sets a minimum standard for the rights of beneficiaries under the Convention.

---

<sup>63</sup> At pages 60ff

Any exception for quotations must also be compatible with “fair practice” and the extent of the quotation should not exceed that justified by the purpose of the quotation. In other words, an exception for quotations should respect and be consistent with the Three Step Test in Article 9(2). Any exception for quotations should be confined to literary and dramatic works.

ARIA is strongly of the view the concept of quotation has no application to neighbouring rights and that there should be no exception for the “quotation” of sound recordings, broadcasts or performances.

## Other free-use exceptions

### Question 48:

**What problems, if any, are there with the operation of the other exceptions in the digital environment? If so, how should they be amended?**

ARIA notes that increasingly, licensing is being used to facilitate and enable new uses of copyright materials in the digital environment that were difficult or not possible to properly license in the hard copy or analogue world. Those free uses permitted under the international conventions do not give rise to particular problems for rights owners in the digital environment. The key issue with exceptions in the digital environment is that they should comply with all the elements of the Three Step Test and should not undermine the capacity of copyright owners to license their content.

### Question 49:

**Should any specific exceptions be removed from the *Copyright Act 1968* (Cth)?**

The exclusive rights of the owner of copyright in a sound recording are set out in section 85 of the Copyright Act; they include the right to cause the recording to be heard in public. Section 199 of the Copyright Act concerns the reception of broadcasts. Section 199(2) of the Copyright Act provides:

*(2) A person who, by the reception of a television broadcast or sound broadcast, causes a sound recording to be heard in public does not, by doing so, infringe the copyright, if any, in that recording under Part IV.*

This limitation on the exclusive right to cause the recording to be heard in public is not required under the Rome Convention or WIPO Performers and Producers of Phonogram Treaty. ARIA submits it unfairly prejudices the legitimate interests of the owner of copyright in relation to this use. Accordingly ARIA urges the Commission to recommend the repeal of s.199(2) and in this regard, ARIA supports the submission made by PPCA to the Commission regarding such repeal.

In addition ARIA strongly supports PPCA’s submissions in respect of the removal of the statutory caps contained within s152 of the Copyright Act.



**Question 50:**

**Should any other specific exceptions be introduced to the *Copyright Act 1968* (Cth)?**

ARIA submits that there is no basis for any additional exceptions in relation to sound recordings. With technological developments, new means and forms of licensing reproduction continue to emerge. When they are applied for the first time it may be difficult to describe them as a “usual”, “typical” or “normal” use of the copyright material. However, these new forms of reproduction are very important to copyright owners to extract market value from their works because they often replace some other more traditional forms. The growth of the digital market for sound recordings and the decline in sales of physical carriers such as LPs and CDs clearly illustrates this.

As previously stated, current commercial licensing practices that operate in the digital environment permit multiple copies to be made of legitimately purchased content so that it can be accessed on multiple devices. As these practices are part of the normal exploitation of sound recordings in the digital environment there is no justification for additional exceptions to the copyright subsisting in sound recordings. In the current market, such exceptions would be inconsistent with the Three Step Test and would undermine established business models for the licensing of content that is delivered online.

**Question 51:**

**How can the free-use exceptions in the *Copyright Act 1968* (Cth) be simplified and better structured?**

ARIA makes no comment on this question other than to note that the existing provisions appear to be drafted in accordance with the permissible free use exceptions under the Berne Convention. There is no obvious need to simplify their drafting and simplification of the Copyright Act appears to be outside of the Commissions terms of reference.

## **Fair use**

**Question 52:**

**Should the *Copyright Act 1968* (Cth) be amended to include a broad, flexible exception? If so, how should this exception be framed? For example, should such an exception be based on ‘fairness’, ‘reasonableness’ or something else?**

ARIA submits that no case has been made out for the introduction of a broad flexible “fair use” style exception into Australian law. ARIA does not support the introduction of any such exception. At paragraph 295 of the Issues Paper, the Commission comments that there has been a noticeable degree of change with respect to technology and social uses of it, even since the 2005 Fair Use Review. The Issues Paper notes that in some circles there may be an appetite for a fair use doctrine in Australian law. The Issues Paper also refers to recent literature by a small number of US pro fair use academics that are of the view that the criticism of fair use as a doctrine of uncertainty is overblown. ARIA submits that none of these factors should have a significant bearing in whether fair

use should be added to Australia's copyright framework. Disappointingly, the Issues Paper fails to acknowledge the considerable body of international academic opinion that the US fair use doctrine is in fact inconsistent with the Three Step Test.

However, the key issue is whether there has been a change in the overall balance of factors for and against the introduction of fair use in Australia since the 2005 review. Paragraph 293 of the Issues Paper conveniently sets out these arguments. Each is discussed in more detail below.

- ***Fair use provides flexibility***

It should be recognised in this context is that US law, including fair use is also subject to the Three Step Test. Like Australia, the US is party to a significant number of international agreements that require US law to comply with the Three Step Test. In recent years the US has been a leading advocate for adopting the Three Step Test and this text has been included in numerous bi-lateral free trade agreements entered into by the US, including with Australia. US policy makers do not appear concerned about any claimed inflexibility of the Three Step Test.

Further it is not generally useful to contrast "fair use" with "fair dealing". A proper measure of the flexibility of Australian law, compared to US law in this case, requires an evaluation of the whole suite of defences and exceptions. In some cases exceptions in Australian law are more generous than those found under US law. We have not seen any evidence supporting the premise that the fair dealing provisions do not provide as much flexibility as a fair use provision might.

The suggestion in the Issues Paper that an open-ended model would be more responsive to rapid technological change is also not well founded. The existing exceptions in the Copyright Act, in particular the fair dealing provisions, are all drafted in a technologically neutral style. The exceptions provide an exception for the exercise of the exclusive right, and are not specific to a technology used to exercise the right.

