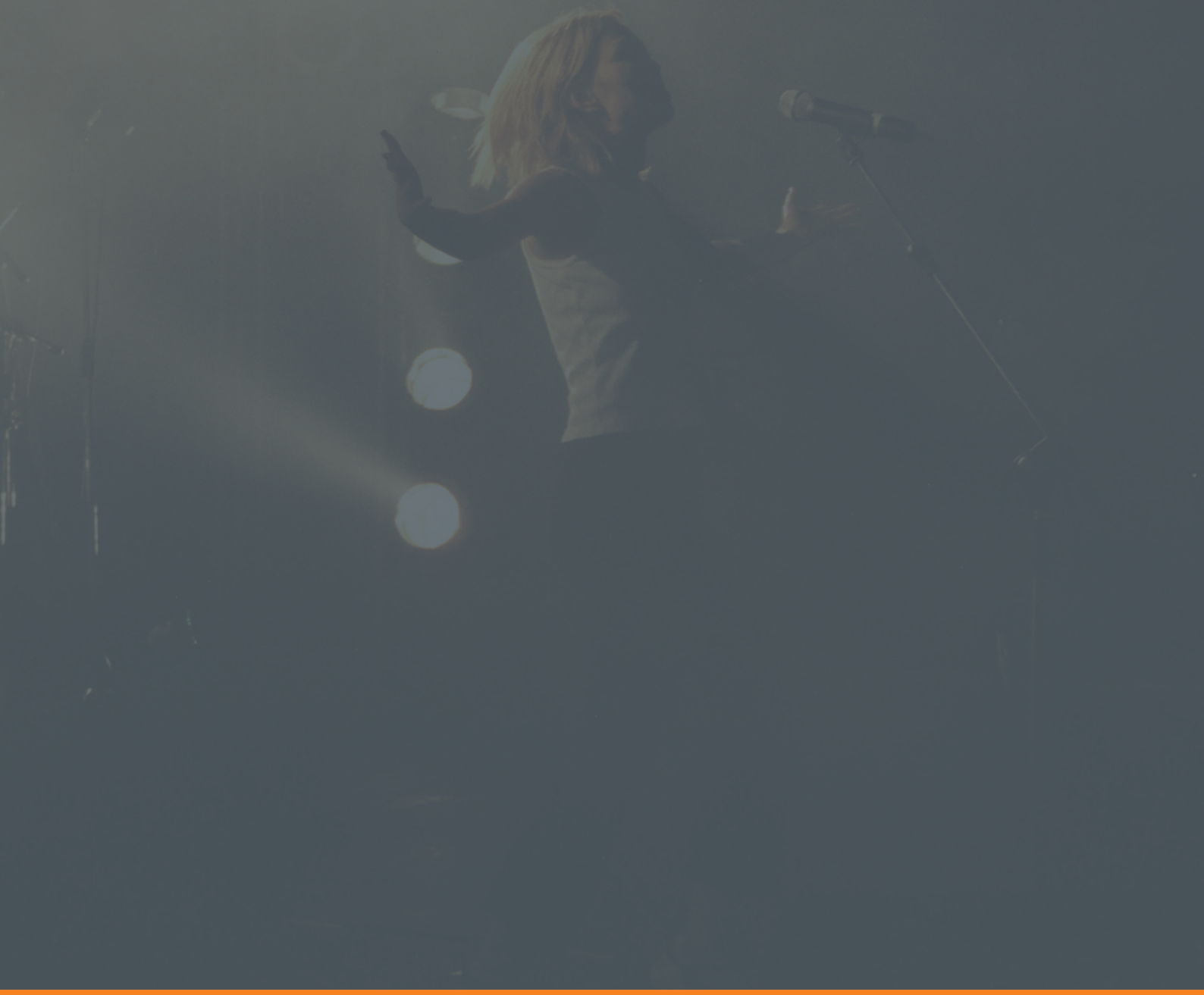
23 NOVEMBER 2017

Review of the Copyright Act 1994

Recorded Music New Zealand Limited:
Submissions ahead of the release of the Issues Paper and in response to the Terms of Reference



RECORDED MUSIC NZ

1. Foreword

These submissions are made in response to the Terms of Reference (**Terms of Reference**) for the Review of the Copyright Act 1994 (**Copyright Act**), released by the Ministry of Business Innovation and Employment (**Ministry**) (see **Schedule 1** attached). They seek to provide fact-based input into the Ministry's Issues Paper, which is proposed to be released in early 2018.

These submissions have been prepared by **Recorded Music New Zealand Limited (Recorded Music**) and its member organisations (see **Schedule 2** attached), with the support of other representative industry organisations in the music industry in New Zealand (**Music**). Music represents a group of musicians, associated creative workers and their companies who actively promote the value, scale and scope of Music to the social and economic wellbeing of New Zealand.

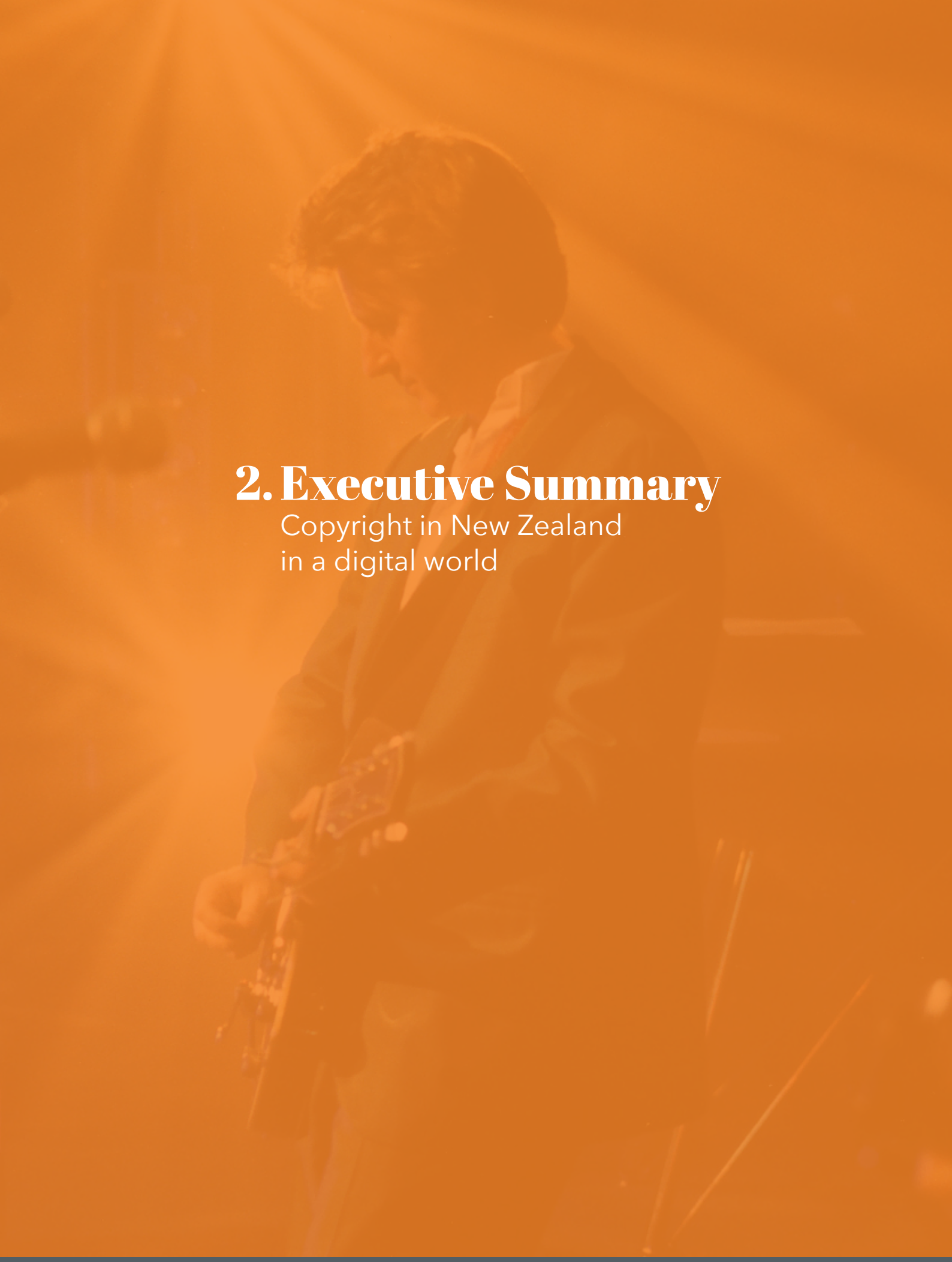
Music is an important test of copyright policy as it is a leading indicator, due it its high exposure to technology change and shifts in consumer behaviour. For example, Music in New Zealand has undergone a dramatic shift in channels to market over recent years, from physical sales to down loads to streaming, with high exposure to piracy and exploitation in digital channels. Similar trends are becoming clear for film, television and other digital content services, but Music (due to its smaller file size) has been and still is a leading indicator.

