MUSIC DOESN'T JUST HAPPEN A Recorded Music NZ Position Paper

on the Review of the Copyright Act

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MUSIC MUSIC

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ABOUT RECORDED MUSIC NZ



It entertains us.
It supports us and unites us.
It soundtracks our lives.

Music is a defining element of our culture that tells our stories in our voice. New Zealand has a rich, diverse music scene to rival any other, and is being embraced by fans more than ever before.

Music fuels jobs, the economy and digital innovation in our country.

AN EXCITING TIME TO BE A MUSIC FAN -ACCESS TO MUSIC FOR

The music industry has embraced the digital transition, investing in new distribution models and driving innovation. In New Zealand, fans have access to 40 million tracks on no less than 15 fully licensed online and mobile music services, enabling them to listen to the music they want, whenever and wherever they wish to do so and in increasingly diverse and immersive ways.

Through partnerships and collaborations with technology companies and others, the industry is enabling music to function as a central element to emerging technologies and innovations. Whether it's home smart speakers, virtual reality headsets or the next social media messaging app, it is no accident that music is consistently there as a driving force for engagement and enjoyment.

The music industry's adaptability has seen 14 years of decline in revenues transform into growth over the last three years as New Zealanders have enthusiastically adopted music streaming services like Spotify and Apple Music.

BUT MUSIC DOESN'T JUST HAPPEN -IT REQUIRES HARD WORK AND

Music doesn't just happen. It requires an incredible amount of work and investment from artists and record companies, not only to write, develop and record music but to license, distribute and market it to a global audience.

We constantly see the importance of strong copyright measures in ensuring that Kiwi artists have all available opportunities to expose and protect their music worldwide.

In a rapidly-developing digital music landscape the NZ music industry has adapted well over the last decade, but we can't take things for granted. As an industry we collectively need legal and commercial certainty in the future if we want to sustain growth.

- Andy Low, DRM New Zealand

A ROBUST COPYRIGHT ENVIRONMENT WILL ALLOW MUSIC TO

The music ecosystem is fragile. Record companies rely on revenue from successful projects to invest in the next body of work their artists create, and to discover and nurture new artists, delivering more music to consumers.

For this to continue, it's essential New Zealand has the right copyright framework that enables full and fair value to be returned to those that create and invest in music.

The Copyright Act review provides an opportunity to correct current flaws in our country's copyright framework to make it more robust and effective. Addressing these flaws will help secure a future for artists, while supporting continued investment and growth in the innovative business models that deliver music to all New Zealanders.

These flaws in the copyright framework are estimated to be costing our industry at least NZ \$50 million per year.

C The investment and resources put into an artist's development is extensive and certainly doesn't come cheaply. The contribution we make is part of our commitment to realising that artist's vision, to engaging music fans, and exposing New Zealand's best music to as wide an audience as possible, both at home and internationally.

The reality is that unless fair value is returned, no one can invest in artists to the level required over a sustained period. The right copyright environment is essential to encouraging risk and to the long-term, artistic and commercial vitality of the music ecosystem.

- Adam Holt, Universal Music NZ



A MAJOR INDUSTRY



Contributing approximately

to NZ GDP per year

via indirect effects

Employing



New Zealanders directly

from recording artists and marketing experts to sound engineers and designers

Indirectly supporting

FTEs

Equivalent of full time jobs

NZ musicians generating overseas earnings of

2014 - 2016 avg

EMBRACING A DIGITAL ENVIRONMENT

Overall revenue 2017

614.6%

to \$98.8m

Driven primarily by streaming services

NZ record companies income

83%

from downloads & streaming as opposed to CDs and vinyl*

DRIVING A WIDER DIGITAL ECONOMY

19⁵ 20 of the most watched



— are official music videos

ACCESS TO MUSIC FOR ALL NEW ZEALANDERS

BUT PIRACY REMAINS A REAL ISSUE

New Zealanders have access to

15

different digital music services



Spotify **Apple Music** iTunes Google Play Soundcloud Tidal YouTube iHeart Radio 7 digital Amazon **Beatport** Deezer serato

> Vevo myspace

25%

of NZ internet users

access music from unlicensed sites

30%+

18 to 24 year olds

access music from unlicensed stream ripping sites

Flaws in the current copyright framework are estimated to cost the industry more than

NZ MUSICIANS MAKING THEIR MARK GLOBALLY



From that first, remarkable creative spark that she ignited in a quiet part of Auckland's North Shore, Lorde has become a true NZ based international mega-star and she's barely in her twenties. To date she has sold the equivalent of 9 million albums worldwide, achieving multi-platinum certifications in numerous countries throughout the world. She has earned two Grammy Awards, two Brit Awards, MTV and Billboard awards, two APRA Silver Scroll awards and ten New Zealand Music Awards.