- ***Assists Innovation***

The Issues Paper notes the argument that a closed list approach restricts new uses and acts as a disincentive for technological development - especially when compared to the US. This argument is flawed on a number of levels and in our view, does not accurately reflect the purpose of copyright. First, the various exceptions contained in the Copyright Act do not prohibit new uses. As ideas are not protected under copyright, a new use will only be an infringement if it constitutes the unauthorised appropriation of a substantial portion of another original, creative work. It is also a misrepresentation of the existing exception regime to suggest that it constitutes a closed list. The exceptions in s.200AB for libraries and archives, bodies administering an educational institution and persons with a disability permit the use of works and other subject matter for where the circumstances of the use amount to a special case, the use does not conflict with a normal exploitation of the work or other subject-matter and the use does not unreasonably prejudice the legitimate interests of the owner of the copyright. These circumstances cannot be described as a "closed list".

It is also mistaken to suggest that an open ended exception such as fair use is the factor that has spurred technological development in the US. This issue was thoroughly examined in the UK by the Hargreaves Review. In his report, *"Digital Opportunity A review of Intellectual Property and*

*Growth*,<sup>64</sup> Professor Hargreaves dismissed the proposition that the adoption of fair use would quickly stimulate innovation. He noted that other factors such as attitudes towards business risk and investor culture were more significant.

It is also worth repeating here that neither in the offline context nor in the digital environment has the US ever sought to endorse fair use as an international standard. To the contrary, in its trade negotiations, the US has sought to negotiate the Three Step Test as the appropriate standard against which exceptions should be measured.

The current scheme is far from certain.

ARIA understands that some institutions have been hesitant to rely on the exceptions in s.200AB. However, this reflects the risk averse culture in those institutions. The introduction of an uncertain and open ended fair use like provision would not change that culture. This fact does not support the introduction of an open ended model of exceptions.

- ***Fair use is not too uncertain***

The introduction of a fair use doctrine, even with the criteria contained in the US law would not lead to or create certainty. It is simply not possible to foresee how Australian courts would apply the provision. The Issues Paper also notes that a number of US academics have concluded, there are patterns in the decisions of the US courts which can assist individuals, businesses and lawyers in assessing the merits of particular claims to fair use protection. This is hardly an endorsement of certainty under US law. The reality, is that academic opinion on the certainty provided to users and rights holders under the US fair use doctrine is divided.

In his 2003 critique of fair use<sup>65</sup> the US copyright commentator, David Nimmer examined 60 cases in which a fair use defence was at issue. Mr Nimmer found that just over 50 per cent of judges found all four factors corresponded in the case. He observed that: *“had Congress legislated a dartboard rather than the particular four fair use factors embodied in the Copyright Act, it appears the upshot would be the same.”*<sup>66</sup>

Mr Nimmer also points out that judges finding for, and those finding against, fair use almost always find that three or four of the factors justify their conclusions. ARIA submits that while this does show the flexibility of the fair use factors it also highlights that the fair use exception is not capable of providing certainty.

Even the prominent advocate of “copyright reform” Professor Lawrence Lessig has complained that “fair use in America simply means the right to hire a lawyer to defend your right to create.”<sup>67</sup>

Against the four arguments in favour of an open ended model, the Issues Paper sets out eight arguments against the introduction of such a model. ARIA agrees with each of those arguments and provides the following brief comments.

---

<sup>64</sup> See <http://www.ipso.gov.uk/ipreview-finalreport.pdf>

<sup>65</sup> “Fairest of them all” and other Fairy Tales of Fair Use” 2003 66 Law and Contemporary Problems at page 263

<sup>66</sup> Ibid at page 280

<sup>67</sup> Lawrence Lessig, *Free Culture -- How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* 142 (2004); see also *id.* at 76 (“In theory, fair use means you need no permission. The theory therefore supports free culture and insulates against a permission culture. But in practice, fair use functions very differently. The fuzzy lines of the law, tied to the extraordinary liability if lines are crossed, means that the effective fair use for many types of creators is slight.”).

- ***Uncertainty of application***

This issue is addressed above. The four factors of fair use have been shown to be incapable of consistent application by the courts.

- ***Likelihood of higher transaction costs***

ARIA agrees that the uncertainty of the application of fair use principles would lead to higher costs for both users of copyright materials who would need to seek legal advice concerning proposed uses, and content owners who would need to litigate more often to enforce their rights.

- ***The need for litigation to determine the scope of permitted rights***

It would be an inevitable consequence of the introduction of a new open ended exception that users and right owners would be drawn into litigation to determine the scope of the exception. This increases legal expenses both for copyright owners, who have to defend against often meritless assertions of fair use made by defendants who are encouraged by the lack of clarity in the law as to whether a particular use is or is not fair, as well as for users, who will be tempted to pay a lawyer to assert even an implausible fair use defense in the hope of avoiding liability or at least extracting favourable settlement terms.

- ***Access to justice issues***

The cost of conducting litigation would adversely affect both users and copyright owners. It would also impose an additional burden on the courts.

- ***Lack of Jurisprudence***

A lack of jurisprudence would mean great uncertainty following the introduction of a fair use exception. In the United States, to the extent that there is any way to predict whether a particular use will be considered fair, it is based upon examination of almost two centuries of well-developed case law that offers more guidance than the test of the fair use provision itself. Given the less litigious nature of Australian society, the uncertainty with respect to application of a fair use defence could last a considerable period and could have a chilling effect.

- ***Transposition of a foreign legal doctrine into Australian law***

It would also not be possible to predict how the jurisprudence would develop or whether it would even follow the same path as in the US. The courts would not have the same legal or constitutional guidance that informs the decisions of the US courts.