Recorded Music works collectively with **WeCreate,** the alliance of creative organisations representing the wider **Creative Sector**. Both Music and WeCreate also cooperate with the digital media and ICT sectors, with whom we share many common interests in relation to the digital market with Music now being an almost entirely digital business. Recorded Music and WeCreate have worked constructively with previous governments on a range of policy and initiatives, including industry development, Arts, Culture and Heritage policy and copyright issues.

These Submissions draw together a range of inputs that Recorded Music believes will assist the Ministry, including:

- Covering explanatory Submissions, which address both the Terms of Reference and the economic and financial consequences of current market failures;
- Financial and research analysis from Stakeholder Strategies Ltd, together with input from Recorded Music and its members, that has informed the Submissions;
- Legal and legislative analysis from Andrew Brown, Q.C. and Recorded Music, offering a breakdown of the issues for Music embedded in the Copyright Act and, accordingly, various recommended reform proposals of that Act; and
- While not attached to these submissions, a list of other relevant documentation that has been made available to the Ministry from 2010-2017 (inclusive) and is therefore re-listed accordingly to reference against.

Contents



2. Executive Summary

Copyright in New Zealand
in a digital world

Executive Summary

2.1 Copyright in New Zealand in a digital world

Sound copyright policy is a fundamental prerequisite for a well-functioning creative economy that is provided for in leading jurisdictions.

The reason for this is to ensure there is an **efficient, effective and fair digital and physical marketplace**, where creators can earn a **sustainable living**, and where New Zealand attracts and retains highly mobile creative talent.

In such markets, **consumers and small businesses** will enjoy convenience, easy access and reasonable costs in respect of cultural and artistic products and services.

However, the market for Music in New Zealand is hampered by the **digital leakage of at least $50 million** per annum through **piracy and freeloading**, and the **lack of effective enforcement** measures.

Leading jurisdictions have moved **to eradicate digital piracy and reduce freeloading and exploitative transactions in cultural goods**.

2.2 Growing the Creative Economy

A major opportunity exists to grow New Zealand's economic, cultural and social wellbeing through development of our creative economy. Preliminary international benchmarking shows this to be a very significant potential additional contribution to GDP, innovation and cultural wellbeing.

Value gain occurs at three levels:

- **Direct and indirect GDP** from Creative Sector growth (including upstream, downstream, and lateral impacts);
- **Dynamic** effects from lifting rates of **innovation** and **creativity** (including positive spill-overs, externalities and multipliers); and
- Additional benefits from strengthened **cultural wellbeing, national identity** and **brand**.

Key success factors include Government engagement as **a top development priority**, clear goals and metrics, and a cohesive development process across subsectors.

2.3 Priorities for Action

- **Make the creative and innovation economy a top-ten priority** for the incoming Government to make New Zealand a leader in creative endeavour;
- **Show joint leadership by engaging with the Creative and digital media and ICT sectors** to develop a world class **creative economy strategy**, implementation plan and metrics;
- Complete the **Copyright Act Review**, which is at the core of the creative economy, and which gives us strong and clear legislation that will combat piracy and freeloading; and
- Address the key success factors needed to **position New Zealand as a leading creative centre**, building on our traditions of creativity, biculturalism, diversity and inclusiveness.

3. Review of the Copyright Act 1994

Terms of Reference

3. Copyright Act Review -Terms of Reference

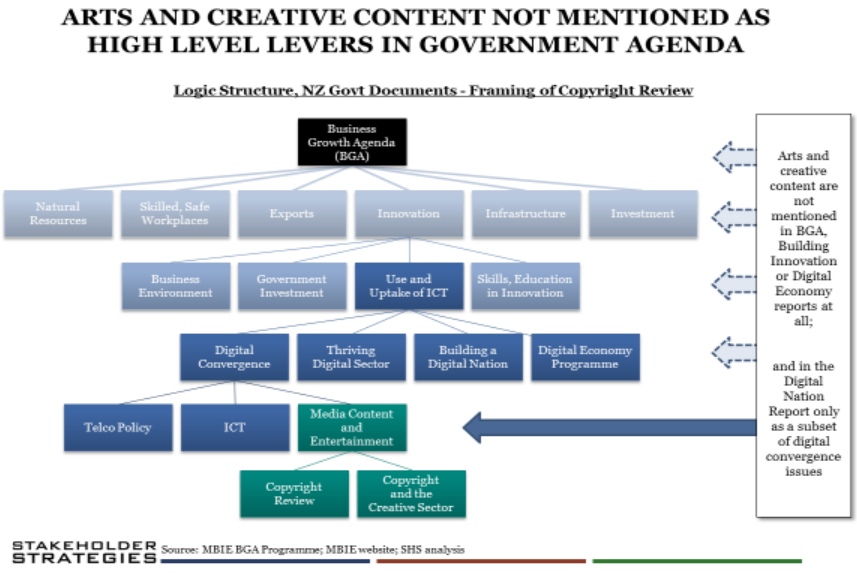
Recorded Music is presenting these submissions and the **attached** Schedules 1-5 to address faithfully the stated goals and objectives of the Review of the Copyright Act 1994[1]. The stated *goals of this Review of the Copyright Act 1994* are to:

- Assess the **performance** of the Copyright Act against the objectives of New Zealand's copyright regime (see below);
- Identify **barriers** to achieving the objectives of New Zealand's copyright regime, and the level of impact that these barriers have; and
- Formulate a **preferred approach** to addressing these issues – including amendments to the Copyright Act, and the commissioning of further work on any other regulatory or non-regulatory options that are identified.

The stated *objectives of the New Zealand copyright regime* are to:

- Provide **incentives** for the creation and dissemination of works, where copyright is the most efficient mechanism to do so;
- Permit **reasonable access** to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand;
- Ensure that the copyright system is **effective and efficient**, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law; and
- Meet New Zealand's **international obligations**

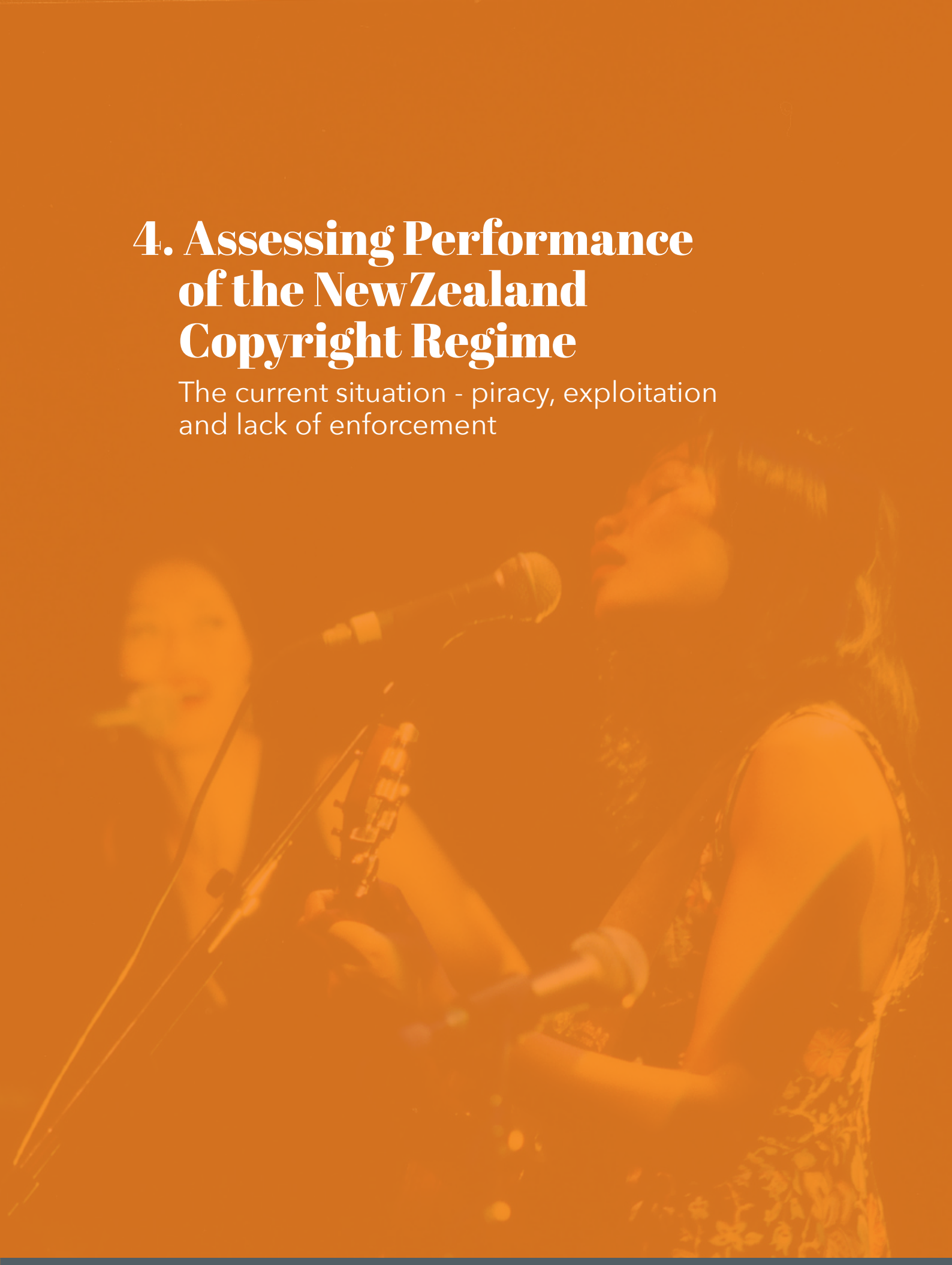
In addressing the Terms of Reference, Recorded Music notes that in the original policy documents linked to the Terms of Reference, **creativity is framed only as an input** to digital content and ICT activity. Recorded Music will seek to show that the contribution of both Music and the Creative Sector is vastly broader than that and asks that the Ministry consider updating this framing in its later Issues Paper, especially given a broader post-election perspective.



