

Music Rights Australia

Music Rights Australia Pty Limited (**Music Rights Australia**) wishes to thank the Australian Law Reform Commission (the **ALRC**) for the opportunity to comment on the Copyright and the Digital Economy Issues Paper (the **Issues Paper**). Music Rights Australia welcomes the opportunity to look at the vital role which copyright plays in the digital economy and how the local and international music industries have used innovation to develop new business models to continue to meet consumer needs. The music industry and its stakeholders are well placed to illustrate the central role which copyright licensing plays in the development of these new business models.

Music Rights Australia supports the principle of promoting the digital economy and encouraging competition. As Placido Domingo, Chairman of IFPI said, in his introduction to the Digital Music Report 2012:

“Thanks to the amazing technology of the internet, the audience for recorded music is fast expanding across the world. Artists who might not otherwise find a way to make their music available can take advantage of new ways to distribute music the internet offers.

At the same time policy makers better understand the internet does not make music “free”. There is a greater acceptance of the need for good and fair copyright laws to stop infringement of artists’ and producers’ rights.”¹

Music Rights Australia will focus on how the present copyright laws affect the ability of creators to earn a living and participate in the digital economy (Question 1) with a particular focus on how the lack of effective protection impacts the development and viability of online business models and artists’ expectations that they can control and protect their creative content online. Further detailed responses to the other specific questions in the Issues Paper can be found in the ARIA and APRA|AMCOS submissions. Music Rights Australia supports the submissions made separately by ARIA and APRA|AMCOS.

Who we are

Music Rights Australia is a joint venture between the Australian recorded music sector (represented by the Australian Recording Industry Association – **ARIA**) and the Australian songwriters, composers and music publishers (represented by the Australasian Performing Right Association Ltd - **APRA** and the Australasian Mechanical Copyright Owners’ Society Limited – **AMCOS**²) representing more than 70,000 songwriters, composers music publishers and record labels. Music Rights Australia aims to ensure that

¹ Digital Music Report 2012 – Expanding Choice, Going Global p 3
<http://www.ifpi.org/content/library/DMR2012.pdf>

² <http://www.aria.com.au/>
<http://www.apra-amcos.com.au>

the works created by its music industry stakeholders are respected, appropriately rewarded and protected. It also seeks to improve the awareness of intellectual property rights among music fans and the wider Australian community.

1. Executive Summary

Music Rights Australia and its stakeholders believe copyright is the currency of creativity. Copyright plays a vital role in the local and international cultural landscape. It enables creators and their businesses to monetise demand for their creations and secure returns that can be reinvested into new projects and new talent, to benefit Australian artists, international artists and those who invest in them.

The music sector has not only embraced digital technologies and the opportunities they offer it to reach new and wider audiences, but it has also embraced the flexibility these technologies give consumers to access the music they want. There are 39 licensed music services available to Australian consumers and the variety of digital services is more compelling than ever before.³ We believe that due consideration of these models and a full understanding of how they are currently meeting consumers' legitimate needs will show that there is no need for the introduction of blanket exceptions and such an approach may inadvertently impact the development of current and future business models. We urge the ALRC to consider the potential negative impact which wide ranging blanket exceptions will have on current commercial models when making its recommendations. For explanations of the services currently operating in Australia and internationally we refer the ALRC to the ARIA and APRA|AMCOS submissions.

The Attorney General's reference to the ALRC requires it to consider Australia's international obligations and Principle 3 of the Issues Paper states that reforms should recognise the interests of rights holders and be consistent with Australia's international obligations. In addition to an appreciation of the legitimate market and how it is progressing, Music Rights Australia urges the ALRC to consider any new or expanded exception in light of Australia's obligations under the Berne Convention and in particular Article 9(2), commonly referred to as the Three Step Test, when making its recommendations.

Additionally, we believe that the proponents of any new or expanded exceptions should be required to present cogent, relevant and current evidence to support their proposals and such evidence should be examined against the backdrop of the legitimate expectations of music industry rights holders and their business practices. Each element of the Three Step Test must be satisfied before the ALRC makes any recommendations for new exceptions and any suggested changes must satisfy the requirement that "they do not conflict with a normal exploitation of the work and do[es] not unreasonably prejudice the legitimate interests of the author."⁴

Protection

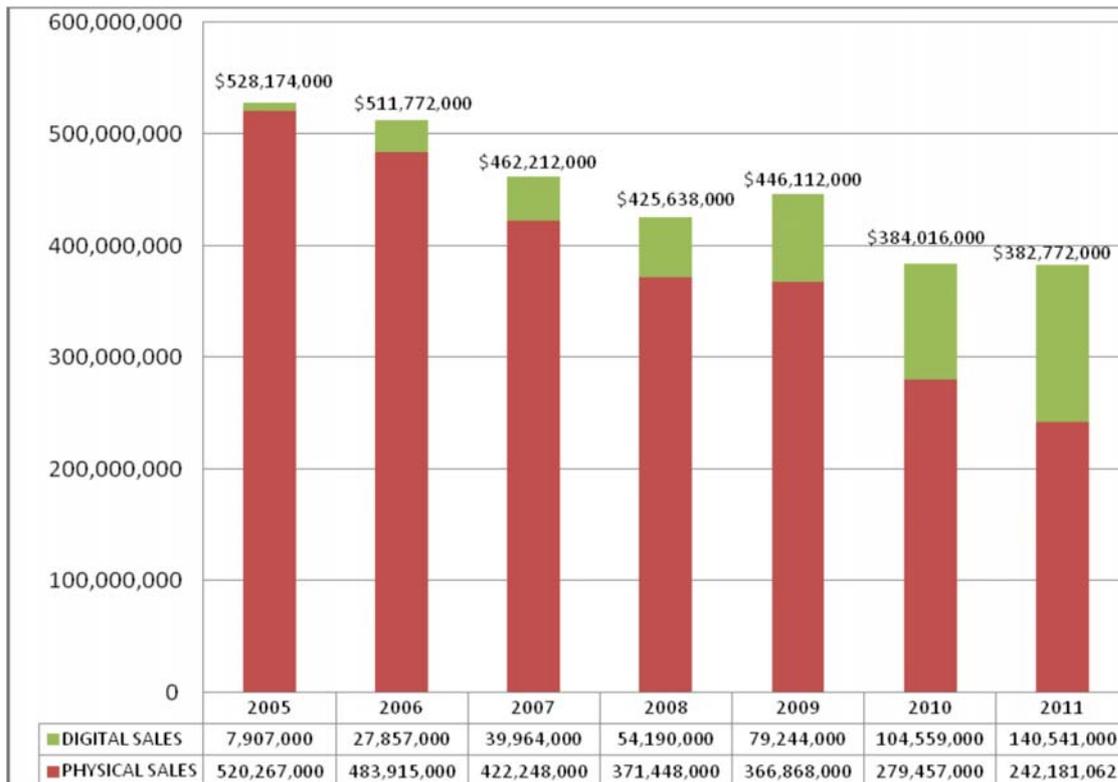
Music Rights Australia believes that the ongoing growth of digital music services can be accelerated if more positive steps are taken to implement effective efficient protection measures for content owners

³ Annexure A sets out the local digital services and summaries their key features

⁴ Berne Convention for the Protection of Literary and Artistic Works, Article 9(2); Article 13 TRIPS.

and legitimate digital content providers. Despite the strong growth in digital sales in Australia in 2012, the market is still performing below its potential. The Australian recorded music market peaked in 2003, when it was worth US\$ 709 million. Since then, sales have declined by 33% to US\$ 475 million (2003-2011).