- ***Does not comply with the Three Step Test.***

There is considerable international debate about the consistency of the US fair use provision with the Three Step Test. ARIA submits that the open ended nature of the exception is clearly inconsistent with the first limb of the Three Step Test which requires exceptions to be limited to certain special cases. It would not be consistent with Australia's international obligations to base an exception on 'fairness', 'reasonableness' or 'something else'.

Nor is it at all clear how the US fair use provision addresses the third part of the Three Step Test - that an exception should not unreasonably prejudice the legitimate interests of the right holder.

## **Conclusion**

In light of the above, it is clear that there has been no change in the overall balance of factors for and against the introduction of fair use in Australia since the 2005 review. The Government's decision not to introduce a fair use style exception following its 2005 review reflects the overwhelming considerations that mitigate against the introduction of such an exception. The balance has not shifted in favour of fair use. ARIA urges the Commission to also recognise that these factors should preclude the introduction of a fair use style exception in Australia.

As Professor Hargreaves reported in his recommendation not to import the fair use doctrine into UK law, *"Most responses to the Review from established UK businesses were implacably hostile to adoption of a US Fair Use defence in the UK on the grounds that it would bring: massive legal uncertainty because of its roots in American case law; an American style proliferation of high cost litigation; and a further round of confusion for suppliers and purchasers of copyright goods. These are important arguments."*<sup>68</sup> Professor Hargreaves also noted that *"the economic benefits imputed to the availability of Fair Use in the US have sometimes been over stated" and that "the success of high technology companies in Silicon Valley owes more to attitudes to business risk and investor culture, not to mention other complex issues of economic geography, than it does to the shape of IP law."*<sup>69</sup>

### **Question 53:**

**Should such a new exception replace all or some existing exceptions or should it be in addition to existing exceptions?**

For the reasons given above, ARIA does not support the introduction of a fair use exception in Australian copyright law.

## **Contracting out**

### **Question 54:**

**Should agreements which purport to exclude or limit existing or any proposed new copyright exceptions be enforceable?**

There is no hard evidence provided in the Issues Paper that the use of clauses restricting the use of exceptions is widespread or causing any problems for businesses or consumers. Clauses restricting exceptions appear to be rare and where they do exist, their purpose is likely to be very specific to the circumstances of the individual agreement.

---

<sup>68</sup> Hargreaves Review at 44.

<sup>69</sup> Id. at 45.

From the music industry's perspective, there are examples of when a particular agreement may properly restrict the use of an exception. An example would be in relation to the use of an artist's sound recording in a context that is incompatible with the artist. It is not unreasonable that an artist who releases music for children would not wish to see their sound recordings used in contexts which, although may be considered as a 'fair dealing', are distinctly adult or perverse. In this situation, an artist or record company may "contract out" in order to protect the artist's rights.

In the digital environment, music services use licences to set the boundaries for the use of content by consumers. For example, a download service may allow a fixed number of copies of downloaded content, a streaming service may prohibit the copying of streams, and a service may supply a time limited copy to be reviewed within a fixed window. Consumers typically pay higher prices for greater access, and accordingly may receive more limited access (e.g., listening to a recording only once) at a much lower price or even for free. All of these delivery models provide varied consumer offerings and services which benefit both consumers and creators; they are also the business models of third party suppliers.

A statutory provision which overrode contractual terms, combined with a private copying exception would put access models, such as streaming services, at a disadvantage compared to ownership models. Rather than facilitating the development of new models there is a real risk that such a provision would undermine them. Establishing controls on the number of copies that can be made, of downloaded or streamed content, are necessary to ensure that the business models which have been developed to make available licensed content, are maintained. These controls also ensure and that underlying royalty fees and licences are complied with.

Freedom to contract is fundamental principle of Australian law. Tailor made licences or contracts offer both parties greater certainty rather than uncertain statutory exceptions which require expensive legal action to interpret, challenge or enforce. As already mentioned, under contractual terms, copyright owners can offer different numbers of particular types of copies at different prices, monthly usage rights at a flat price, or temporary usage rights for free. Rather than overriding such useful competitive market offerings it would be more appropriate to respect and uphold agreed licence terms and leave exceptions to work as a reasonable default when usage terms have not been defined in contract.

Furthermore, most contracts negotiated by the owners of copyright in sound recordings are negotiated business to business. In such negotiations parties do not require licences for uses that are permitted by exceptions. An essential element of a contract is consideration. Any grant of a right to do something that the other party can already do by law, cannot be consideration. Licences therefore do not permit acts that are permitted under exceptions. However, the third party service providers who sell, or otherwise distribute, the content they have licensed may in some cases obtain benefits in lieu of the right to exercise exceptions. For this reason there is no logic in having legislation impose itself between commercial parties and restricting their flexibility to contract. It would actually create greater complexity and uncertainty and lead to a reduction in choice for the consumer.

A statutory provision which overrode the freedom to determine contractual terms would have a chilling effect on business. It would interfere with business models for content in ways that are likely to reduce innovation in business models and would limit the choices for consumers. It would also seriously impede Australia's ability to participate and thrive in the digital economy. Content owners

would be reluctant to do deals knowing their agreement could be undermined by the licensee having the right to use content freely for additional purposes.

**Question 55:**

**Should the *Copyright Act 1968* (Cth) be amended to prevent contracting out of copyright exceptions, and if so, which exceptions?**

As stated above, ARIA would be extremely concerned at any proposal to interfere with contract terms to give primacy in every instance to copyright exceptions. If evidence establishes there is abuse in some circumstances, then it would be appropriate that any exception providing override should be drafted very narrowly to address that issue only to avoid any chilling effect on the development of new business models.