Lorde signed with Universal Music NZ in 2010 and released her first EP 'The Love Club' in 2012 at the age of sixteen. It was her debut single "Royals" released in mid-2013 that rocketed her to global stardom.

It became an international crossover hit peaking at number one on many national charts.

At the age of 17 this made her the youngest solo artist to achieve a number-one single on the US Billboard Hot 100 since 1987. Lorde released her second studio album Melodrama in 2017. The album debuted at number one in New Zealand, Australia and the U.S.

NZ MUSICIANS MAKING THEIR MARK GLOBALLY



With heritage spanning the South Pacific and musical career honed in Auckland, Opetaia Foa'i is a unique example of the music industry taking the South Pacific's voice to the world.

His group "Te Vaka" has released 8 award winning studio albums and their unique Polynesian sound has taken them to over 40 countries, including performances at The Royal festival hall in London, The Beijing Olympics, The Rugby World Cup in Paris, The Byron Bay Blues Festival, The Sydney Opera House and more.

In 2013, Opetaia was scouted by Walt Disney pictures and signed on as Songwriter for the musical, animated feature film Moana. The Moana movie and soundtrack were a global success; the soundtrack

album spent 23 weeks in the Top 10 on the Billboard Top 200 Chart (peaking at no. 2) and as of July 2018 worldwide sales in excess of 5 million copies. Opetaia's composition "We Know the Way" also spent 2 weeks on the Billboard Top 100 (a unique achievement as a song with Samoan and Tokelauan verses atop the U.S. music charts).

In November of 2017, Opetaia received the International Achievement Award at the Vodafone NZ Music Awards, Moana won "Top Soundtrack" in the American Music Awards and was nominated in the 60th Grammy Awards for "Best Compilation Soundtrack for Visual Media". In 2018 it won "Top Soundtrack" at the Billboard Music Awards.



Copyright provides incentives to create, finance and distribute creative works

Copyright is the basis on which artists and record companies are paid for their work.

Copyright functions to provide incentives to create, finance and distribute creative works. Without the ability to protect works from unauthorised copying or distribution there are fewer incentives for artists to create work, or for companies to take the commercial risk of investing in them.

Copyright provides incentives by way of a set of exclusive rights which are granted to those who create and invest in the creation of content such as artists and record companies. These exclusive rights enable copyright owners to negotiate licence fees for the use of their content and prevent others from using that content without a licence.

The exclusive rights are balanced by other elements including limitations and exceptions to copyright, which set out the circumstances in which third parties are entitled to use copyright protected content without a licence.

The copyright framework in New Zealand is incorporated in the Copyright Act 1994, which was last amended in 2008. The Government has now announced a full review of the Copyright Act.

While New Zealand's Copyright Act provides a sound framework, some key adjustments are needed to bring it into line with the reality of today's market.



There are



key issues

that we believe need to be addressed in the Copyright Act review

FAIR MARKET **CONDITIONS IN THE** DIGITAL MARKETPLACE

Platforms that monetise music uploaded by their users, such as YouTube, pay dramatically less revenue to artists and record companies than audio streaming services such as Spotify and Apple Music that negotiate licences with right holders before they start. This is due to a flaw in the legal framework that impacts right holders' ability to obtain fair licence fees from user upload platforms.

Although some user upload platforms, including YouTube, are now licensed, it wasn't a fair negotiation. These platforms built up their audience by streaming music uploaded by members of the public and relying on special privileges in copyright law called "safe harbours" to claim they didn't need to obtain licences at the outset in the usual way.