ARIA Wholesale Figures 2005 to 2011 – Total Dollar Value⁵



We note that the terms of reference exclude the issues of “unauthorised distribution of copyright material using peer to peer networks.”⁶ However, the issue of unauthorised use of copyright material online has a significant impact on Australian creators’ ability to earn a living and is wider than the narrow scope of the ongoing discussions referred to in the terms of reference.

Music Rights Australia does not believe the ALRC can review the issues it raises in Question 1 of the Issues Paper or have regard to the objective of copyright law in providing an incentive to create and disseminate original copyright materials⁷ without taking submissions on the impact which unlicensed use of copyright material online has on rights holders, creators and their willingness to invest in new models for legitimate online distribution.

⁵ See <http://www.aria.com.au/pages/documents/2011wholesalefigures.pdf>

⁶ Terms of Reference page 4

⁷ Terms of Reference page 3

Music Rights Australia believes that any further discussion paper or recommendations for change need to include consideration of these issues. We urge the ALRC to take submissions on the damaging impact which unchecked unauthorised use online has on content owners and its impact on the growth of the digital economy. We ask the ALRC to take submissions on the steps which content owners believe should be taken to secure the ongoing investment in digital services and in new music to meet legitimate consumer needs and to protect content owners' revenues in the digital economy.

The International Federation of Phonographic Industries (IFPI) estimates that 25 per cent – one in four – Internet users in Australia access unauthorised services on a monthly basis and over half (57%) of these users are using P2P networks, with BitTorrent sites leading the field. Use of unauthorised services continues to rise in Australia despite the growing number of legitimate services that the industry has licensed. This growth is also above and beyond the increase in internet users. Piracy remains the biggest competitor to legitimate services such as iTunes and Spotify.

Fair Use and free use exceptions considered by the ALRC

Music Rights Australia is concerned about the ALRC's consideration to include a general exception for fair use and to implement new or restructure existing free-use exceptions.

In 2006, the House of Representatives Standing Committee considered and rejected a general fair use defense. Since 2006, there does not appear to be any additional factor or pressing need on the part of users which would warrant the introduction of a general fair use defense. This matter was recently considered in the United Kingdom during the Hargreaves Review of Intellectual Property and Growth and the Government rejected a broad fair use defense. The recent review in Canada also considered the fair use issue and similarly declined to introduce a broad fair use exception.

Additionally, Music Rights Australia asks that the ALRC take into consideration the examples of the misuse of the fair use defense in copyright infringement cases and the burden this has placed on rights holders and the courts in the protection of their interests.

Request:

Music Rights Australia asks the ALRC to:

- I. Consider the negative impact unchecked unauthorised use of creative content online has on content owners and the new digital business models when making its recommendations.
- II. Take submissions on possible solutions which could be implemented to address unauthorised use of creative content online.
- III. Adopt the Three Step Test as one of its guiding principles in this review process.

Question 1: The ALRC is interested in evidence of how Australia's copyright law

(a) affects the ability of creators to earn a living through access to new revenue streams and new digital goods and services

A recent Price Waterhouse Cooper report (the **PWC Report**) found that in the year 2010-11 Australian copyright industries employed 906,591 people or 8 % of the Australian workforce.⁸ This means that "1 in 12 employed Australians works in an industry reliant on copyright."⁹ Compared with other countries, Australia has a higher percentage of the workforce employed in copyright industries and in 2010-11 copyright industries generated over \$7 billion or 2.9% of exports.

The report found that copyright industries comprised \$93.2 billion or 6.6% of GDP. This was a decrease from \$100.2 billion or 7.8% in 2007-8. The report attributes this decrease to a number of factors including the increased risk of unauthorised copying.

Despite the current inadequacies of the legislative framework to address the serious problem of unauthorised use online, the international and local music industries have continued to find ways to bring music to consumers.

IFPI's Investing in Music highlights that labels invest about 26 per cent of their revenues in developing and marketing new artists.¹⁰ Of this, an estimated 16 per cent was spent on artist and repertoire work (A&R) in 2011.¹¹ This far exceeds the research and development investment of many other industries¹². Record companies have defied the global economic downturn to invest US\$4.5 billion annually in A&R and marketing. They remain the primary investors in artists, maintaining A&R spend despite declining overall revenues in recent years. As a result, Australia has a vibrant and diverse music scene, with many of our artists being recognised internationally.

Innovative business models have transformed the music industry enabling it to operate in the digital economy, to deliver diversified products to Australian consumers and to enter new online markets. The recent IFPI Recording Industry in Numbers¹³ report illustrates that while global recorded music revenues declined in the past six years, digital sales grew strongly in many territories including Australia, with digital channels now accounting for 31 per cent of all trade revenues to record companies worldwide.¹⁴ In 2011 Australia ranked sixth in both digital and physical sales worldwide.

⁸ The Economic Contribution of Australia's Copyright Industries 1996-97 to 2010-11, <http://www.copyright.org.au/pdf/PwC-Report-2012.pdf>.

⁹ Jeremy Thorpe 's speech at the launch of the PWC Report 15 August 2012 www.copyrightcouncil.org.au

¹⁰ IFPI Investing in Music 2012 p 7

¹¹ IFPI Investing in Music 2012 p 9

¹² IFPI Investing in Music 2012 p11

¹³ IFPI Recording Industry in Numbers 2012 p 5

¹⁴ IFPI Recording Industry in Numbers 2012 p 17

However, the industry continues to struggle against ineffective laws to protect online content. Examples around the world show that the introduction of effective protection for creative content online can revitalise local investment and increase export of local content.¹⁵ (See Korean example below)

The cycle of investment can only be achieved through robust protection of creators' rights. Presently, the Copyright Act 1968 (the **Act**) does not have an adequate system to protect copyright owners' rights online. Inadequate protection for rights holders impacts the music industry stakeholders, who invest in established and emerging talent. Inadequate protection can devastate a local music industry. On the other hand effective protection designed to address unauthorised use can support the creative industries and examples can be found in many countries around the world. This has resulted in positive benefits to the content industries and consumers though the growth in online services which deliver the content they want.