ARIA supports the view of UK Music<sup>70</sup>, which noted that any legislation introduced to ensure copyright exceptions cannot be overridden by contract was unlikely to achieve the alleged benefits. Rather, such a move would reduce the clarity and certainty of contractual arrangements, which are at the heart of contractual relationships. The contractual relationships between rights holders and their licensees are on a business to business basis and, by their nature, designed to cover the specific requirements of the parties concerned.<sup>71</sup>

---

<sup>70</sup> UK Music, HM Government: Consultation on Copyright March 2012, page 33

<sup>71</sup> *ibid*



## Annexure A

### Australia's Legal Digital Music Market – Digital Distribution Channels

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
<b>Bandit.fm</b>	<a href="http://www.bandit.fm/australia">http://www.bandit.fm/australia</a>	Download	A la carte track, album and video downloads via artists and channel pages. Artist pages also have news, gigs and other artist information.	Music from all four majors and majority independents	Download to computer and import to iTunes
<b>BBM Music</b>	<a href="https://appworld.blackberry.com/webstore/content/36110/">https://appworld.blackberry.com/webstore/content/36110/</a>	Streaming	Blackberry Music service accessed via Blackberry only app. Users create a profile of up to 50 songs from millions in the BBM music catalogue. Users can share with friends and keep on mobile device for offline use.	Music from all four majors and majority independents	Blackberry
<b>BigPond Music</b>	<a href="http://bigpondmusic.com/">http://bigpondmusic.com/</a>	Download	A la carte track, album and video downloads via genres, charts and browse pages. Variable range of free content including 24x7 BPM TV. News, reviews and interviews also available	Music from all four majors and majority independents	Downloads to compatible with iPod, iPhone etc and CD burning
<b>Cartell</b>	<a href="http://cartellmusic.com.au/">http://cartellmusic.com.au/</a>	Download	Local a la carte album downloads curated to provide "Music from France and Beyond"	Music from all four majors and some independents	DRM free, can be used on any computer or audio device
<b>Da Da</b>	<a href="http://us.dada.net/">http://us.dada.net/</a>	Download and Subscription	A la carte ring tone, track downloads. Premium SMS subscription service	Music from all four majors.	DRM free, can be used on any computer or audio device
<b>Dance Music Hub</b>	<a href="http://dancemusicclub.com/">http://dancemusicclub.com/</a>	Download	Specialist electronica and dance download store. Niche site for DJs.	Music from specialist dance music labels.	1. Burn to CD/DVD 2. Copy to a compatible portable listening device 3. Save to hard drive for unlimited playback
<b>Deezer</b>	<a href="http://www.deezer.com/en/">http://www.deezer.com/en/</a>	Streaming	Web-based music streaming service. Free ad-supported or 2 subscription Tiers with mobile portability at Premium+ level. French based, announced available in Australia in April 2012. Local office in Australia.	Currently 18 million licensed tracks, over 30,000 radio channels and 22 million users (1.5 million subscribers).	Deezer Discovery/Premium – online access only Deezer Premium+ available online on 1 mobile phone, web tablet, IP radio or IPTV at a time AND offline on one mobile or web tablet and one PC or Mac.

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
<b>Get Music</b>	<a href="http://www.getmusic.com.au">www.getmusic.com.au</a>	Download	A la carte track, album and video downloads via artists and channel pages. Artist pages also have news, gigs and other artist information.	Music from all four majors and many independents	Transfer content from personal computers to certain enabled and compatible portable devices and to burn CDs.
<b>Guvera</b>	<a href="http://www.guvera.com">www.guvera.com</a>	Streaming	Online music download and streaming service founded in Australia in 2008 for online and mobile use. Offers free music downloads and streams paid for (or sponsored) by brands from a large music catalogue. Available to members in Australia and the US.	UMA, EMI and some indies.	Streaming of tracks via PC and Mac. Downloads available through interacting with brands on the site.
<b>Inertia</b>	Launch to occur soon	Download, physical formats,	Boutique online music store curated by Australian independent record company Inertia.	Not launched yet – however content will be available from a variety of labels.	Downloads and physical sales. Basic streaming function available to allow users to stream samples before purchase.
<b>iTunes</b>	<a href="http://itunes.apple.com/au">http://itunes.apple.com/au</a>	Download	Music and video download store (also includes books, films, TV shows and mobile apps).	Music from all four majors and majority independents	Use products on five iTunes authorized devices at any time Store iTunes Products from up to five different Accounts at a time on compatible devices Burn an audio playlist up to seven times For personal and noncommercial use only
<b>Jamster</b>	<a href="http://www.jamster.com.au/tw/">http://www.jamster.com.au/tw/</a>	Download	Range of music entertainment content including ringtones, games and apps for mobile phone. Music to download, burn, own for mobile and PC.	More than 1 million tracks / All genres / Hip Hop, Pop, Dance, Rock, Alternative and many more	Designated compatible mobile device solely for personal non-commercial use
<b>JB Hi Fi NOW</b>	<a href="https://now.jbhifi.com.au/#/music/Home/Choose/">https://now.jbhifi.com.au/#/music/Home/Choose/</a>	Streaming	Music streaming service built in Australia offering millions of songs to subscribing customers on internet connected computers at both tiers, mobile for top tier.	Music from all four majors and majority independents. Over 10 million Songs.	Register up to three devices, but you may only access the services on device at a time.
<b>Leading Edge Music</b>	<a href="http://www.leadingedgemusic.com.au/">http://www.leadingedgemusic.com.au/</a>	Download	A la carte MP3 Downloads. Powered by Get Music.	Music from all four majors and majority independents	MP3 files licensed to one computer but can be transferred to mp3 players and burnt to CDs.