This puts right holders in an unfair bargaining position and reduces the revenues they are able to obtain in licence deals, while giving user upload platforms an unfair advantage over other digital music services.

Safe harbour privileges have a legitimate place in copyright law to protect companies such as internet service providers that play a passive role in providing infrastructure and storage space for internet users. They should not be available to platforms like YouTube that actively monetise, curate and promote music.

It's time to ensure fair market conditions by clarifying safe harbour privileges so that they are only applied to passive intermediaries.

SAFEGUARDING CREATIVITY

In 2018 our music industry is online and mobile, but the tools to safeguard it have not kept up.

Our copyright law needs to be updated so that enforcement provisions enable artists and record companies to effectively tackle unlicensed content online.

Most importantly, we need a clear and streamlined process to enable courts to order internet service providers to block their users' access to illegal websites offering unlicensed music to New Zealanders.

Website blocking is an effective remedy that is already available in at least 30 countries and has been used widely in the UK, Australia and the EU.

COPYRIGHT TERM **EQUALITY FOR NZ ARTISTS** AND RECORD COMPANIES

New Zealand is one of very few countries that does not give artists and record companies a 70 year term of copyright protection for their work.

Our recording artists and their record companies stop earning revenues from their recordings 50 years after they are released. This is out of step with international norms and means NZ artists may stop receiving payments both in NZ and overseas even before they reach retirement. Our shorter term puts an unfair penalty on NZ artists and gives them incentives to move overseas.

In addition, a shorter term does not deliver the intended benefits to NZ consumers and users. In the world of streaming, copyright term does not impact consumer pricing. A shorter term simply shifts value away from NZ creators to online distributors which are often based offshore.

It's time for NZ to stop penalising its artists and record companies and harmonise copyright term to 70 years.

FAIR GO ON PERMITTED USES

Exceptions to copyright known as 'permitted uses' are set out in copyright law and play an important role in enabling free use of copyright material in appropriate circumstances.

We support a review of these permitted uses in light of technological changes. The review should focus on credible evidence of real problems that cannot be addressed through licensing and any new exceptions should provide certainty and be clearly defined.

We do not support a move to an American style system of open-ended "fair use", or "flexible exceptions", as some have proposed. This would lead to widespread legal and commercial uncertainty, while delivering nothing in support of innovation.

FAIR MARKET CONDITIONS IN THE **DIGITAL MARKETPLACE**

There is not a level playing field in the digital marketplace.

This is shown by the dramatic gap between the revenues paid to artists and record companies by two types of online music services. On the one hand, platforms such as YouTube encourage members of the public to upload content, which is then streamed to the world. On the other hand, audio streaming services, such as Spotify and Apple Music, negotiate licences with right holders before making any music available and do not stream content provided by members of the public.

The gap in value is starkly illustrated by the graph opposite. Video platforms with more than 1,300 million music users globally paid \$856 million US in royalties in 2017. By contrast

jeopardizes the music ecosystem.

Sir Paul McCartney

The value gap

272 million users of subscription music streaming services, paid \$5.6 billion globally.

The reason for the value gap is the differing treatment of these two business models under current copyright law.

Platforms that stream music uploaded by users claim the protection of special privileges under copyright law called "safe harbours". These safe harbours mean that the platforms are not liable for infringing content uploaded by their users as long as they take steps to remove infringing content as and when they become aware of it - a process called "notice and take down".

These privileges are not available to sites like Spotify or Apple Music because they do not stream content uploaded by members of the public.



The next generation of artists coming through need to get a better deal when their music is used online. We need this problem fixed.

James Blunt

Relying on safe harbour privileges to monetise music uploaded by users has enabled user upload platforms to build large global businesses based on the offering of music, attracting large numbers of users while not properly remunerating the artists and record companies who risk the financial investment in that music in the first place.

User upload sites like YouTube are now a major source of music consumption, with over half of New Zealanders listening to music on YouTube or another video streaming service.

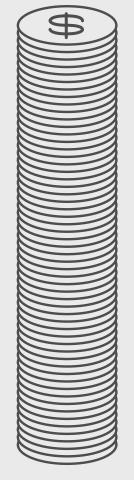
Some of these user upload platforms are now licensed by artists and record companies, but it wasn't a fair negotiation. Services like Spotify or Apple Music negotiate with right holders about the terms on which music will be made available before they launch. In contrast, user upload platforms already have music uploaded by users available on their service before the negotiations even start.