[1] The full Terms of Reference as released by the Ministry of Business, Innovation and Employment are attached at Schedule 1.

4. Assessing Performance of the NewZealand Copyright Regime

The current situation - piracy, exploitation and lack of enforcement



4. Assessing the performance of the New Zealand copyright regime

4.1 The impact of copyright on Music in New Zealand

Sound and appropriate copyright legislation is a prerequisite for success for innovation and the creative economy ecosystem. Without creators of content being able to earn a reasonable income from their works, there would be little economic incentive for creative production. Consequently, highly creative individuals often move to other centres of creative excellence.

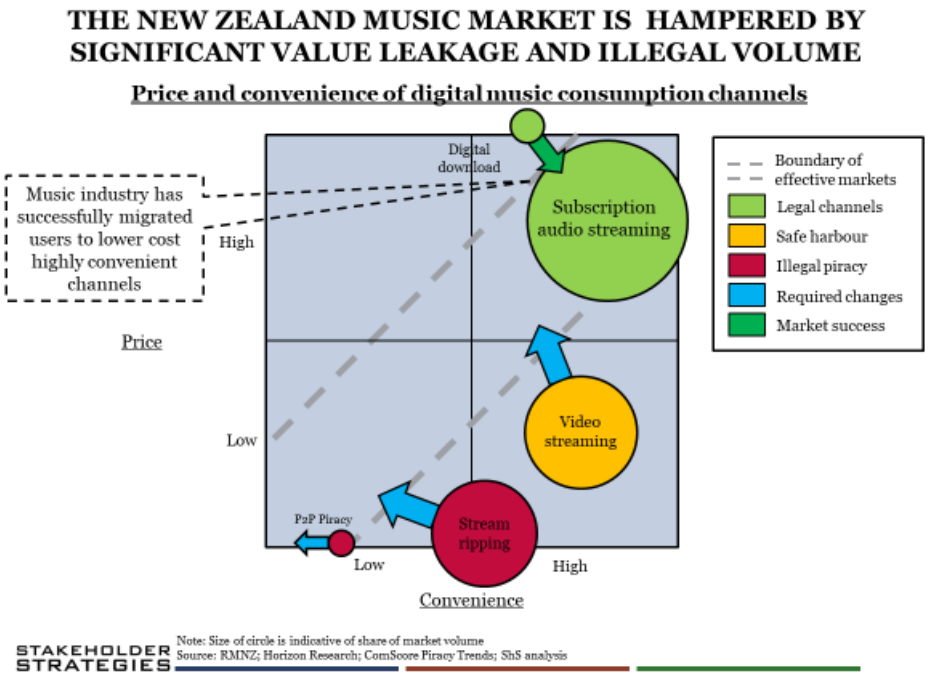
The aim of good copyright policy is therefore to create an **efficient and effective market** (and in today's world **a fair digital market**), so that producers can earn income from their work and consumers can access creative content lawfully, cost-effectively and conveniently.

Worldwide, Music has been a leading indicator of trends in the creative economy, and Music markets are typically sensitive to copyright policy and to digital disruption. The smaller size of Music data files (relative to film and TV) means that Music has more easily been pirated, subject to rapid channel shift – from vinyl to CDs to downloads to streaming – and is vulnerable to freeloading of many kinds. Music has been dubbed the "*canary in the coalmine*" of copyright policy.

The Music market in New Zealand suffers from two main forms of **leakage and value destruction**:

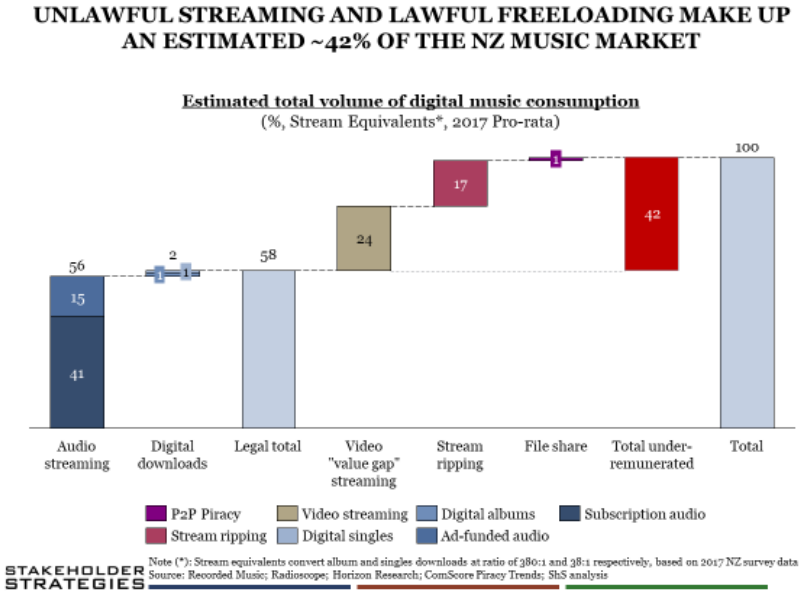
- **Unlawful black markets**, driven by forms of piracy such as stream ripping; and
- Freeloading and **exploitative transactions**, where content is streamed legally but without any (or any reasonable) return to the creators of the work.

These are accentuated by a third factor - the fact that the Music industry's efforts in New Zealand to deal with both issues have been completely thwarted by the lack of effective and efficient enforcement mechanisms.

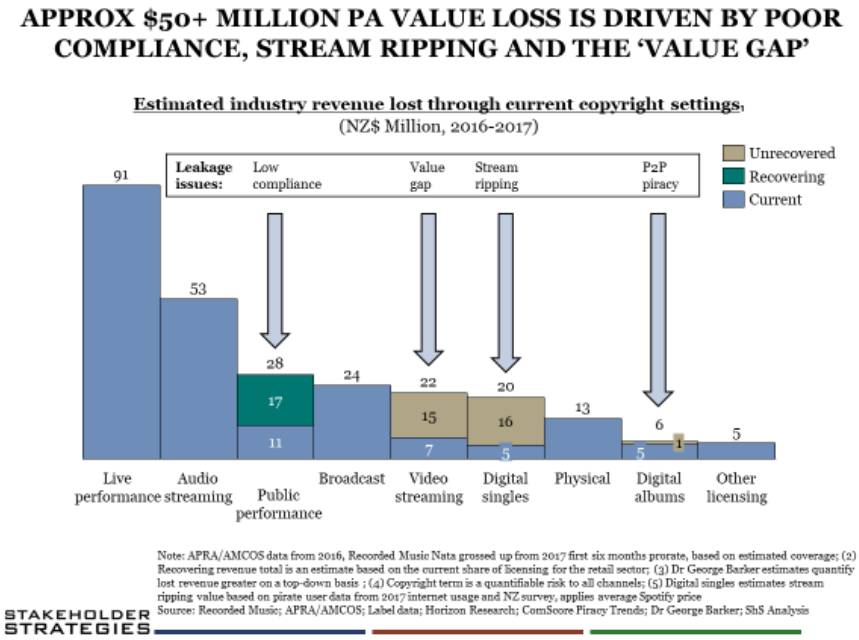


The diagram above illustrates that in well-functioning markets there is typically a positive correlation between price and convenience (shown by the dotted lines or "tracks"). Subscription audio streaming (e.g. Spotify) has dropped price and grown volume but stream ripping and video streaming are currently operating outside acceptable and normal market boundaries.

Analysis undertaken of Music in New Zealand shows that piracy and freeloading make up a staggering **42% of the market** (approx.). It is therefore unsurprising, using Music as a leading example, that the New Zealand creative ecosystem is being damaged and depleted by these practices.



The cost of piracy, freeloading and non-compliance to the Music market in New Zealand alone is **at least $50 million** per annum.



Addressing black market and freeloading issues typically requires a response at two levels – industry to play its part by exercising its legal rights to redress; and then Government to intervene where such legal action is patently insufficient or unable to be effected.

New Zealand Music has certainly played its part. More convenient services have been offered, notably in the growth of streaming services such as the partnership between Spotify and Spark. Recorded Music (previously RIANZ) has delivered approximately 15,000 takedown notices at a

hard cost of $375,000 and several million dollars in total commitment including staff time, legal analysis and related attendances. It has won 20/21[2] court cases but with an average sum awarded of only $500 and was eventually forced to cease such action due to the significantly negative net value. Six months after cessation of such action, unique piracy visits had returned to pre-intervention levels.