Digital Services¹⁶

At the start of 2011, the largest international digital services were present in 23 countries. By the start of 2012, they were present in 58 countries. Leading services such as Deezer, iTunes, 7digital and Spotify are engaging in expansion programs across Africa, Asia and Latin America. The Australian music industry has also licensed a large number of legal services. As of November 2012, there were 39 legal services.¹⁷ In 2012 revenues from digital recorded music sales (including streaming services) amount up to 50 per cent of total revenues, compared to 32% in 2011.¹⁸

There are now more legitimate options available to music lovers than ever before:

Subscription services allow users to access to a vast library of music for a low monthly fee and usually to listen to these services on multiple devices (PC, mobile phone, tablet). Most of these services are streaming services and some of them have begun to link with new partners, such as social networks (e.g. Spotify with Facebook). Subscription services grew by 67% globally with 13.4m paying subscribers (Spotify accounted for 3 million of those).

Advertising-supported services enable consumers to legally listen to large catalogues of music for free, while artists and record labels receive income from the advertising placed on them. These services are similar to listening to commercial radio, except that the consumer has control of the playlist. Some of these services also offer subscription packages that enable consumers to drop the advertising, for instance Spotify.

Digital downloads Download stores account for a large proportion of digital revenues and account for most of the 500 legitimate services worldwide, offering libraries of up to 20 million tracks. The iTunes

¹⁵ The Economist September 20, 2011 *Spotting the Pirates* and <http://www.ft.com> Financial Times 12 October 2012 *Is pop going polygot?*

¹⁶ For examples of the local and international music services see the APRA | AMCOS and ARIA submissions

¹⁷ www.pro-music.org

¹⁸ IFPI estimate

stores are probably the best known of these types of stores and in 2011 Google launched a service for its Android platform.

Streaming Services from the Cloud - The Apple iTunes Match service was launched in November 2011 in the US. This service allows users to access their music libraries across the full range of devices they own for a set fee per year.

CDs, DVDs and vinyl can be purchased through traditional bricks and mortar stores as well as through online stores.

The ProMusic site (www.promusic.org) sets out country by country the various licensed online sites which are making music available to fans around the world. Annexure A sets out a summary of local digital services.

Despite the long list of services which continue to make genuine music available to fans, these models continue to struggle in the face of ongoing intellectual property infringements and protection is needed to put an end to this unfair competitive environment.

Case Study: Spotify

Spotify expanded into Australia in May 2012 with the aim of offering a powerful music experience within a 100 per cent legal framework. We've built up a catalogue of more than 16 million tracks from both major and independent labels, and combined this library with a service that makes it easier than ever before to search for and share music.

The success of Spotify in Australia and other countries has been driven by the 'freemium' business model. Users can register either for free accounts supported by adverts, or upgrade paid subscriptions without ads and with a range of extra features such as portability, higher quality streams and offline music access. Our users tell us the biggest reason they subscribe to Spotify is to take their music with them, which is possible on a range of mobile devices.

It's fantastic to see so many people in Australia enjoying Spotify. As we continue to develop the service, we're also proving to be a major international source of revenue for artists and labels.

Piracy continues to be the music industry's biggest challenge. Look at it this way – in the physical world, an enormous supermarket giving away entertainment illegally and for free would be a serious deterrent to setting up and running a shop where you charge for the same products.

Online, we continue to face a comparable challenge where our ability to convert people to paying for music subscriptions, or attract advertising for our service, will be challenged by the continual availability of the same music on illegal services.

Spotify has invested in and developed a service that people are moving to in their millions, and is playing an increasingly important role in attracting people away from unlicensed file-sharing and illegal streaming. As ever, a level, legal playing field remains vital for any business looking to flourish in the digital age.

Kate Vale

Managing Director Spotify Australia & New Zealand

Protection

According to the IFPI Digital Music Report 2012¹⁹ the biggest factor undermining the growth of digital music businesses is widespread piracy. Without a comprehensive platform for rights protection, it is extremely difficult for any business model to compete and for new models to emerge. The widespread availability of unlicensed content has greatly damaged the ability of authorised services to compete and grow audiences. The Arts Council of Australia study titled Do You Really Expect to Get Paid?, (an economic study of professional artists, including musicians and composers) found that sixty per cent of all artists believe new technologies are likely or very likely to improve their income with the ability to reach new audiences (26 %) and to promote their work (20%) being the most common new opportunities cited.

The study also noted that artists had increased their understanding of how intellectual property could be a means of providing remuneration to creators and stated:

“From the viewpoint of individual artists, if they are to gain full economic benefit to which their creative endeavour entitles them, their intellectual property in their work must be adequately protected against unauthorised exploitation and appropriation.”²⁰

The study also looked at the role played by collection agencies in assisting artists in the protection of their intellectual property and found that composers traditionally collect their primary royalties via collecting societies such APRA or AMCOS.

As we have already stated the music industry has embraced the digital economy. However, the industry continues to be negatively impacted, locally and globally, by unauthorised use of its creative content through P2P technologies, unauthorised streaming sites and rogue sites which offer only pirated material.

The music industry has partnered with other industries through the Australian Content Industry Group (**ACIG** is made up of representatives of the music, books, games, software and visual arts industries) to try to achieve a solution to address the present and emerging issues online.

Over the last two years, ACIG members have engaged in discussions with the Attorney General’s Department, ISPs and consumer groups to try to address the unauthorised use of creative content on line.

ACIG’s goal continues to be the development of an efficient, equitable and proportionate system through cooperation with ISPs, Government and consumer groups. However, since the High Court’s decision in the *iiNet* case²¹, it is apparent that this goal can only be achieved through amendments to the legislation.

¹⁹ IFPI Digital Music Report 2012 <http://www.ifpi.org/content/library/DMR2012.pdf>

²⁰ Throsby and Zednik, *Do you really expect to get paid? An economic study of professional artists in Australia*, 10 August 2010 www.australiacouncil.gov.au

²¹ *Roadshow Films Pty Ltd & Ors v iiNet Ltd* [2012] HCA 16

The High Court found that iiNet had not authorised the copyright infringement of its customers who used the BitTorrent peer- to-peer (P2P) file sharing software to download copyright material, and was not required to take action to stop its customers using P2P technologies to access infringing content . As the law stands today, the only solution content owners have to protect their rights is to sue consumers who use BitTorrent technologies to access unauthorised content.²²

Music Rights Australia does not believe this is an adequate solution and Australian music copyright owners have been reluctant to take that option and have, through their participation in the ACIG and other industry groups, continued to seek a collaborative solution which addresses the significant losses they face from unlicensed use of content online.

Music Rights Australia asks the ALRC to take submissions on solutions to address these issues as they have a significant negative impact on creators and their ability to earn a living in the digital economy and the introduction of new and innovative business models which give consumers access to creative content.²³

In his speech at the launch of the PWC report on 15 August 2012, The Honorable Mark Dreyfus QC MP spoke of the challenges in the digital economy and said:

“The responsibility for generating policies is now shared among us all ... the future will be collaboration across industry, government, institutions and users.”²⁴

Music Rights Australia believes a code, implemented through legislation and binding all ISPs, which requires them to take meaningful steps to address unauthorised use on their networks, will go some way to address these issues. The code will also create a new flexible model which takes into consideration the needs of rights holders, ISPs and consumers. Additionally, it will avoid unnecessary and costly litigation against ISPs and consumers and mean the court system will not be burdened by increasing numbers of cases.