AN UNFAIR

VALUE GAP

2017

US\$5.6b



1.3b



US\$**856m**



Users Revenue Paid

V

Users

272m

Revenue Paid

Audio Streams

Paid & ad supported

Examples



MUSIC

Video Streams

Example

VS

YouTube

When approached by right holders for licences these platforms claim that due to the safe harbours they do not require a licence at all or that they only require a limited licence covering the activities of their users in uploading the content. This adversely impacts the bargaining position of right holders and reduces the revenues they are able to obtain in licence deals.

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

> Steve Cooper, CEO of Warner Music www.billboard.com

negotiation.

Meantime the platforms continue to rely on these privileges, asking right holders to search their platforms for unauthorised content, and send individual notices to request it to be removed.

Right holders are left with only bad options agree to terms imposed by those platforms and accept whatever revenues the platforms are prepared to share, rely on ineffective "notice and take down" procedures to try to remove all their music from the platform - a near-impossible task due to the sheer volume of music available - or commence costly and protracted legal proceedings.

It's time to clarify safe harbour privileges

Safe harbour privileges were introduced into copyright laws in the late 1990s to allow the internet to develop without fear of wide-ranging copyright liability.

The privileges were intended for companies such as internet service providers that play a passive role in providing the infrastructure for the internet: the "pipes" and storage space used by others to transmit content.

These intermediaries bear little resemblance to sites like YouTube which actively monetise, promote and engage with content via curation and recommendations. The reliance on safe harbour provisions by platforms like YouTube is an abuse of them.

It's time to take a fresh look at safe harbours in light of today's market realities.

The EU has introduced legislation to address this issue which is proceeding through the EU Parliamentary process. The problems caused by safe harbours are being reviewed in the US while Australia has recently rejected a proposal to expand its safe harbours to user upload platforms.

New Zealand needs to ensure fair market conditions and clarify safe harbour privileges so that only passive intermediaries can rely on them.

of internet users agree that they do not pay for a streaming subscription because

> - Ipsos Consumer Survey 2018 (across 13 countries)

"Anything I want to listen to is on YouTube"

1998

- Dial Up 56K
- AOL
- Bulletin Boards
- Alta Vista

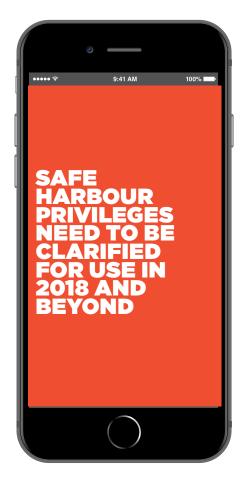
NZ internet usage (approx)



2018

- YouTube
- Google
- Twitter
- Facebook

NZ internet usage (approx)



2 SAFEGUARDING CREATIVITY

Today NZ record companies obtain over 80% of their revenues from digital music services as opposed to CD's and vinyl. We've done a great job of adapting to the new environment and partnering with the platforms of the future.

But New Zealand's enforcement measures haven't kept up and we don't have the tools we need to enforce our rights in the digital environment.

In particular, the Copyright Act needs to be amended to clearly provide for a streamlined process to enable right holders to apply for a court order requiring internet service providers to block their subscribers' access to illegal websites. This process would incorporate appropriate checks and balances to ensure that the rights of website owners and users are taken into account.

25%

of New Zealanders that source music on the internet have done so from unlicensed sites.

- Horizon NZ Research 2017

Website blocking is an effective remedy, adopted by many of our trading partners from the UK to Australia, to the EU. It has been successfully applied in at least 30 countries, and is on the statute books in many more. It has been shown to be workable in practice over ten years of experience overseas.

It is a simple and effective way to stop illegal websites from ripping off Kiwi artists and record companies, and encourage internet users to consume music via one of the multiple legal and licensed services in NZ.

Not all unlicensed use can be addressed by blocking an entire website. We also need a fast and effective remedy to remove individual pieces of infringing music from the internet.