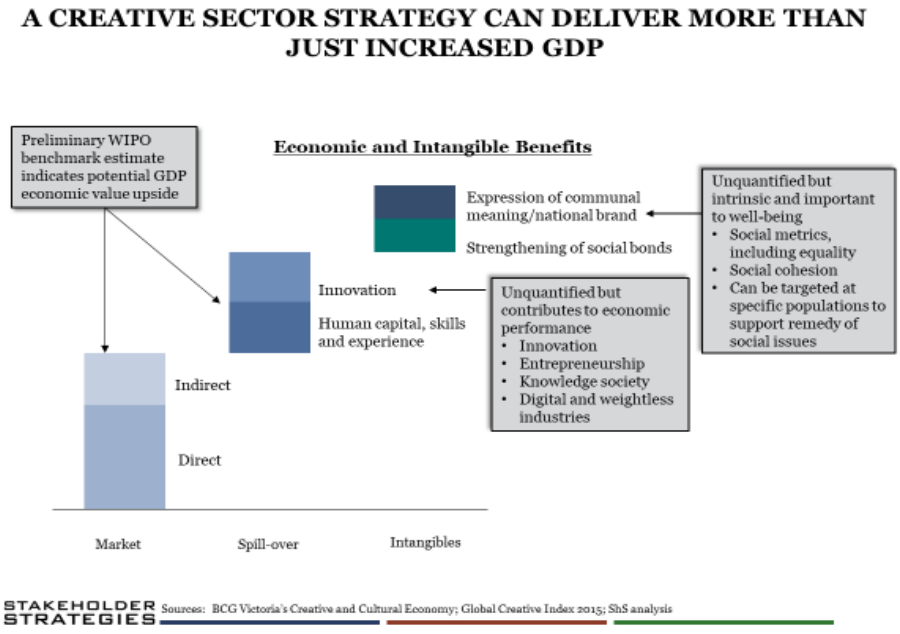
The lack of efficient and effective enforcement has imposed higher transaction costs on Music in New Zealand and has brought the rule of law into disrepute.

Music therefore welcomes this timely review of copyright law and submits that it is time for Government to address decisively the desultory state of **copyright enforceability**.

4.2 Broader effects on the creative economy

The impact of copyright policy is to set up either a virtuous or vicious cycle of effects on the broader creative economy. This economy operates as an **ecosystem**, where multiple and complex relationships between creators result in value being created at four levels:

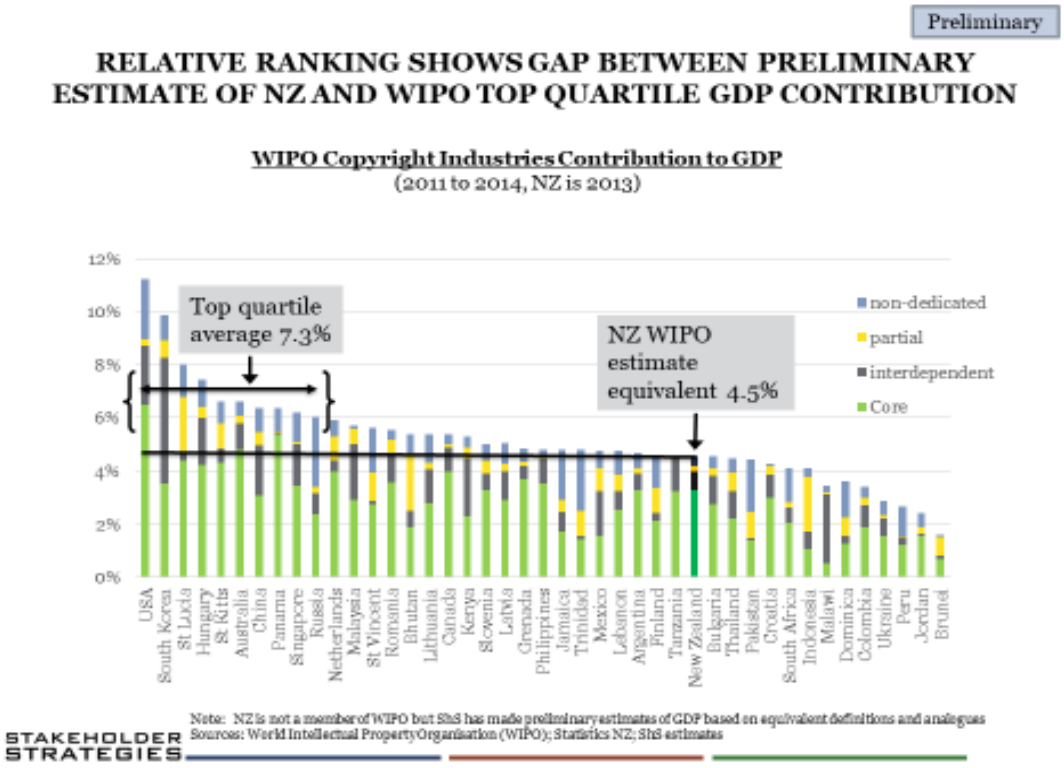
- **Direct GDP** contribution from goods and services produced;
- **Indirect GDP** contribution from upstream, downstream and related activity;
- **Economic spill-over effects** such as through higher levels of innovation; and
- **Non-economic, intangible** (but nonetheless valuable) effects on national identity, social cohesion and national brand (for example, the impact of The Lord of the Rings trilogy).



There is significant evidence that New Zealand's creative economy is under-performing its potential. The lack of a coherent creative economy strategy, with sound copyright policy as its critical baseline and structural underpinning, is likely to be among the causes. The OECD recognises the benefits that flow from the creative economy, including generating **economic growth**, developing intellectual property, diversifying regional economies, promoting R&D and stimulating **innovation**. This in turn provides a foundation for **cultural** and **social wellbeing**.

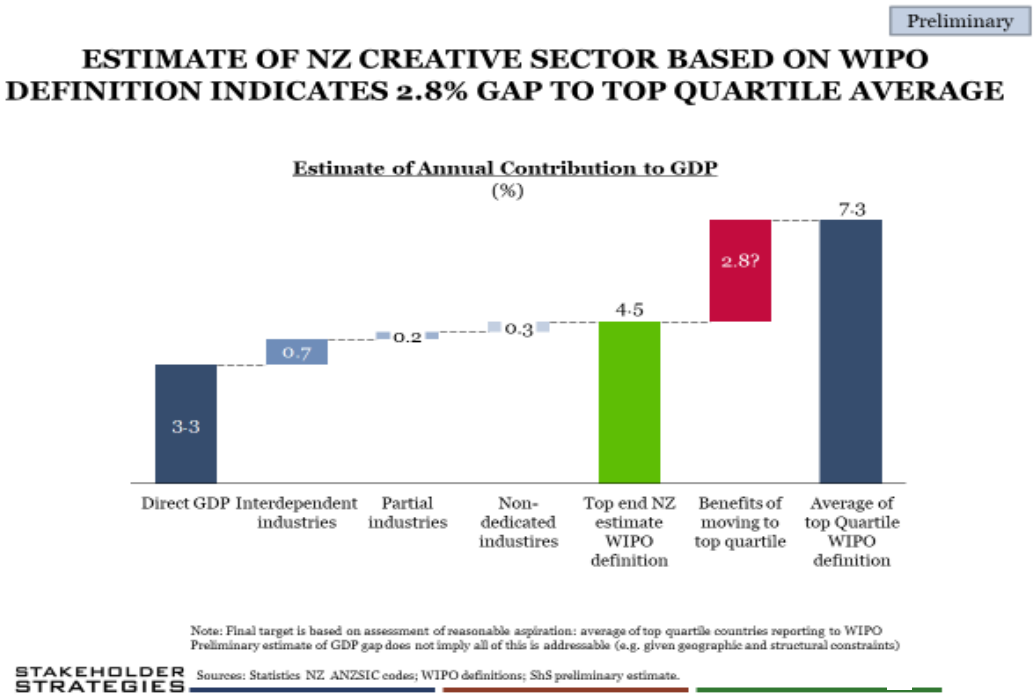
[2] The one case lost was due to the a fault within the notice sent – i.e. by the ISP and beyond Recorded Music's control.

Although comparison is complicated by the differing definitions of the Creative Sector used by various countries, preliminary estimates using the **WIPO** (World Intellectual Property Organisation) approach and various national assessments show a gap between New Zealand's current Creative Sector output and the WIPO top quartile average. Closing such a gap could generate a substantial additional contribution to GDP of up to **2.5%-3% of GDP**, in addition to many other spill-over and intangible benefits.



Preliminary application of the WIPO accounting methodology to the New Zealand creative sector[3] indicates a top-end estimate for the more broadly defined creative economy at 4.5% of GDP. The WIPO methodology components are showing below.

[3] Using Statistics NZ data where they are available and preliminary estimates using Australian proxies where necessary.