It is evident from international examples that programs which have a combination of education, consumer notices and effective sanctions, work effectively and have a positive impact on consumer behaviour and the uptake of legitimate sources of content. Music Rights Australia does not necessarily advocate one international example over another. However, we do believe that any solution designed to address this serious problem should include the following minimum and reasonable elements:

- Coordinated consumer education campaigns designed to raise awareness of the sources of genuine and authorised content;
- a series of education notices which ISPs send to their customers to alert them to the consequences of their use of P2P technologies to access unauthorised content;

²² *Copyright Act 1968*, 101(1A), Part V Div 2AA

²³ Question 1 (a) and (b) of the Issues Paper

²⁴ www.copyrightcouncil.org.au

- sanctions designed to deter the infringing behaviour of those who continue to ignore their legal obligations after several notices. However in the case of P2P technologies, we do not advocate disconnection from the internet;
- a right of appeal for those consumers who believe they have received notices incorrectly;
- legislation to ensure all ISPs are required to participate in the code ; and
- legislation to assist rights holders to obtain orders against rogue sites and unauthorised streaming of creative content.

Music Rights Australia urges the ALRC to review the international evidence when making its recommendations. For instance, measures like graduated response to address P2P piracy are operating in many countries, like France, New Zealand, Ireland, South Korea, Chile and soon in the US (end of 2012), and the UK (March 2014) and initial studies have shown a positive impact on consumer behavior and sales (see Evidence from France below).

Evidence from France

In France, a graduated response system operates under the administrative authority HADOPI. It started in October 2010 and since then the authority has issued more than 1,150,000 first warnings, 100,000 second warnings and 340 notification letters at the third stage. Out of these third stage files, 14 have been submitted to the judiciary prosecutors who can impose fines of up to 1,500 Euros or the suspension of internet access for up to one month. In September 2012, a tribunal ruled that an account holder pay a fine of 150 Euros for negligently allowing his account to be used for infringing activity.

The law has not only had an impact on P2P piracy but also on sales. An independent academic study²⁵ which analysed the impact of the HADOPI law in France and its impact on consumer behaviour found that public awareness of the HADOPI law caused iTunes song sales in France to increase by 22.5% above the sales increase of a control group of five European countries. In addition, there was a 25% increase in iTunes album unit sales above the change in the control group. The study found that effect of HADOPI was larger for more heavily pirated genres like Rap and smaller for less pirated genres like Jazz, suggesting that the increase in sales was likely to have been caused by a reduction in piracy.

The increase in sales was observed even before the law's final passage. This is consistent with the idea that increasing the public knowledge of the law, the illegality of piracy, and the potential penalties are important elements in changing consumer behaviour.

²⁵ Danaher, Smith, Telang and Chen, *The Effect of Graduated Response Anti-Piracy Laws on Music Sales: Evidence from an Event Study in France*, 2012 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989240

Korea – A Market Revived²⁶

Korea's recorded music market has attracted attention because of its return to growth at a time when the industry globally is still in decline. Sales in Korea increased in value by 6% in 2011, following 12% growth in 2010. This increase can be attributed to Korea's anti-piracy laws that include a graduated response scheme which can apply to cyberlockers and also website blocking measures.

Government officials reported in 2011 that 70 % of infringing users stop their activity on receipt of a first notice. A similar pattern has been found after users receive a second notice, with 70% ceasing to use their account to infringe. In 2011 the Korean market, driven by a surge in sales of K-Pop artists, had its fourth year of consecutive growth. The market has moved up the international rankings in recent years, rising from Number 23 in 2007 to Number 11 in 2011.

Korea is proof that effective Government policies and action can make a difference to the environment in which record companies and other music industry stakeholders operate.

Actions against LimeWire

The music industry has also benefited from legal actions against major infringing services like LimeWire. LimeWire was one of the most popular P2P services in the world. Research by The NPD Group in the US found that the percentage of the internet population using a P2P file sharing service to download music fell from a high of 16% in 2007 to just 9% in 2010, when LimeWire ceased its operation.²⁷

Addressing Rogue Sites

We also know that limiting access to rogue sites can also be effective to protect rights holders' interests and to assist in consumer protection. The Pirate Bay and other rogue sites have been blocked by ISPs in several countries including the United Kingdom and in other non EU jurisdictions.

Recital 59 of the EU Copyright Directive 2001/29/EC recognises that in the digital environment, the services of online intermediaries, such as ISPs, may be used by third parties to carry out copyright infringing activities, and that in many cases those intermediaries are best placed to bring such infringing activities to an end. Accordingly, and without prejudice to any other sanctions and remedies available to copyright owners, article 8(3) of the Copyright Directive provides that the courts in EU member states should have the power to grant injunctions against intermediaries, to require them to stop or prevent an infringement.

Rights owners have now obtained a number of court decisions in EU member states and other jurisdictions requiring ISPs to block their customers' access to websites that offer infringing material Annexure B sets out summaries of some of these cases.

Evidence shows that these blocks have had an impact on piracy as usage of the blocked sites has decreased after implementation of the blocks. The courts in each case assessed the harm to copyright

²⁶ IFPI Recording Industry in Numbers 2012 p24.

²⁷ IFPI Recording Industry in Numbers 2012 p25

owners and any impact on the ISP in implementing the blocks, and concluded that blocking the site was a reasonable and proportionate response.

Australia does not currently have a process which would allow rights holders to obtain similar orders. We submit that this needs to be addressed so rights holders can ensure their Intellectual Property is adequately protected and also to ensure that consumers are not taken advantage of by the broad range of online rogue groups involved in the distribution or making available of infringing materials. We urge the ALRC to take submissions on steps which can be taken to ensure that these sites are not permitted to undermine the development of legitimate online services.

Evidence of damage to content owners from unauthorized use on line

A snap shot of the current Australian piracy situation is outlined in Annexure C. It is clear from the evidence in Annexure C and other material referred to in the Music Rights submission that online copyright infringement is a serious issue in Australia and internationally. The situation was also addressed recently in the *CCi Digital Futures Report- The Internet in Australia 2012*²⁸ which found that 44.33% of users said the main reason they used file sharing services was because they were free and when asked if the ability to download music from the internet influenced their purchase of music, 24.3% said they bought less music as a result of this.

In addition to that study, the majority of academic and empirical studies show that the level of piracy negatively impacts the demand for legitimate content:

- A recent study titled *Assessing the Academic Literature Regarding the Impact of Media Piracy on Sales*²⁹ found that the majority of the literature which studied the music industry showed that piracy harmed media sales. For motion picture sales the peer-reviewed literature, which focused on recently released titles, strongly suggested that digital piracy resulted in a decrease in sales of motion picture content. Generally the study found that all papers in peer reviewed journals (bar one), spanning both music and motion picture sales, found evidence of statistically significant harm to sales of recently released content as a result of unauthorised file sharing.
- A comprehensive study in this area, which was included in the review of academic literature referred to above, was undertaken by Jupiter Research in 2009.³⁰ Based on consumer research in the top 5 EU markets, Jupiter Research established that most illegal file-sharers “do not buy music and are nearly half as likely as music buyers to buy CDs in a high street shop or from an online store”. The study also found that the net effect of illegal file-sharing was negative. “Although it is possible that file-sharing functions as some sort of discovery tool for those digital

²⁸ Ewing and Thomas, *The Internet in Australia*, 2012 www.cci.edu.au; www.apo.org.au

²⁹ Study by Michael D. Smith/Rahul Telang (August 2012), <http://ssrn.com/abstract=2132153>

³⁰ Analysis of the European Online Music Market Development and Assessment of Future Opportunities, JupiterResearch 2009,

music buyers that also file-share, it is reasonable to assume that their spend would be higher if they were not file-sharing.” Only a third of music buyers were also file shares.