Currently right holders can issue a "take down" notice to service providers that are hosting illegal music. Legitimate service providers generally comply with these notices and they risk liability if they do not.

However, service providers usually only remove the specific link provided to them, while hundreds of other links to the same content remain available and links are re-posted within minutes of being removed. This results in the farcical situation where artists and record companies are notifying over and over the same content to the same sites. We need changes to the law so that notice and take down means notice and stay down – when we notify a platform that a recording is not licensed, all copies of the recording should be removed and kept down in future.

Website blocking in the UK reduced total visits to illegal sites by



Increased licensed activity by

- Danaher, B., Smith, M, Telang, R. The Effect Of Piracy Website Blocking On Consumer Behavior, 2018

11_{m+}

infringement notifications were sent to online platforms globally in 2017

Over 90%

of these were repeat violations on the same platform

- IFPI

The review should also consider the role and responsibilities of the various intermediaries that enable illegal websites to operate. Intermediaries such as search engines, advertisers, payment providers, domain registrars and social media platforms all profit from illegal use of music content, even if unwittingly, and all have a role to play in ensuring music is safeguarded online.

Some commentators claim that increasing the effectiveness of online enforcement will break the internet or hinder its operation. In fact, the opposite is true - the music industry's business, which is overwhelmingly online and mobile, depends on a healthy internet to thrive.

This is not about big brother or shutting down the internet.

This is about updating enforcement provisions for 2018, giving our artists the ability to protect their voice, and stopping illegal businesses from profiting from music without paying any revenues back to artists and record companies.

3

COPYRIGHT TERM EQUALITY FOR NZ ARTISTS AND RECORD COMPANIES

NZ is one of very few countries that does not give its artists and record companies a 70-year term of copyright protection for their work.

Our recording artists and their record companies stop earning revenues from their recordings 50 years after they are released. This is out of step with international norms and means NZ artists may stop receiving payments for their recordings even before they reach retirement. In contrast, an Australian, US or British artist releasing a recording at the same time will enjoy an additional 20 years of royalties.

"

32 out of 35 OECD countries offer a term of 70 years or more for recording artists and record companies

- IFPI

In addition to losing out on revenues at home, NZ artists also lose out abroad as many countries take a reciprocal approach and apply shorter 50 year terms to NZ artists and record companies in their jurisdiction.

If term harmonisation is not achieved, many iconic Kiwi recordings will stop being copyright protected over the coming years. For example, Fourmyula's song Nature, written by Wayne Mason of the band, was released in 1969 and in 2001 it was voted the number one NZ song of all time.

With a term of only 50 years, by next year (2019) the band will not be entitled to receive royalties for their recording of that song. By contrast, overseas recording artists like Paul McCartney that released iconic songs at the same time will continue to receive royalties for an additional 20 years.



"In less than a year our record Nature will no longer have copyright protection in New Zealand. In real terms that means myself and the other members of Fourmyula will lose a significant portion of the income that we have been lucky enough to receive from the recording.

"It's incredibly hard to make a living out of being a musician in New Zealand and to know that we miss out on two decades of royalties in comparison to fellow musicians overseas is hard to take. It's time that New Zealand delivered term equality for its artists, record companies and songwriters."

Wayne Mason, The Fourmyula

But this is not just to help a few artists. Harmonising term copyright would benefit all New Zealanders.

The additional royalties generated in the extended term can be reinvested in finding and developing new talent. As record companies typically invest up to 27% of their revenues in A&R, or finding and nurturing new talent, this represents a significant potential boost. Revenues can also be invested in the business models that deliver content to all New Zealanders.

Copyright provides the incentive for businesses to digitise and reissue classic recordings. Over the last 5 years NZ record companies have embarked on an intensive program to digitise their back catalogues and make them available on licensed digital services. Recent re-issues include historic recordings from NZ labels such as HMV, Zodiac and Flying Nun. This requires a significant investment of time and money which record companies can only justify if they will receive revenues via copyright protection.

Finally, our shorter term does not deliver the intended benefits to NZ consumers and users. In the streaming world, copyright term does not impact consumer pricing. A shorter term simply shifts value away from NZ creators to online distributors, which are often based offshore.