The WIPO-based definition is important because, while preliminary, it provides a significant indication of relative underperformance of the NZ Creative Sector, which should be amenable to improvement and consequent value growth using a well-structured and implemented growth strategy, such as been implemented in the United Kingdom (see Sections 6 and 7 below).

- Understanding the definitional issues is important as several other recent studies using different definitions have produced a range of results: PwC in various studies of the industries MBIE identified as 'Creative' suggests a total direct sector output of 1% of GDP, with several of those industry reports conducted by PWC identifying indirect contribution of about the same value, which can be extrapolated for a total creative sector contribution in the vicinity of 2% of GDP. [4]

- The WIPO-based definition above, which shows a total New Zealand creative economy value of approximately 4.5% of GDP, compared to a WIPO top quartile average of 7.3%. This provides evidence measured on a WIPO-consistent basis of a significant value gap that can be narrowed by lifting New Zealand creative sector output. [5]

- A study of wider creative occupations and impact across the economy found a total contribution of approximately 6.8% of GDP. This study included both employment and output within the ("vertical") creative sectors, and ("horizontal") impacts across the rest of the economy, which includes creative employment in unrelated industries and spill-over impacts on innovation. The Creative Sector component of this is 4.5% of GDP, similar to the WIPO estimate.[6]

[4] See Schedule 3 slide 27 for a breakdown of these results, which are based on MBIE's definition of the Creative Sector. September 2015; PWC "Economic contribution of the New Zealand music industry, 2014" October, 2015; PWC "The value of design to New Zealand's economy in 2016" August 2017. No research estimating the size of visual and performing arts was identified, except for the performance of music which was included in the music estimate; likewise no research estimating the creative component of software and web design was identified, except that included in gaming software and websites.

[5] This hypothesis of relative underperformance is also supported by analysis by Martin Prosperity Institute quoted by NZIER - see Global Prosperity Index, p1.

[6]] NZIER "*The Evolution of Kiwi Innovation*" (Destremau, Wilson and Kriebel), Unpublished paper commissioned by WeCreate, 2017.

4.3 How did we get here?

Recorded Music submits (and has done so for some time now) that New Zealand copyright law has in recent years **moved too far from the balance** required to sustain a thriving creative economy. In previous iterations of the copyright debate, most recently over copyright term harmonisation in the context of the (then) Trans Pacific Partnership negotiations, a view has been propagated that copyright should be seen as a "transaction cost" or a "rigidity" impeding the downstream re-creation of digital content. For some members of the ICT community, this notion was aligned with "internet freedom" concepts, with a somewhat religious zeal.

To those voices were added further selected views from consumer representatives, and public interest users of copyright material.

It is a matter of record that these arguments were orchestrated within a public relations campaign co-ordinated by David Farrar of Curia Consulting, one of the then Government's chief pollsters. As his subsequent *Kiwiblog* post[7] makes clear, this campaign was backed, inter alia, by global ISP interests that invest heavily to influence global copyright policy to their advantage.

Reducing barriers to use of data and digital content (including copyright protections) provides competitive advantage to global internet and search platforms, which should be of concern to policy makers in New Zealand. The looming competition policy issues of global search and data dominance by these platforms, who arguably also enjoy increasing returns to scale, has not been lost on other major jurisdictions such as the EU[8].

Recorded Music therefore welcomes a substantial review of New Zealand copyright law and policy (Review), and commits to engaging with data and evidence to contribute to a way forward that appropriately balances the interests of creators, consumers and platforms, to create a step change in the **value** of New Zealand's creative economy in the best interests of New Zealand as a whole. Recorded Music submits that the emphasis of the Review should be on **value and opportunity** for New Zealand as a whole and not on the cost and devaluation of New Zealanders' creativity.

[7] Kiwiblog: 8 October 2015 "The Battle for the IP Chapter", extended post by David Farrar.
[8] See https://techcrunch.com/2017/06/27/google-fined-e2-42bn-for-eu-antitrust-violations-over-shopping-searches/ for one example of recent media coverage.

5. Improving New Zealand Copyright Law

The reform opportunity (1): Higher creativity through efficient, effective and fair digital markets

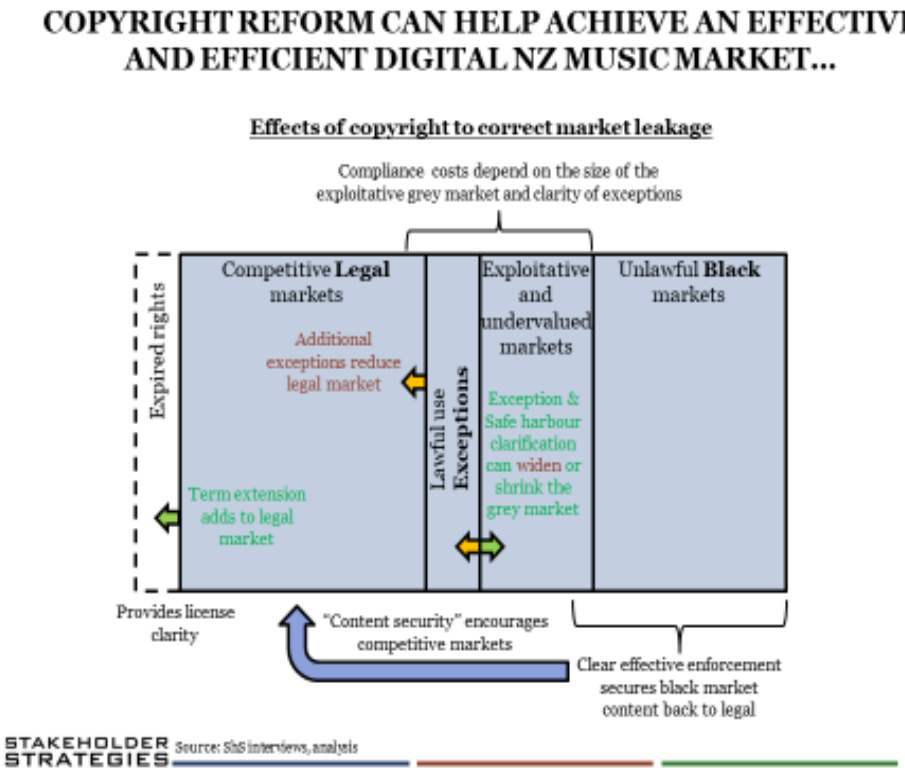
5. Improving New Zealand Copyright Law

This particular chapter should be read in close conjunction with **Schedule 4** attached. Schedule 4 sets out a detailed analysis by Andrew Brown QC (in conjunction with Recorded Music) of what Music considers the key legal and legislative priorities required to be effected in order to correct the anomalies referred to earlier in these submissions and accordingly improve the productivity and innovation of New Zealand's creative economy.

In Recorded Music's view two key types of mechanism are needed to be in play, being:

- **Government legislation and regulation** that provides a robust institutional foundation for fair digital content markets and accordingly enhances New Zealand's creative ecosystem and ensures healthy competition; and
- **Industry mechanisms** to reduce availability of pirated content and to enable legal services, including through technical solutions.

Copyright policy should encourage the **legal, convenient and fair exchange of creative products and services**. That requires moving currently pirated and exploitative **leakage** to within the boundaries of a **well-functioning market and fair digital marketplace**, as represented in the diagram below.



From the perspective of Music in New Zealand, the priority issues that must be addressed drive clearly from the analysis of what is causing value leakage, distortion and under-performance. Recorded Music therefore urges the Government through the Review to:

- **Take urgent measures to address piracy, including site-blocking for stream ripping sites and therefore ensure that effective and efficient (time and cost) enforcement measures can be used to protect copyright;**

- **Address exploitative freeloading under the cover of "safe harbour" by distinguishing between passive (e.g. private cloud storage) and active (e.g. video streaming) services; and**
- **Maintain the integrity and predictability of fair dealing law with modernised exceptions.**

In addition, to release the most positive economic and cultural value from New Zealand's Creative Sector to:

- **Develop a creative economy strategy in partnership with the Creative Sector and the creative community, and make this a top government priority, in keeping with the recommendations of the Future of Work Commission;**
- **Ensure sound copyright policy recognised as a necessary foundation and legislative underpinning of this creative economy strategy; and**
- **Encourage dialogue and cooperation not only across the Creative Sector but between both the creative, digital media and ICT communities.**

Clarifying or narrowing **safe harbour** provisions to exclude actively managed video streaming sites would provide a market-based incentive for major platforms to enter into fair and equitable value sharing arrangements with creators. In short, ensuring that user uploaded content services such as YouTube are covered by the same legal framework applicable to equivalent streaming services like Spotify would go a long way to resolving the issue. At this time, however, Music simply has to take or leave the spoils that a YouTube type service may provide at its sole election. That is not a level playing field between level players. For further legal analysis on the clarification of safe harbour, please refer to Part 2 of **Schedule 4** attached**.**

Site blocking of stream ripping sites to address piracy is also highly significant. There can be no legitimate justification for piracy. Failure to address it imposes deadweight loss on the lawful market and undermines the rule of law. Recorded Music and the New Zealand Music industry have exhausted their current legal options and there is no doubt that the existing notice and takedown regime is ineffective, costly, and, put in plain language, a nonsense. A far better approach would be to reduce unlawful and instead promote lawful transactions in cultural (including digital) content. For more complete analysis of the required reforms in the area of enforcement, please see part 1 of **Schedule 4** attached commencing at the start of that document as well as the helpful summary of key issues set out the end of the document. The latter captures all of Recorded Music's recommendations arising from the Review from a legal and legislative perspective.