The Jupiter Research’s conclusion was confirmed by a more recent research conducted by the NPD Group in the US during 2010 which found that just 35 per cent of P2P downloaders also pay for music downloads.³¹ P2P users spent US\$42 per year on music on average, compared with US\$76 among those that pay to download and US\$126 among those that pay to subscribe to a music service. While some P2P users also pay for music, and some are serious music fans who spend a lot, they are far outnumbered by the greater number of P2P users who spend little or nothing.

- Tera Consultancy’s March 2010 study *Building a Digital Economy: The Importance of Saving Jobs in the EU’s Creative Industries*, found that in 2008 the EU’s creative industries contributed 6.9 per cent, or approximately €860 billion, to total European GDP, and represented 6.5 per cent of the total workforce, or approximately 14 million workers. That same year the EU’s creative industries most impacted by piracy (film, TV series, recorded music and software) experienced retail revenue losses of €10 billion and losses of more than 185,000 jobs due to piracy, largely digital piracy. Based on projections and assuming no significant policy changes, the EU’s creative industries could expect to see cumulative retail revenue losses of as much as €240 billion by 2015, resulting in 1.2 million jobs lost by 2015. To estimate the impact of piracy, the study reviewed country and industry-specific third party surveys on the number of infringements in Europe’s five largest markets (UK, France, Germany, Italy and Spain), together representing 75 per cent of European GDP, and used those to extrapolate the results to a EU-wide measurement. To estimate the future effects of digital piracy in Europe, the study reviewed industry forecasts of broadband penetration and Cisco’s forecasts of internet traffic in Europe. To estimate losses, the authors of this report did not assume that every infringement results in a lost sale. Instead, they reviewed a range of third party academic studies in the music sector, suggesting ratios of 10-30 per cent. The lower, more conservative rate of 10 per cent was used. Their estimate of losses therefore rests on the very conservative assumption that in the absence of piracy, only one legitimate recording would be sold for every 10 that had been illegally downloaded. The study also excludes losses from other creative sectors such as book publishing, sports interests and video games.

Question 52 and Question 53 of the Issues Paper

Music Rights Australia does not believe that the Act should be amended to include a broad flexible exception. In 2006 the House of Representatives Standing Committee considered and rejected a general fair use defense. Extensive analysis took place during the review and the Government determined that

³¹ See <https://www.npdgroupblog.com/driving-under-the-influence/> and also http://www.ifpi.org/content/section_news/20121017.html.

the Australian context did not warrant a fair use exception and Music Rights Australia has not seen any evidence that would justify a change.

The fair use doctrine under the US Copyright Act is stated in the form of factors allowing courts to assess on a case by case basis whether an activity infringes copyright or not. It does not exempt whole sets of activities but requires consideration of activities on a case by case basis, including the effects and implications of the activity. There is a body of US case law that has been developed over several years and this further defines the boundaries of fair use. The well- developed case law means there is a degree of legal certainty for rights holders and others, which would not exist if a broad exception were introduced in Australia.

Music Rights Australia believes the existing set of defined fair dealing exceptions gives certainty and guidance to users and minimises the need to litigate, and so does not advocate changes to the Act.

In his article, which forms an appendix to the British Recorded Music Industries submission to the Hargreaves review, Professor Graeme Austin stated: ³²“Business growth is helped by legal certainty. Fair use does not provide it.”

In addition he states:

” In file sharing cases for example, sometimes involving significant volumes of unlicensed music files , defendants have argued that their actions are excused by the fair use defense. [BMG Music v Gonzales] While , in the file sharing context , the fair use arguments have not prevailed , copyright owners have been put to significant expense of responding to them [Sony BMG Music Entertainment v Tenenbaum]. If fair use were introduced into UK law, copyright owners might be required to litigate these very same issues. This would create significant risk for copyright industries. For all concerned litigating these kinds of cases would also be a wasteful expenditure of resources. “³³

Music Rights Australia believes that the risks which Professor Austin outlines above would exist in the Australian context and in light of the uncertainty such a broad exception would create for rights holders and consumers and the potential misuse of the fair use defense and the additional burden this will place on right holders to protect their creative content, we ask the ALRC make recommendations against its introduction. We refer to the ARIA and APRA |AMCOS submissions in this regard and also in connection with other free use exceptions considered by the ALRC.

International Obligations

In its consideration of any proposals to either expand or to create new exceptions, Music Rights Australia asks the ALRC to refer to the Australian Government’s obligations and specifically the elements

³² Independence Review of Intellectual Property and Growth - Response of the British Recorder Music Industries’ (BPI) March 2011 appendix A page 73

³³ BPI submission Page 76

of the Three Step Test. The three criteria as reflected in the Berne Convention Article 9(2), TRIPS article 13 and the WIPO Treaty article 10 are in summary:

that exceptions or limitations must extend only:

- to certain special cases;
- that do not conflict with normal exploitation of the work; and
- that do not unreasonably prejudice the legitimate interests of the author.

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. 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 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.

Exceptions by their nature should be limited, be specific in their purpose and only be granted when there is a clear demonstrated need over the long term.

Education

The ALRC states at Principle 7 that reform should promote clarity and certainty for creators, rights holders and users.

Music Rights Australia believes that one way this goal could be achieved is through education programs.

The music industry and others continue to invest heavily in education through website development, seminars and events designed to improve industry and consumer understanding of copyright and licensing practices.

We urge the ALRC to review the many education programs which content industries and other groups participate in and to make recommendations that Government increase its consultation and support to industry in the development of education resources to assist consumers to understand Copyright and its essential role in the development of the local digital economy.

By way of example, Music Rights Australia maintains a website which includes links to other sources of information on Copyright and intellectual property protection issues. Music Rights Australia has developed a set of fact sheets to assist with questions consumers may have about copyright and licensing in specific situations. The fact sheets direct consumers to other industry groups and institutions so that they can obtain specific and detailed information on their licensing questions.

Music Rights Australia is also an active participant in the Music Matters ANZ campaign which was launched in September 2011, (a link to the Music Matters ANZ campaign can be found on our website). Music Matters is essentially a collective of people across the music community, including artists, songwriters, managers, labels, publishers and stores formed to remind listeners of the value and significance of music and to assist members of the public to identify and obtain music from legitimate sources.