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
<b>Liveband.com.au</b>	<a href="http://www.liveband.com.au/music/">http://www.liveband.com.au/music/</a>	Download	Live concert recordings professionally mixed and mastered, ready for download in digital format.	Live Australian performances with niche repertoire.	DRM free, can be used on any computer or audio device
<b>MCM</b>	<a href="http://take40.com/">http://take40.com/</a> <a href="http://www.thehothits.com/home">http://www.thehothits.com/home</a>	Streaming	Ad supported online music video streaming services with playlists, articles and interviews.	All majors and some independents.	For use on personal computers (including laptops) only.
<b>Mobile Active</b>	<a href="http://www.mobileactive.com/">http://www.mobileactive.com/</a>	Download	Downloads for mobiles – ringtones, videos, games.	Ringtones.	Mobile Phone
<b>MOG (Telstra)</b>	<a href="http://bigpondmusic.com/mog">http://bigpondmusic.com/mog</a>	Streaming	Web based music streaming subscription service at Basic and Premium levels launched in June, 2012. Premium levels extend to home music systems and mobile, as well as off line mobile. No ad based free service.	All four majors and numerous independents. Over 16 million songs.	Download via Bigpond. Streaming via MOG service.
<b>Music Unlimited</b>	<a href="https://music.sonyentertainmentnetwork.com/">https://music.sonyentertainmentnetwork.com/</a>	Streaming	Web based music streaming subscription services with personal libraries, playlists and channels. Sync from personal collection into a cloud library. Access through multiple devices, online, mobile and Sony devices.	All four majors and majority independents.	Playback from one Sony system at a time.
<b>Nokia Music</b>	<a href="http://music.ovi.com/au/en/pc">http://music.ovi.com/au/en/pc</a>	Download	A la carte music downloads through a 12 month download subscription when you buy selected Nokia mobiles. Music can be downloaded and played on registered PC and mobile.	Music from a mix of major labels and independent labels.	Pay per song – play on any portable device Unlimited subscription – play on PC
<b>MY NRMA Music</b>	<a href="http://www.mynrmamusic.com">http://www.mynrmamusic.com</a>	Download	A la Carte MP3 Downloads. Powered by Get Music.	Music from all four majors and majority independents.	Transfer content from personal computers to certain enabled and compatible portable devices and to burn CDs.
<b>Optus Music Store</b>	<a href="http://www.optusmusicstore.com/">http://www.optusmusicstore.com/</a>	Download	A la carte track, album, music video and ringtone downloads by genre and browse pages available for PC and Mobile. Includes music subscription service for phones and Music Mobile TV channels	Music from all four majors and majority independents.	Download to mobile handset and/or PC up to 10 times within 5 days of purchasing the original.
<b>Pandora</b>	<a href="http://www.pandora.com">http://www.pandora.com</a>	Streaming	Personalised stations		Accessible through site only or through device officially supported by Pandora
<b>Qtrax</b>	<a href="http://www.qtrax.com/">http://www.qtrax.com/</a>	Streaming	Free global on-demand music service for internet connected computers where users can	Music from all four majors and numerous	Permission to access Qtrax databases only.

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
			download, stream or create radio playlists and organize and share their music. Provides artist biographies, song lyrics and links to videos and ticketing outlets. Launched for Australian audiences by 2011.	independents.	
<b>Rara.com</b>	<a href="https://www.rara.com/">https://www.rara.com/</a>	Streaming	Subscription based streaming service with unlimited on-demand access on any internet connected computer and Android mobile device. Playlists and music channels, hand curated by a team of resident DJ's. Caching to mobile dependent on subscription Tier. UK based, currently live in Australia.	All four majors and majority independents. Over 10 million songs.	Unlimited streaming and caching on one device at a time. Authorise up to three different devices for offline playback at any one time.
<b>Rdio</b>	<a href="http://www.rdio.com/">http://www.rdio.com/</a>	Streaming	Subscription service with different tiers. Unlimited web streaming, with mobile access and caching as well as some home music clients at higher tiers. Local office presence in Australia. Also offers social networking.	All four majors and majority independents. Over 18 million songs.	Subscription – tiered streaming Downloads – unlimited copying and transfer.
<b>Songl</b>	<a href="https://secure.songl.com/songl/home">https://secure.songl.com/songl/home</a>	Streaming	In Beta. Goal is to allow listeners to enjoy music anywhere, at any time and on any device. On-demand music subscription service designed and made in Australia.	All four majors and majority independents.	Streamed tracks must not be stored.
<b>Spotify</b>	<a href="http://www.spotify.com/us/">http://www.spotify.com/us/</a>	Streaming	Multiple Tiers. Ad-funded on-demand streaming and ad free premium subscription with mobile portability. Swedish based with local office presence in Australia.	All four majors and majority independents	Premium service – store cached content on up to three personal computers, mobile handsets and/or other relevant devices. (Files are non-transferable)
<b>Samsung Music Hub</b>	<a href="http://www.samsung.com/au/mobile/featured-applications/music-hub-teaser/index.html">http://www.samsung.com/au/mobile/featured-applications/music-hub-teaser/index.html</a>	Streaming and download	Subscription based music service to select Samsung devices via web browser or computer with mobile caching available. Designed for and available exclusively in Australia.	All four majors and many independents. Over 3 million music and media tracks.	MP3 and AAC format files are DRM free and may be used for personal non-commercial use.
<b>Sony Vidzone</b>	<a href="http://au.playstation.com/vidzone/">http://au.playstation.com/vidzone/</a>	Streaming	Free music videos on users PS3 or streamed to their PSP via Remote Play since June 2009.	All four majors.	PS3
<b>The In Song</b>	<a href="https://www.theinsong.com/au/#!/home">https://www.theinsong.com/au/#!/home</a> <a href="https://www.theinsong.com/aapt-iinet/#!/home">https://www.theinsong.com/aapt-iinet/#!/home</a>	Download	A la carte music downloads.  iiNet purchased the AAPT consumer business in 2010. The In Song music store is available to existing customers of AAPT as at a specific date.	Music from three majors and numerous independents.	MP3 and AAC format files are DRM free and may be used for personal non-commercial use.