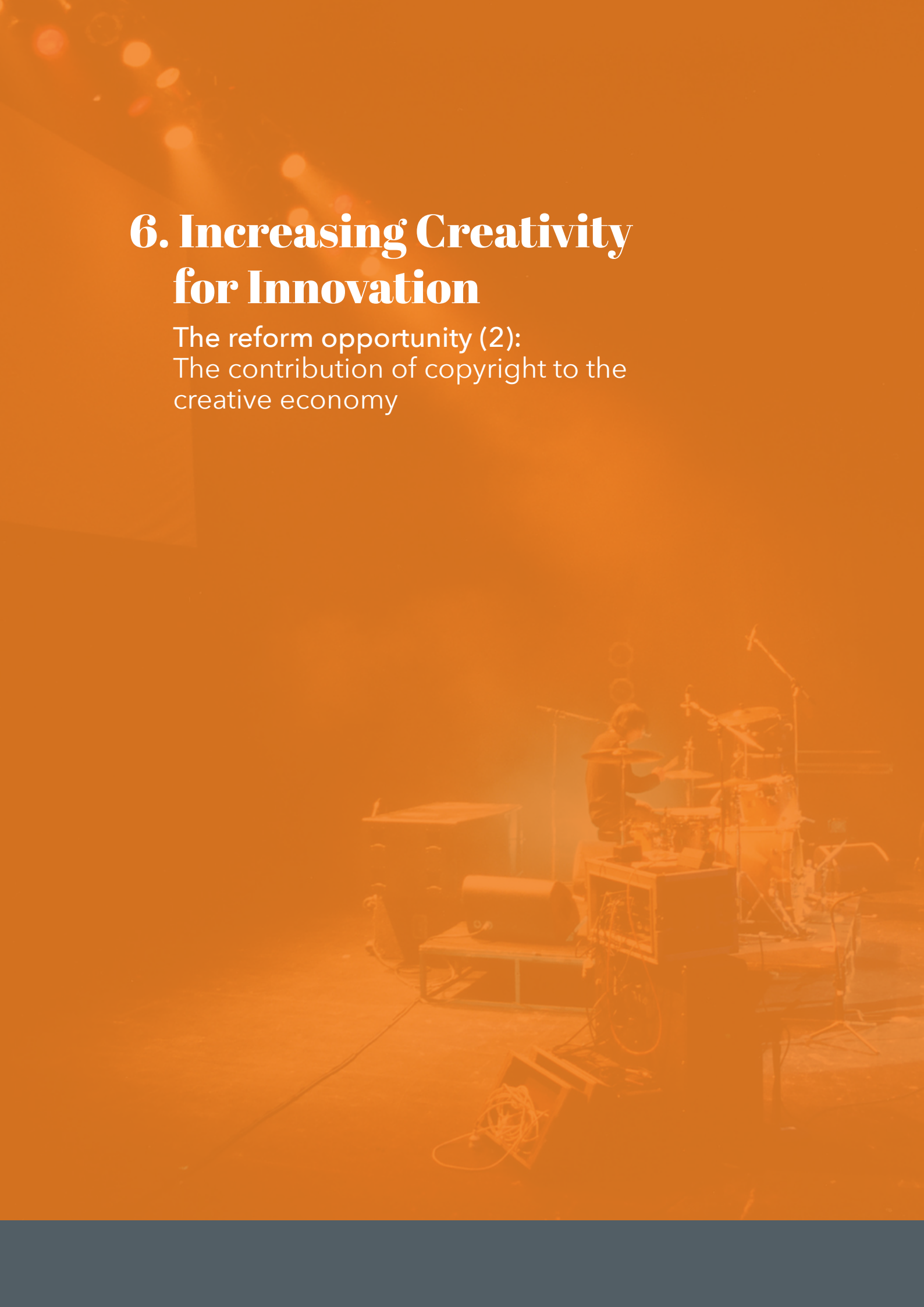
There is also a residual unnecessary compliance and valuable back catalogue cost from the lack of **term harmonisation**. Extensive submissions have been made previously by Recorded Music but due to new information to hand, further submissions will separately be made towards the end of 2017 on this in the context of both the CP-TPP and NZ-EU FTA negotiations. The new information relates to compelling data on exports of New Zealand Music as prepared in July of this year by PwC as well as a more complete understanding of the *shorter term* rules applying in other jurisdictions. [9]

In summary, the stated goal of a well-functioning, efficient and effective digital market for Music is being hampered and undermined by a known set of problems, which can be readily addressed through legislative and policy reform.

[9] PwC, NZ Music Export Earnings Report, July 2017.

6. Increasing Creativity for Innovation

The reform opportunity (2): The contribution of copyright to the creative economy



6. Leveraging Creativity for Innovation

How can improved Copyright policy fuel the creative ecosystem and lift innovation rates?

International benchmarking analysis conducted for Recorded Music has found seven key success factors that have enabled countries to grow the value of their creative economies. Sound copyright settings that afford creators a sustainable income were considered a basic pre-requisite to support an effective creative economy strategy. Conversely, inadequate copyright policy may have spill-over effects far greater than the direct losses to the immediate creators affected.

A first qualitative assessment shows that New Zealand currently does not rate well on these success factors.

SEVEN KEY SUCCESS FACTORS ARISE FROM INTERNATIONAL EXPERIENCE IN DEVELOPING CREATIVE SECTORS

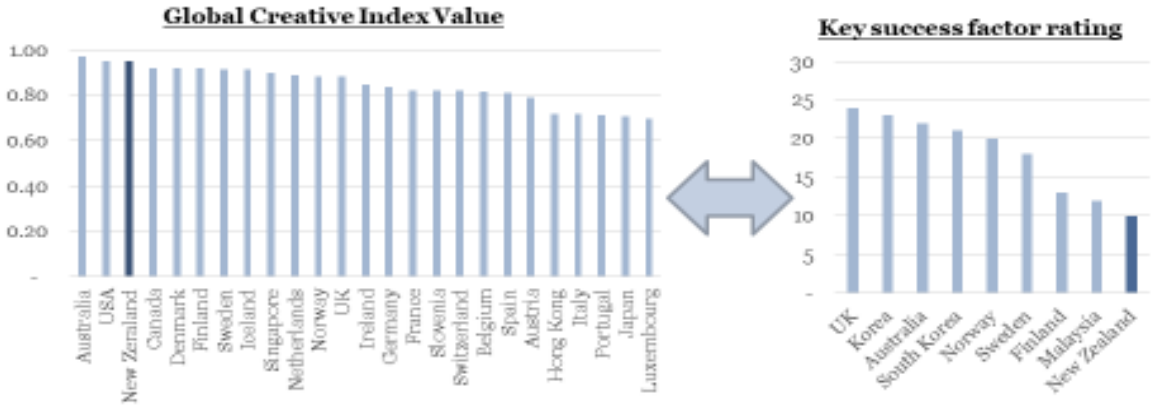
Key Success Factor	Description	Countries demonstrating	Estimated Importance
1. Copyright settings that support creators	Favourable settings currently include: • If Safe Harbour then passive only • Fair deal or effectively limited fair use • Notification achieves cessation of illegal Legislative willingness to modify and update copyright settings to address developments	UK, Australia, EU	High – basically table stakes.
2. Industry participants have a strong voice	Creative Sector participants engage with each other and government in an effective manner, particularly to clarify where they are aligned	Across most surveyed success examples	High – stimulates collaboration and cross-pollination
3. Excellent execution to SME level	Declaration of objectives gets follow-through with supporting action, industry engagement is genuine	UK, Australia	High, particularly for top-down Government initiated
4. Government recognition, partnering	Creative Sector is defined, measured, and there is a designated touchpoint high- up in government, if not cabinet level	Across most countries, can be provided at national or regional level	High or moderate –less so with well-established creative industries
5. Digital infrastructure	Digital resources are not considered a constraint on Creative Sector or its interaction with consumers	Supports or inhibits SMEs and regions, noted for policy in Australia, UK, USA	Moderate – like copyright settings a tablestake, less relevant if domestic market is small
6. Government resources	The government provides funding to support creative industries in supply, demand, and market operation	In variable amounts, with a variety of targets	Moderate
7. Top 10 plank of economic policy	The economic impact of Creative Sector is noted to be one of the top contributors to the economy or upcoming growth of economy	Some standout examples like UK, but others like Australia regional	Moderate to lower

STAKEHOLDER STRATEGIES Source: ShS international benchmarking and research

This may help to explain why the economic contribution of New Zealand's creative sector is so low, despite ranking as a country of high creative potential. In 2015, New Zealand ranked 3rd in the world in the Global Creative Index compiled by researchers Richard Florida, Mellander and King. A similar result was found by the Martin Prosperity Institute, who found New Zealand's high latent creativity was not matched by its economic output.[10]

[10] Martin Prosperity Institute, "Global Creativity Index" in NZIER 2016, op cit, P1.