It's time for New Zealand to stop penalising its artists and record companies and harmonise copyright term to 70 years.

FAIR GO ON PERMITTED

The foundation of NZ's digital music industry is adequate and clear copyright protection. This provides the legal certainty needed to invest and take commercial risks.

We accept that there is also a need for exceptions to copyright that allow content to be used for free and without the permission of the copyright owner. These exceptions are known as permitted uses.

In NZ's law currently, these permitted uses are clearly defined and encompass areas such as fair dealing for research and private study, and the use of copyright material by libraries.

The Copyright Act review is an opportunity to review our existing exceptions, update them where needed, and if there is evidence of a problem that cannot be resolved through licensing, extend or introduce new clearly defined exceptions.

This approach represents sound policy and ensures that exceptions are fit for purpose without creating uncertainty. It also mirrors the approach taken in the EU, UK, Ireland and many other countries.

Important we don't take the wrong path

Some groups will call for an American style open-ended "fair use" or flexible exception.

The so-called fair use system is in reality anything but.

The open-ended nature of fair use means that each use must be assessed on a case-bycase basis. This results in commercial and legal uncertainty. New Zealand has no judicial precedent to rely on and fair use would lead to a more litigious environment, as copyright owners would be forced to file litigation to determine the boundaries of what is permitted. This would tip the balance in favour of large commercial players who want to use creative content for free knowing that the outcome of litigation is uncertain, and that very few New Zealand copyright owners can match their resources to fund the cost of extensive legal action.

There is widespread expert support, both in the US and elsewhere, for the view that fair use is unpredictable.

Tech innovation happens with or without fair use. In fact, fair use is only in place in a handful of countries and there's no evidence to show it has given those countries a competitive advantage. Spotify, one of the greatest recent innovations in music, was developed in Sweden which does not have a fair use exception.

The New Zealand music industry has shown in recent years that it can be flexible and adaptable in its transition to a digital base. In particular the industry has been dynamic in the way it has evolved its approach to licensing of music. Licensing, not exceptions to copyright, has driven the innovations that have developed the NZ music market.

That is not to say that exceptions should never be changed - there can be a need to review them in light of changes in technology, which is the purpose of the current copyright review. If clear evidence is put forward of a problem that cannot be resolved through licensing and which justifies a policy intervention, it may be appropriate to amend existing exceptions or to introduce new clearly defined exceptions that uphold certainty, and which are fair.

A US style "fair use" approach would not achieve these aims.

What the courts say on "Fair Use"

"so flexible as virtually to defy definition"

 United States Court of Appeals for the Sixth Circuit

"a sort of rough justice."

 United States District Court for the Central District of California

What the experts say on copyright and innovation

"it is questionable whether fair use litigation is an appropriate vehicle for facilitating technological development"

Professor Graeme Austin
 Victoria University

"empirical research on the relationship between copyright flexibility and innovation/economic growth is both limited and inconclusive"

Ernst & Young
 2016 study for the Australian Government

"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."

Professor Hargreaves
 2011 report for the UK Government

MUSIC DOESN'T JUST HAPPEN

About

Recorded Music NZ

Recorded Music New Zealand is a non-profit organisation representing the interests of record companies and recording artists in New Zealand. Our members include the NZ branches of the three major record companies Universal Music NZ, Sony Music NZ and Warner Music NZ, as well as a multitude of independent record companies and distributors, including Flying Nun, Rhythmethod and DRM and over 2000 registered individual kiwi recording artists.

We are dedicated to protecting and promoting the interests of artists and labels across the New Zealand recording industry. We also provide market analytics and industry reporting and some of the key projects we produce are the annual Vodafone NZ Music Awards, the Official NZ Top40 Charts, The NZ Music Hall of Fame and our Music Grants programme for educational and/or charitable music projects. Our Licensing division administers collective licensing of sound recordings when broadcast on radio and television and publicly performed in bars, clubs, gyms and other venues, either directly or through our joint initiative: OneMusic with APRA. The majority of music licensing, e.g. licences to the digital services such as Spotify and Apple Music, is handled by record companies individually.

Recorded Music NZ is a member of WeCreate, the alliance of New Zealand's creative industries.