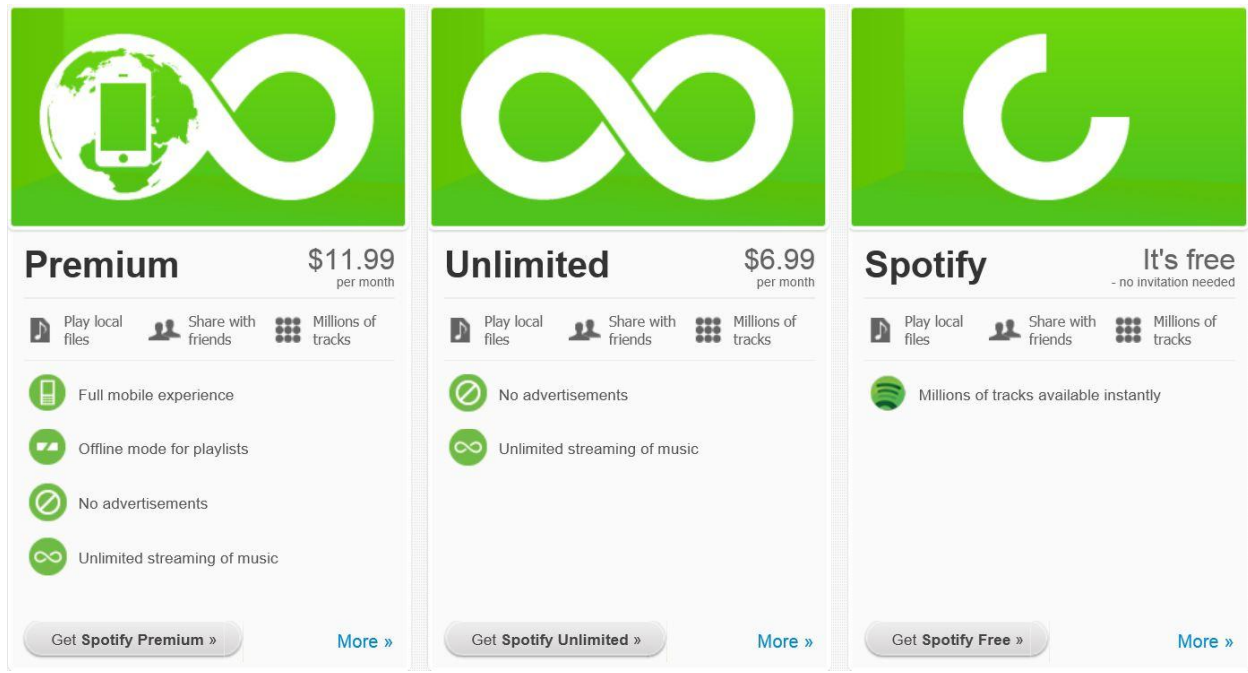
NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
<b>Third Mile</b>	<a href="http://www.thirdmile.com/">http://www.thirdmile.com/</a>	Download	Local a la carte downloads curated to provide Christian music and video	Over 25,000+ Christian Mp3 songs from a mix of major labels and independents	WMA, WMV and MP3 formats for personal, non-commercial use.
<b>Vevo</b>	<a href="http://www.vevo.com/#/">http://www.vevo.com/#/</a>	Streaming, Ad supported	Ad supported entertainment platform for premium music video and entertainment. Available through internet browsers on computers, mobiles and some home entertainment systems. Additionally, through a partnership with YouTube, VEVO is accessible in over 200 countries, expanding the platform's reach around the globe. Launched in Australia in April, 2012.	Music videos from three of the major record labels: Universal, Sony, EMI and numerous independents.	Personal non-commercial use. Downloads are purchased through iTunes.
<b>Vodafone</b>		Download	A la carte MP3 Downloads.	Music from all four majors and majority independents	
<b>Ticketek Music</b>	<a href="http://www.ticketekmusic.com.au/">http://www.ticketekmusic.com.au/</a>	Download	A la carte MP3 Downloads. Powered by Get Music.	Music from all four majors and majority independents	Account holders are allowed to transfer certain content to their personal computer, transfer content from their personal computer to enabled and compatible portable devices, and burn downloads to CDs for personal and non-commercial use.
<b>YouTube</b>	<a href="http://www.youtube.com/">http://www.youtube.com/</a>	Streaming Ad supported	Free ad-supported on-demand video streaming with click through track purchasing from iTunes	All four majors and hundreds of independents	Online access – unauthorized downloads are not permitted.
<b>Virgin Mobile</b>	<a href="http://www.virginmobile.com.au/the-vibe/">http://www.virginmobile.com.au/the-vibe/</a>	Download	Music accessible through Virgin compatible handsets (not available on iPhone).		Available on Virgin handsets only
<b>X box Music</b>	<a href="http://www.xbox.com/en-AU/Music?xr=shellnav">http://www.xbox.com/en-AU/Music?xr=shellnav</a>	Streaming	Streaming subscription service	Over 18 million tracks	Unlimited access to songs on Windows 8 or Windows RT tablet, PC, Windows Phone 8, and Xbox 360.
<b>zDigital</b>	<a href="http://www.zdigital.com.au/">http://www.zdigital.com.au/</a>	Download	a la carte track, album and video downloads in MP3 with locker storage for purchased tracks (branded 7Digital in other countries)	Millions of tracks from all four majors and leading independents	DRM free, can be used on any computer or audio device but for personal, non-commercial use only.