The investment in these educational resources, in addition to a program of engagement with educational institutions including TAFEs and universities around the country, are vital to ensuring consumers are given information on the importance of copyright protection to the long term health of the local music industry.

Below is a short list of some of the sites which industry groups have developed.

www.air.org.au

www.apra-amcos.com.au

www.aria.com.au

www.australiacouncil.gov.au

www.copyrightcouncil.org.au

www.mca.org.au

www.pcca.com.au

www.musicrights.com.au

Education plays a vital role in increasing understanding. We urge the ALRC to consider the role of education in assisting consumers to understand the importance of copyright in protecting artists' and creators' rights and its role in the development of Australia's content industries and a vibrant Australian digital economy.

Vanessa Hutley

General Manager

Music Rights Australia Pty Limited

Annexure A – Music Rights Australia Submission, November 2012

Australia's Legal Digital Music Market – Digital Distribution Channels

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
Bandit.fm	http://www.bandit.fm/australia	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
BBM Music	https://appworld.blackberry.com/webstore/content/36110/	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
BigPond Music	http://bigpondmusic.com/	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
Cartell	http://cartellmusic.com.au/	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
Da Da	http://us.dada.net/	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
Dance Music Hub	http://dancemusicclub.com/	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
Deezer	http://www.deezer.com/en/	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.
Get Music	www.getmusic.com.au	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

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
					and to burn CDs.
Guvera	www.guvera.com	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.
Inertia	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 form a variety of labels.	Downloads and physical sales. Basic streaming function available to allow users to stream samples before purchase.
iTunes	http://itunes.apple.com/au	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
Jamster	http://www.jamster.com.au/fw/	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
JB Hi Fi NOW	https://now.jbhifi.com.au/#/music/Home/Choose/	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.
Leading Edge Music	http://www.leadingedgemusic.com.au/	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.
Liveband.com.au	http://www.liveband.com.au/music/	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
MCM	http://take40.com/ http://www.thehothits.com/hom	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.

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
	e				
Mobile Active	http://www.mobileactive.com/	Download	Downloads for mobiles – ringtones, videos, games.	Ringtones.	Mobile Phone
MOG (Telstra)	http://bigpondmusic.com/mog	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.
Music Unlimited	https://music.sonyentertainmentnetwork.com/	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.
Nokia Music	http://music.ovi.com/au/en/pc	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
MY NRMA Music	http://www.mynrmamusic.com	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.
Optus Music Store	http://www.optusmusicstore.com/	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.
Pandora	http://www.pandora.com	Streaming	Personalised stations		Accessible through site only or through device officially supported by Pandora
Qtrax	http://www.qtrax.com/	Streaming	Free global on-demand music service for internet connected computers where users can 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.	Music from all four majors and numerous independents.	Permission to access Qtrax databases only.
Rara.com	https://www.rara.com/	Streaming	Subscription based streaming service with unlimited on-demand access on any internet	All four majors and majority independents.	Unlimited streaming and caching on one device at a time.

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
			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.	Over 10 million songs.	Authorise up to three different devices for offline playback at any one time.
Rdio	http://www.rdio.com/	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.
Songl	https://secure.songl.com/songl/home	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.
Spotify	http://www.spotify.com/us/	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)
Samsung Music Hub	http://www.samsung.com/au/mobile/featured-applications/music-hub-teaser/index.html	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.
Sony Vidzone	http://au.playstation.com/vidzone/	Streaming	Free music videos on users PS3 or streamed to their PSP via Remote Play since June 2009.	All four majors.	PS3
The In Song	https://www.theinsong.com/au#!/home https://www.theinsong.com/aapt-iinet#!/home	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.
Third Mile	http://www.thirdmile.com/	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.

NAME	WEBSITE	PRIMARY ACTIVITY	SERVICE DESCRIPTION	PRIMARY CONTENT	DEVICES
Vevo	http://www.vevo.com/#/	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.
Vodafone		Download	A la carte MP3 Downloads.	Music from all four majors and majority independents	
Ticketek Music	http://www.ticketekmusic.com.au/	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.
YouTube	http://www.youtube.com/	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.
Virgin Mobile	http://www.virginmobile.com.au/the-vibe/	Download	Music accessible through Virgin compatible handsets (not available on iPhone).		Available on Virgin handsets only
X box Music	http://www.xbox.com/en-AU/Music?xr=shellnav	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.
zDigital	http://www.zdigital.com.au/	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- Music Rights Australia submission November 2012

Summary of ISP blocking actions in Europe

Rights owners have now obtained a number of court decisions in EU member states requiring ISPs to block their customers' access to infringing websites, such as the well-known Bittorrent site, the Pirate Bay. Depending on the country, these actions have been undertaken under laws implementing article 8(3), tort law, as part of a criminal procedure, or administrative process. In general the courts have ordered ISPs to implement the orders in the form of DNS and IP blocking. In all cases the ISPs have been required to bear their own costs of implementing the blocks.

Austria

In May 2011, in a case brought by film companies, an Austrian court ordered the ISP UPC to block access to kino.to - a popular portal for streaming infringing movies – via DNS and IP blocks.

Although kino.to went offline in June 2011 following criminal actions against it, the proceedings have continued and in November 2011 the appeal court refused the ISP's attempt to have the blocking order set aside. Instead, the appeal court made a broader form of blocking order and also dropped a condition imposed by the first instance court, which had required the film companies to pay security. Some questions in the case have recently been referred to the European Court of Justice.

Belgium

In September 2011, an appeal court made orders requiring the ISPs Telenet & Belgacom to block their customers' access to the Pirate Bay. In April 2012 further orders were made against all Belgian ISPs in relation to blocking alternative forms of the Pirate Bay domain name (Depiraatbaai.be and baiedespirates.be). The blocking was applied only at DNS level. ComScore research shows a 79 per cent drop in usage of The Pirate Bay between October 2011 and September 2012.

Denmark

In Denmark, there have been three cases in which blocking orders have been made. In October 2006, a court granted Danish rightsholders' request for orders that ISP, Tele2 A/S block access to Allofmp3.com. The choice of blocking method was left to the ISP, which chose to implement DNS blocking.

In January 2008, a court ordered ISP, DMT2 A/S (later known as Sonofon A/s and Telenor A/S) to implement DNS blocking of the Pirate Bay. That decision was confirmed on appeal by the Danish Supreme Court in November 2008, and then again in May 2010. The Danish Supreme Court's decision notes that the remedy sought was proportionate to the harm suffered by rights holders from infringers. In particular, the Court noted:

Having been informed about the costs and inconvenience incidental to blocking at DNS level, compared with the very extensive infringements of copyrights administered by the respondents which are effected via the website www.thepiratebay.org and in which the respondents have a significant and protection-worthy interest in bringing to an end or, at least, in reducing significantly, the Supreme Court concurs that there are no grounds for concluding that the injunction will imply any damage or inconvenience to Telenor which are out of apparent proportion to the respondents' interests in the issues of the injunction.