LOW SUPPLY OF KEY SUCCESS FACTORS MAY BLOCK NZ REALISATION OF BENEFITS FROM HIGH CREATIVE INDEX



Notes: The Global Creative Index measures national capacity for creativity based on three dimensions. NZ ranks highly across all dimensions: 7th in Technology; 8th in Talent; 3rd in Tolerance

STAKEHOLDER STRATEGIES Source: 2013 Global Creativity Index compiled by Florida/Mellander/King

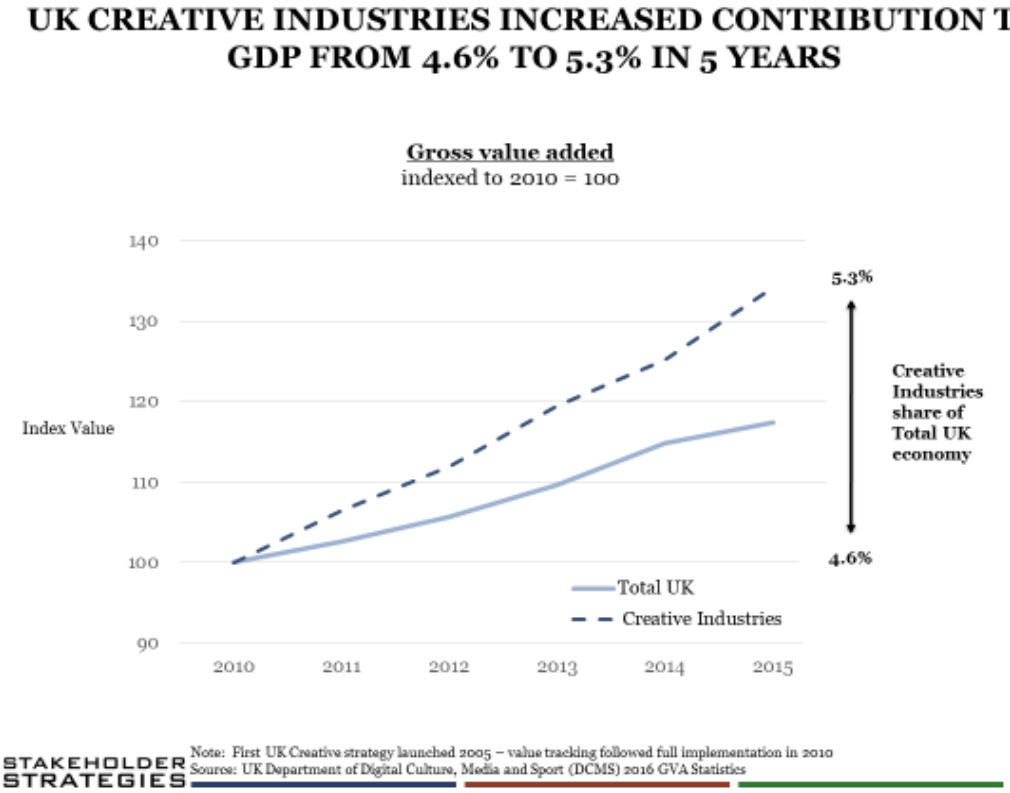
New Zealand's performance on the identified key success dimensions can be accelerated through a set of interventions including improvements to copyright law and enforcement to create a more efficient market.

NEW ZEALAND'S RATING ON KEY SUCCESS FACTORS CAN BE IMPROVED

Key success factor	NZ now	Current state	Opportunity to improve	NZ result
1. Copyright settings	◑	Piracy not adequately prevented – e.g. no site-blocking. Safe harbours do not specify passive, term is 50.	Amend copyright settings to underpin efficient effective market: safe harbours passive only, site-blocking, term etc	●
2. Voice of industry participants	◑	Cross-industry voice is nascent with WeCreate	Support growth of We Create	◕
3. Execution to SME level	◔	No creative industries strategy, definition for copyright review varies to industry self-definition at We Create	Commit to a creative industries strategy and deliver it well	◕
4. Government recognition and partnering	◔	Creative industries interact with government independently, to various degrees, without guidance of unified creative strategy	Commit to a creative industries strategy	◕
5. Digital infrastructure	◕	This has largely been delivered where immediately feasible, or is underway	Continue to deliver good performance, but tough to increase the assessment	◕
6. Government resources	◔	It is hard to know how much resource is available to creative industries given the diverse channels and programmes	Not so much invest more but coordinate investment and provide resources to administer the creative strategy development and measure creative industries	◑
7. Top 10 plank of economic policy?	○	Creative industries are not considered relevant to Business Growth Agenda	Need good measurement to assess whether this is feasible or appropriate – measure and manage	○ - ●
Value out of 28	10			18-22

STAKEHOLDER STRATEGIES

Countries that have implemented a creative industries strategy, such as Australia, Great Britain, and Finland, have seen their creative sectors grow faster than their overall economies (see **Schedule 3** attached). The graph below shows the incremental value achieved in the UK following implementation of the Create UK creative economy strategy from 2005-2015.



Similar results have been achieved by other WIPO countries embarking on deliberate strategies to enhance their creative economy. In all cases of which we are aware, countries which grew their creative sectors above GDP trend had sound copyright policy as a baseline. More detail is available in **Schedule 3** attached.

7. A Way Forward

Towards the best balance for New Zealand Inc.

7. A way forward

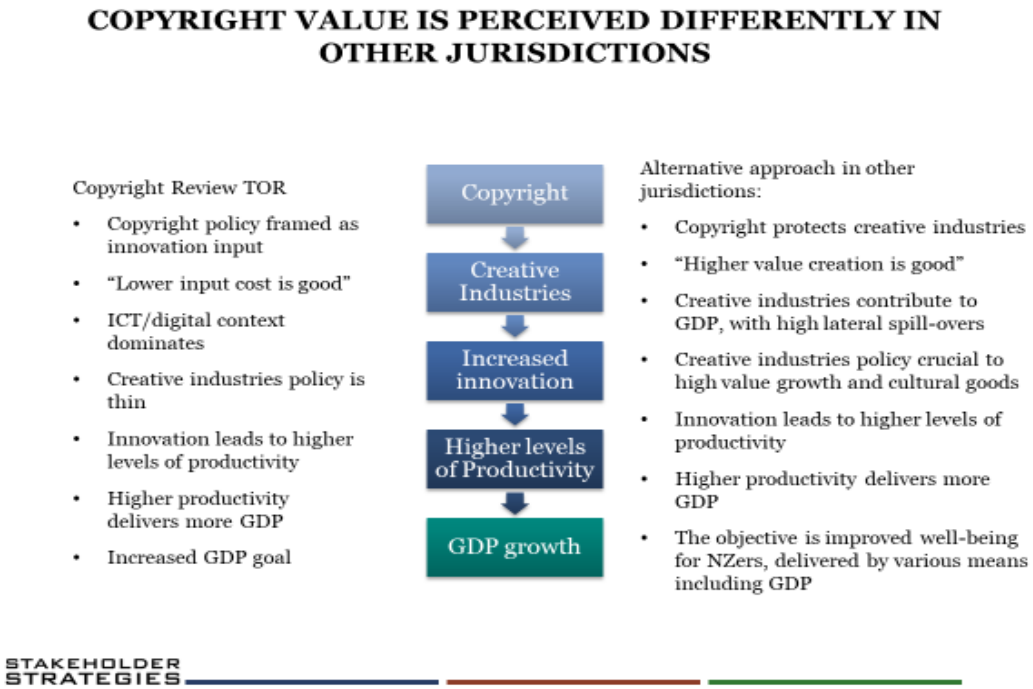
The Government has set out a clear process for the Review, including submissions, an Issues Paper, an opportunity for further comment, an Options Paper, and following the Cabinet process, a Legislative Proposal. In Recorded Music's view, the Government should be commended for the openness and thoroughness of this process, which we are endeavouring to support through **high quality, fact based input**, including data provided by businesses dealing with these issues on a daily basis complemented by specialist research.

It is hoped that, in addition to gathering information, two parallel processes can occur.

First, Recorded Music believes that some **reframing** is needed of the objectives of the Review, given the huge potential **value** creation opportunity attached to releasing the potential of New Zealand's creative economy. This will in turn support the Government's goal of lifting **innovation** and **productivity.**

If this is recognised, two key conclusions will follow:

- Appropriate copyright law is **essential to the incentives for creative production**, and for creators to locate within New Zealand; and
- Copyright, as a necessary precondition for a vibrant and valuable creative economy, should be approached as a **value creator rather than as a cost**.



Secondly, Recorded Music believes that there is potential to move towards consensus, or at least higher levels of cooperation, between the creative, digital media and ICT sectors in New Zealand, to build a business and creative environment that best serves the interests of NZ Inc.

In our earlier Briefing to Incoming Ministers we have suggested that consideration be given to supporting a Creative Economy Strategy, using WeCreate as the partner organisation, to help develop these ideas.