*These descriptions are for guidance only and may not be full, complete or exhaustive. No guarantee is made as to the accuracy or correctness of the data although reasonable efforts were used in compiling the data. The services referred to are those currently launched and available, but they may change frequently in terms of availability and service offering. There are additional services that have been licensed and are not yet launched, or are in the process of being negotiated and licensed, all of which are currently confidential. The information provided in this table is current as at 28 November, 2012. Information primarily sourced from publicly available materials.*

## Annexure B

### Screenshots of a selection of streaming services and accompanying inclusions

Figure 3: Spotify<sup>72</sup>:



<sup>72</sup> <http://www.spotify.com/au/get-spotify/overview/>



## Compare products

See which product is right for you.

	<b>Spotify Premium</b> <i>Spotify in its purest form. <a href="#">Learn more »</a></i>	<b>Spotify Unlimited</b> <i>No time limits, no ads. <a href="#">Learn more »</a></i>	<b>Spotify Free</b> <i>The best music player in the world. <a href="#">Learn more »</a></i>
Price	\$11.99 per month	\$6.99 per month	Free
Millions of tracks available instantly	✓	✓	✓
<a href="#">Play and organise your own MP3s</a>	✓	✓	✓
<a href="#">Spotify social</a>	✓	✓	✓
<a href="#">Play local files on your mobile</a>	✓	✓	✓
<a href="#">Take your music abroad</a>	✓	✓	14 days
No advertising on desktop	✓	✓	✗
<a href="#">Play music from Spotify on your mobile</a>	✓	✗	✗
<a href="#">Offline mode</a>	✓	✗	✗
Enhanced sound quality	✓	✗	✗
Exclusive content	✓	✗	✗
<a href="#">Play Spotify through music systems</a>	✓	✗	✗

[Get Spotify Premium »](#)
[Get Spotify Unlimited »](#)
[Get Spotify »](#)

Figure 4: Spotify



Free. **XBOX LIVE**  
 My Account | Join Now | Sign In



Xbox 360 + Kinect
 Xbox LIVE
 Social
 Games
 Video
 **Music**
 Support
 Search All

# Xbox Music Pass

Unlimited music wherever you go\*



Try it risk free for 30 days. Don't like it? You can cancel at any time.\*\*

**TRY IT NOW**



**Stream or Download the music you love**

Stream millions of songs on your Windows 8 and Windows RT tablet and PC, Windows Phone, and Xbox 360. Or download your favorite songs so you can listen offline.\*\*\*



**Discover new music**

Like Pandora? You'll love Smart DJ. Just type in an artist and Smart DJ creates a playlist from similar artists. You can see everything in your playlist, and with unlimited skipping, skip to any song you want as many times as you want.\*\*\*



**Keep your devices in sync**


Your Xbox Music Pass collection automatically syncs across all your Xbox Music devices so you can easily access songs, albums, and playlists no matter where you are.\*

**Figure 5: Xbox Music**<sup>73</sup>

<sup>73</sup> <http://www.xbox.com/en-AU/music/music-pass>

<p><b>Premium</b> \$12.99/mo</p> <p>Hear your favorite music at home and on the go.</p> <p><a href="#">Start Free Trial</a> <a href="#">Get Premium Plan</a></p>	<p>Listen on these devices:</p> <table border="0"> <tr> <td> <p><b>At Home:</b></p> <p>Mac</p> <p>PC</p> <p>Blu-ray players</p> <p>Bravia &amp; Sony Internet TVs</p> </td> <td> <p><b>On the Go:</b></p> <p>Xperia™</p> <p>iPhone®</p> <p>iPod Touch®</p> <p>Android smartphones and tablets</p> <p>Walkman® Players</p> </td> </tr> <tr> <td colspan="2"> <p><b>For Gamers:</b></p> <p>PlayStation®3</p> <p>PlayStation® Portable</p> <p>PlayStation® Vita</p> </td> </tr> </table>	<p><b>At Home:</b></p> <p>Mac</p> <p>PC</p> <p>Blu-ray players</p> <p>Bravia &amp; Sony Internet TVs</p>	<p><b>On the Go:</b></p> <p>Xperia™</p> <p>iPhone®</p> <p>iPod Touch®</p> <p>Android smartphones and tablets</p> <p>Walkman® Players</p>	<p><b>For Gamers:</b></p> <p>PlayStation®3</p> <p>PlayStation® Portable</p> <p>PlayStation® Vita</p>	
<p><b>At Home:</b></p> <p>Mac</p> <p>PC</p> <p>Blu-ray players</p> <p>Bravia &amp; Sony Internet TVs</p>	<p><b>On the Go:</b></p> <p>Xperia™</p> <p>iPhone®</p> <p>iPod Touch®</p> <p>Android smartphones and tablets</p> <p>Walkman® Players</p>				
<p><b>For Gamers:</b></p> <p>PlayStation®3</p> <p>PlayStation® Portable</p> <p>PlayStation® Vita</p>					
<p><b>Access</b> \$7.99/mo</p> <p>If you mostly listen to your music at home, this plan is the perfect choice.</p> <p><a href="#">Get Access Plan</a></p>	<p>Listen on these devices:</p> <table border="0"> <tr> <td> <p><b>At Home:</b></p> <p>Mac</p> <p>PC</p> </td> <td> <p><b>For Gamers:</b></p> <p>PlayStation®3</p> </td> </tr> </table>	<p><b>At Home:</b></p> <p>Mac</p> <p>PC</p>	<p><b>For Gamers:</b></p> <p>PlayStation®3</p>		
<p><b>At Home:</b></p> <p>Mac</p> <p>PC</p>	<p><b>For Gamers:</b></p> <p>PlayStation®3</p>				

**Figure 6: Sony Music Unlimited<sup>74</sup>**



**BBM™ Music. Free for up to 30 days<sup>2</sup>**

The free trial allows you to try out the features of BBM Music Premium. After your free trial, the monthly fee for BBM Music Premium is \$5.99 (VAT inclusive).