In February 2012, the Danish High Court ordered ISP "3" (Hi3G Denmark) to take "necessary and suitable steps" to block their subscribers' access to the Grooveshark website, including sub-sites and sub-domains. 3 has complied with the court order by using a deep packet inspection method. No appeal was filed. All major ISPs (Telia, Telenor and TDC & subsidiary companies) blocked the site as of 20 April 2012 using the DNS method of blocking. Usage of Grooveshark decreased between April 2012 and September 2012 by 48 per

cent.¹ In July 2012 a court order required ISP Telenor to block a different domain name of The Pirate Bay (www.thepiratebay.se) and all ISPs have implemented the block on DNS level.

Finland

In October 2011, a court in Finland ordered ISP Elisa to block access to The Pirate Bay. The Finnish Court found that the injunction was reasonable and proportionate, noting that:

“It is not credible that the measures referred to in the resolution would result in such costs, or have such an impact otherwise, that implementing said measures could be held to be unreasonable from Elisa Oyj’s point of view, or that they would cause others such harm or inconvenience that they might be regarded as an impediment to an injunction to discontinue.”

The order was confirmed on appeal, and in October 2012 Elisa’s application to further appeal to the Finnish Supreme Court was rejected. In June 2012, two further Finish ISPs, DNA and TeliaSonera were also ordered to block The Pirate bay. The blocks have been implemented on IP and DNS level as of July 2012 but the ISPs (DNA and TeliaSonera) have appealed. Usage of The Pirate Bay declined between January 2012 and September 2012 by 74 per cent.²

Greece

In May 2012, a court in Athens granted an application brought by a broad coalition of rights holders, including music, film, and book publishers, for an order requiring all major Greek ISPs to implement DNS and IP blocking of the ellinadiko.com and music-bazaar.com websites. The ISPs did not appeal the decision.

Ireland

In July 2009, in *EMI & Ors v Eircom*, a court ordered ISP Eircom to implement DNS & IP blocking of access to the Pirate Bay. The court action was not contested by Eircom.

Italy

In Italy, successful blocking actions have been taken under criminal law. In December 2009, the highest court in Italy confirmed orders requiring all ISPs in Italy to implement DNS & IP blocking of The Pirate Bay. Following the implementation of the order, usage of The Pirate Bay decreased between February 2010 and September 2012 by 57 per cent.³ A similar court order was obtained in April 2011 in connection with the BT Junkie Bittorrent website. Usage of this site decreased by 92 per cent between April 2011 and February 2012⁴, when the service voluntarily shutdown following the closure of MegaUpload. And in May 2012 an order was obtained in connection with Bittorrent site kat.ph, whose usage went down by 74 per cent between May and September 2012.⁵

Netherlands

In 2012, an appeal court made orders requiring the ISPs Ziggo and XS4ALL to implement blocking for the Pirate Bay.

In May 2012, a Dutch court issued an injunction requiring other Dutch ISPs UPC, KPN, Tele2 and T-Mobile to also block The Pirate Bay. Between January and September 2012 the usage of The Pirate Bay decreased by 79 per cent.⁶

Also in May 2012, the court issued a further judgment against the Dutch Pirate Party, prohibiting it from providing access to The Pirate Bay via a dedicated proxy and to stop offering links to circumvention sites. The court held that the party is facilitating the active circumvention of The Pirate Bay block, which is a tort under Dutch law.

¹ ComScore September 2012.

² ComScore September 2012.

³ Nielsen, September 2012.

⁴ Nielsen, September 2012.

⁵ Nielsen, September 2012.

⁶ ComScore, September 2012.

Norway

In February 2012, an appeal court affirmed the lower court's decision not to grant an order requiring ISP Telenor to block access to The Pirate Bay. The court refused the order due to a lack of legal basis – the relevant European law has not been implemented in Norway. The Government is currently working on a bill to address this.

Spain

In Spain, the new “Sustainable Economy” law and an implementing decree which came into force in March 2012, enables the blocking of foreign infringing sites in certain circumstances. The process begins with a complaint from rights holders which is then considered by an administrative body. Rights holders have filed several complaints under the new law.

UK

In October 2011, in a case brought by film companies, a court ordered ISP BT to block access to the Newzbin2 website. Similar orders were subsequently obtained against other ISPs.

The Court rejected an argument that the blocking order pursuant to section 97A of the UK *Copyright Designs and Patents Act 1998* (which implements article 8(3) of the EU Information Society Directive) would be contrary to fundamental rights:

“...it merely requires BT to implement an existing technical solution which BT already employs for a different purpose; implementing that solution is accepted by BT to be technically feasible; the cost is not suggested by BT to be excessive; and provision has been made to enable the order to be varied or discharged in the event of a future change in circumstances. In my view, the order falls well within the range of orders which was foreseeable by ISPs on the basis of section 97A, and still more Article 8(3) of the Information Society Directive. I therefore conclude that the order is one “prescribed by law” within Article 10(2) ECHR, and hence is not contrary to Article 10 ECHR.”

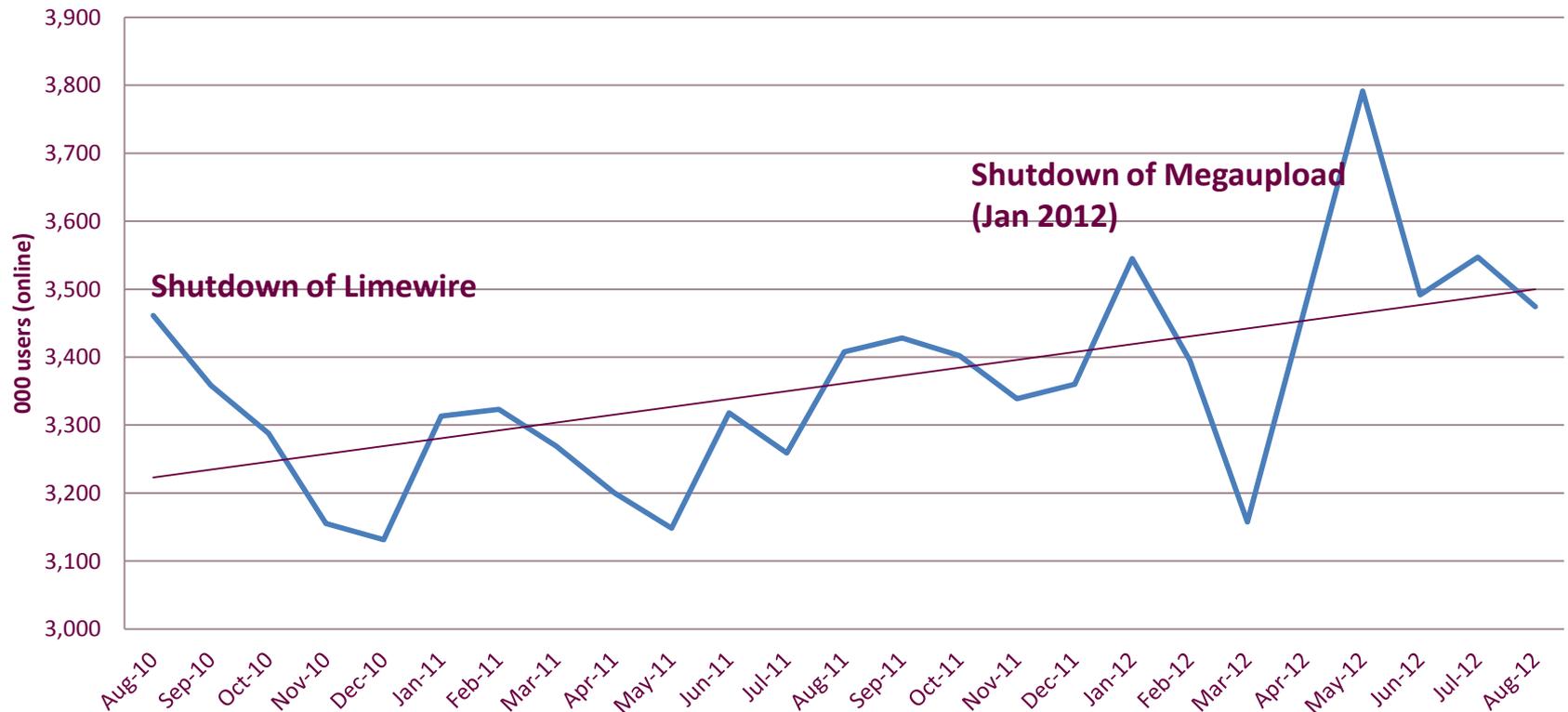
In May 2012, in a case brought by record companies, a court ordered five major ISPs to block access to The Pirate Bay. Research shows that usage of The Pirate Bay in the UK significantly decreased since the block was implemented by ISPs in May 2012: the usage of the site declined between April and September 2012 by 73 per cent.⁷

⁷ Nielsen September 2012.

Annexure C
Music Rights Australia submission
November 2012

Despite the availability of legitimate music, piracy continues to grow

Number of users accessing at least one unlicensed service in Australia (online)

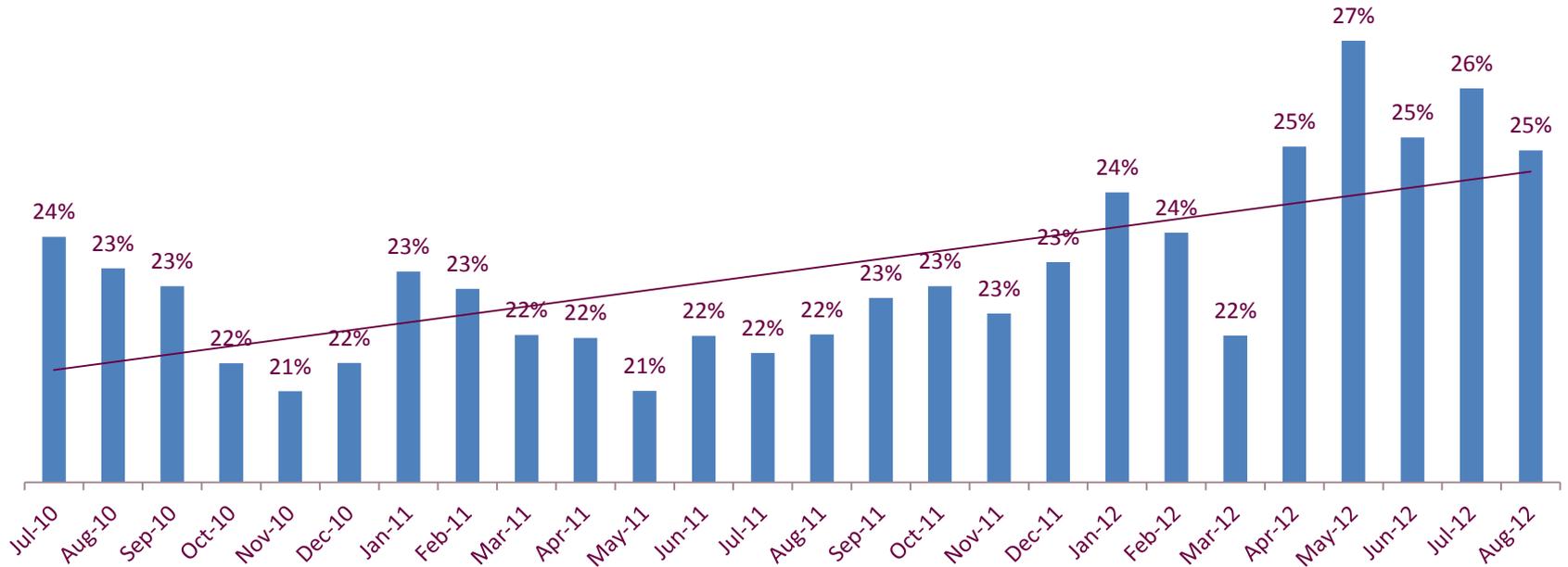


All figures presented are based on Nielsen data.



Use of unlicensed services growing faster than internet adoption

% of internet users accessing unlicensed services in Australia (online)



All figures presented are based on Nielsen data.



P2P accounts for the majority of the problem in Australia

- Australia's piracy problem is more concentrated in P2P than in other markets
 - 63% versus 41% global average
- Audience for P2P services increased by 7% in the past 12 months
 - Key services: The Pirate Bay (+20%), Isohunt (+30%), Torrentz (+19%), Kat.ph (+61%), Torrenreactor (+88%)
- Stream ripping is the fastest growing piracy channel, but a smaller problem at this point (around 10% of all piracy)
 - Youtube-mp3.org is the main service (+234%)
- Use of other forms of piracy have declined in the past 12 months

Most popular unlicensed services in Australia

		Aug-11	Aug-12		
	Service			Type	YOY % change
1	The Pirate Bay	977	1,171	BitTorrent	20%
2	isohunt.com	656	855	BitTorrent	30%
3	torrentz.eu	520	616	BitTorrent	19%
4	kat.ph	377	609	BitTorrent	61%
5	mediafire.com	358	447	Cyberlocker	25%
6	Filestube.com	309	314	Website	2%
7	4shared.com	280	277	Cyberlocker	-1%
8	youtube-mp3.org	67	224	Stream Ripping	234%
9	rapidshare.com	205	185	Cyberlocker	-10%
10	torrentreactor.net	84	158	BitTorrent	88%
11	ExtraTorrent.com	145	152	BitTorrent	5%
12	rapidgator.net	0	150	Cyberlocker	0%
13	Bitsnoop.com	129	137	BitTorrent	6%
14	video2mp3.net	106	133	Stream ripping	25%
15	DepositFiles.com	73	130	Cyberlocker	80%
16	putlocker.com	54	114	Cyberlocker	112%
17	Torrenthound.com	92	99	BitTorrent	7%
18	beemp3.com	176	94	Website	-46%
19	ZippyShare.com	26	94	Cyberlocker	256%
20	1337x.org	52	91	BitTorrent	76%

'000 users

All figures presented are based on Nielsen data.