[Download BBM Music](#)

[Send an email to your smartphone](#)

**Figure 7: Blackberry BBM<sup>75</sup>**

<sup>74</sup> <http://www.sonyentertainmentnetwork.com/au-en/music-unlimited/two-plans/>

<sup>75</sup> <http://au.blackberry.com/services/bbm-music/>

## Annexure C

### Music Video Streaming: Screenshots from Shock Records

karen@shock.com.au (Shock Entertainment Pty) [Give us feedback?](#) [Account Settings](#) [Help](#) [Sign out](#)

[Overview](#) [Search](#) [Uploads](#) [Claims](#) [Assets](#) [Reports](#) [YouTube Analytics](#)

**All Claims** \* **Possible Claims (13 of 12)**

**Shooter Jennings - The Deed and The Dollar (MUSIC VIDEO)** [Release Claim](#) [Confirm Claim](#) [Take down](#) [Review Later](#)

**Notifications and History**

If no action is taken, the claim will be released on 10/24/12

**Add a note**  
YouTube's content ID system indicates that this may be a match but did not have sufficient confidence to generate an automated claim.

**09/24/12 02:11 AM** Pending claim created: Video Match (Pending for review)

**Policies**

Change location to view policy:  
Location:

**Applied Policy**

<b>Owner Policy</b>	<b>Monetize if</b> the viewer is in Australia, or New Zealand
---------------------	------------------------------------------------------------------

[Change claim policy](#)

**Claim Details**

<b>Claim ID</b>	#F0Q4tpm9M
<b>Claim Date</b>	09/24/12
<b>Claim Type</b>	Audiovisual
<b>License</b>	Premium
<b>Platform</b>	Google Video
<b>Video Source</b>	User Uploaded
<b>Custom ID</b>	8q2ZhAkgJ0
<b>Claim Flags</b>	Embeds Enabled Syndication Permitted to All Platforms

[Edit claim details](#)

**Video Information** [Play both videos at match offset](#)

**Video title:** Shooter Jennings - The Deed and The Dollar (MUSIC VIDEO)

**View info**



**Longest Match** 3:59 (user video: 0:01 - 4:00, reference: 0:01 - 4:00)

**Total Match** 97% of user video (3:59), 99% of reference (3:59)

**Reference title:** Shooter Jennings - The Deed and The Dollar (MUSIC VIDEO)

**View info**



**Asset Details**

<b>Type</b>	Music Video
<b>ISRC</b>	
<b>UPC</b>	
<b>Artist</b>	Shooter Jennings
<b>Song</b>	Shooter Jennings - The Deed and The Dollar (MUSIC VIDEO)
<b>Label</b>	
<b>Genre</b>	
<b>Track length</b>	
<b>Custom ID</b>	8q2ZhAkgJ0

[View asset details](#)

[https://cms.youtube.com/cyc\\_claim\\_new](https://cms.youtube.com/cyc_claim_new)

1/2

Overview	Search	Uploads	Claims	Assets	Reports	YouTube Analytics
----------	--------	---------	--------	--------	---------	-------------------

All Claims ▸ Disputed Claims (5 of 10) ▾

## Jump Rope Montage

Release Claim

Reinstate Claim

Takedown

Review Later

## Notifications and History

If no action is taken, the claim will be released on 11/05/12

<b>Dispute Reason</b>	Approval from copyright holder is not required. It is fair use under copyright law.
<b>User Note</b>	Copyright Disclaimer Under Section 107 of the Copyright Act 1976, allowance is made for "fair use" for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. Fair use is a use permitted by copyright statute that might otherwise be infringing. Non-profit, educational or personal use tips the balance in favor of fair use.

Add a note

10/05/12 12:21 PM	Claim disputed. Approval from copyright holder is not required. It is fair use under copyright law.	YT User - adamwies95
04/01/12 11:44 AM	Claim created: Audio Match	

## Policies

Change location to view policy:

Location: Worldwide

**Pending Policy** **Monetize if**  
the viewer is in Australia, or New Zealand

**Owner Policy** **Monetize if**  
the viewer is in Australia, or New Zealand

## Claim Details

<b>Claim ID</b>	80Xs6_CBULQ
<b>Claim Date</b>	04/01/12
<b>Claim Type</b>	Audio only
<b>Platform</b>	Google Video
<b>Video Source</b>	User Uploaded
<b>Custom ID</b>	5361063
<b>Claim Tags</b>	Embeds Enabled Syndication Permitted to All Platforms

Edit claim details

## Video Information

Play user video at match offset

Video title: Jump Rope Montage

View info



<b>Longest Match</b>	3:20 (user video: 0:00 – 3:20, reference: 0:00 – 3:20)
<b>Total Match</b>	98% of user video (3:20), 77% of reference (3:20)

The reference content is not available.

## Asset Details

<b>Type</b>	Sound Recording
<b>ISRC</b>	USP6L1000053
<b>UPC</b>	886443594999
<b>Artist</b>	AWOLNATION
<b>Song</b>	Sail
<b>Album</b>	Sail
<b>Label</b>	Red Bull Records
<b>Genre</b>	
<b>Track length</b>	
<b>Custom ID</b>	5361063

View asset details