The UK model is an example that merits consideration due to the success it has achieved, and their similarity to New Zealand in matters creative. Elements identified as key to the UK success in particular include:

- High profile focus on creative industries, at national and regional levels;
- Consultation, input and delivery from industry participants, coordinating via government, and developed channels led at ministerial level and partnered with industry champions; and
- Measurement and reporting of scale, targets, and progress.

The Government should consider a task force partnership between a group of ministers and leaders from the Creative Sector although it needs to be action focussed with achievable goals.

Ideally such an important ministerial Task Force would be led by the Prime Minister and include the Ministers of Finance (and Assoc. Arts, Culture and Heritage); Economic Development and Trade; Commerce and Consumer Affairs; Associate Arts Culture and Heritage; and Broadcasting and ICT. It should incorporate representatives of content creators (represented by the WeCreate alliance, its members and friends) and representatives of related digital businesses. Coverage of Maori, Pasifika, educational and media interests should also be ensured.

A robust and actionable strategy supported by actionable milestones, quantifiable metrics and strong communications should be developed with appropriate levels of supporting expertise. Helpful precedents are currently underway in Victoria, Australia and in Canada as well as the UK. WeCreate and Recorded Music will be offering further detail on this proposed plan for a Creative Strategy in due course.

In summary, Recorded Music submits that Government should:

- Complete the Review, which is at the core of the creative economy, which gives us **strong**, **clear and enforceable legislation** that will combat piracy and freeloading;
- Address the **key success factors** required to position New Zealand as a **leading creative centre**, building on our traditions of creativity, biculturalism, diversity and inclusiveness;
- Make the creative and innovation economy a **top priority**, to make New Zealand a leader in creative endeavour and to boost the value of the creative economy; and
- Show **joint leadership** by engaging with the creative and digital media and ICT sectors to develop a world class creative economy strategy for trade, implementation plan and metrics through a partnership between a Prime Ministerial Task Force and industry and sector leaders.

Recorded Music looks forward to supporting the Copyright Review process going forward and is very willing to provide any supplementary information that the Government may find helpful.

23 November 2017

8. Schedules

1. Terms of Reference – published 29 June 2017 by MBIE
2. The NZ Music Industry – Key Representative Organisations
3. Financial and Resarch Analysis:
   Stakeholder Strategies Ltd, with input from Recorded Music and its members
4. Legal and Legislative Priorities: Andrew Brown, Q.C and Recorded Music
5. List of previously supplied documentation – 2010-2017 (inclusive) by Recorded Music to MBIE and MED

MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Review of the Copyright Act 1994

TERMS OF REFERENCE

Objectives of the review

New Zealand's copyright regime is governed by the Copyright Act 1994. The Act sets rules relating to copyright protection, infringement, exceptions and enforcement. It has not been reviewed in over a decade. The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*.

The Government wants to ensure that the copyright regime keeps pace with technological and market developments and is not inhibiting the provision of, and access to, innovative products and services, which will underpin higher levels of wellbeing in New Zealand. This is a focus of the Government's work in the *Business Growth Agenda* — working toward *Building Innovation* and, within this, *Building a Digital Nation*.

Building on the *Copyright and the Creative Sector* report, the Government is committed to understanding the landscape in which copyright settings operate and ensuring that our regime is fit for purpose in New Zealand in a changing technological environment.

The objectives of this review are to:

- assess the performance of the *Copyright Act* against the objectives of New Zealand's copyright regime (discussed further below)
- identify barriers to achieving the objectives of New Zealand's copyright regime, and the level of impact that these barriers have
- formulate a preferred approach to addressing these issues – including amendments to the Copyright Act, and the commissioning of further work on any other regulatory or non-regulatory options that are identified.

Objectives of copyright

Copyright seeks to incentivise the creation and dissemination of original works. It gives authors the exclusive right to copy, disseminate and adapt their works. Authors can also transfer or license those rights. Without the ability to protect works (e.g. books, recorded music, fine art, digital art, movies, educational literature, software code) from unauthorised copying or distribution, there would be fewer incentives to create and disseminate important social, cultural and commercial works.

However, copyright must strike a balance. Over-protective copyright settings can inhibit the creation and dissemination of copyright works by restricting competition and 'follow-on' creation — that is, using existing creative works and the ideas underpinning them to create new works, ideas, products and services. It can also inhibit important cultural activities, such as those of educational, library and archival organisations.

New Zealand's copyright law is intended to benefit New Zealanders as a whole. This requires consideration of the impacts on creators, distributors, users, consumers and all other people affected by copyright.

As a starting point, the following objectives of New Zealand's copyright regime have been identified:

- provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so
- permit reasonable access to works for use, adaption and consumption, where exceptions to exclusive rights are likely to have net benefits for New Zealand
- ensure that the copyright system is effective and efficient, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
- meet New Zealand's international obligations.

These objectives are not set in stone, and will be tested through consultation on an issues paper.

Context

Copyright is unlike other forms of intellectual property, such as patents, in that there is no need to register a copyright work.

Copyright is also unique due to the broad range of content it applies to. While many copyright works require significant investment of money, talent and/or time (such as a feature film or a professional painting), other copyright works are cheap and easy to make (such as a photo captured with your phone). Many of us inadvertently create copyright works every day.

Copyright Act 1994

The *Copyright Act* provides New Zealand's copyright regime. This includes specifying:

- the works covered by copyright, the qualifications and ownership of copyright and the duration of copyright
- the acts that constitute infringement of copyright (i.e. the exclusive rights of the copyright owner and licensees)
- exceptions to infringement of copyright (including 'fair dealing' with a work)
- moral rights to be identified as an author or director, and to object to derogatory treatment of the work
- performers' rights
- technological protection measures and copyright management information
- licensing and transfer of copyright
- enforcement and remedies for infringement, including civil proceedings, the Copyright Tribunal, border protection measures and powers of enforcement officers.

The last major review of the Copyright Act took place from 2001 to 2004 resulting in the *Copyright (New Technologies) Amendment Act 2008*. This introduced:

- protection for "communication works" (previously broadcasts and cable programmes)
- new exceptions for transient or incidental copying
- decompilation of computer programs
- format shifting and time shifting
- limitations of liability for ISPs
- greater protection for technological protection measures
- new protections for copyright management information.

Study into the role of copyright and designs in the creative sector

The copyright regime plays an important role in the creative sector. A study into the role of copyright and designs in the creative sector was launched in October 2015 to help the Government better understand how copyright is used in practice.

The final report, *Copyright and the Creative Sector*, was released in December 2016. It was the culmination of information from 71 interviews, two sector workshops, an online survey and an online consumer focus group.

The report illustrates the diversity of the creative sector, in terms of the works created, the drivers for creation, the means of distribution and the revenue models. It highlights some of the opportunities and challenges posed by developments in digital technology.

Understanding the landscape – how copyright is operating on the ground – is a first step toward developing high quality policy.

We invite feedback on the report (email creativesectorstudy@mbie.govt.nz). Stakeholder views will continue to inform our thinking.

International environment

The international environment is a significant factor in any review of the Act, as:

- International agreements set the broad framework for our settings and require that we do not depart from some approaches in certain areas.
- Many dealings with copyright works occur across borders.
- Foreign companies play a significant role in the creation and distribution of a large amount of content that is available in New Zealand.

The need to ensure copyright laws are fit for purpose in a changing technological environment has been recognised in a number of other major jurisdictions. For example, copyright reviews are proposed or underway in the European Union, Canada and Singapore. Changes to Australian copyright law are also being considered by the Australian Senate.

What's next?

The next step will be **release of an issues paper for public consultation in early 2018**. The issues paper will likely be broad ranging and include a number of questions for public input.

The overall scope of the review, and the staging of it, will be informed by that consultation process. An indicative process for review of the Act is set out below:

Through future consultation processes, we would encourage submitters to support their submissions with appropriate evidence. Evidence will play an important role in our analysis of issues and any options for reform. The United Kingdom Intellectual Property Office has published a *Guide to Evidence for Intellectual Property Policy*, which is a useful tool to help guide the information provided throughout the future processes.

Schedule 2: The New Zealand Music Industry and Representative Organisations

These submissions have been prepared by **Recorded Music New Zealand Limited**, with the support of the Music industry in New Zealand, which includes the following representative bodies: **APRA AMCOS, Independent Music NZ Inc** and **The Music Managers Forum**.

Recorded Music New Zealand Limited (Recorded Music)

Recorded Music is a not-for-profit industry representation, advocacy and licensing organisation for recording artists and their labels. Recorded Music's membership consists of over 1900 Master Rights Holders (recorded labels and artists who own their own copyrights) and 2700 plus New Zealand recording artists registered in the Direct-to-Recording Artist scheme. This scheme provides the opportunity for New Zealand recording artists to be paid directly for the broadcast and public performance of sound recordings. Membership includes such record labels and New Zealand companies as Universal Music NZ, Sony Music NZ, Warner Music NZ, Liberation Music NZ, Rhythmethod Distribution, Southbound Distribution, Digital Rights Management NZ along with many more independent New Zealand owned Master Rights Holders.

Recorded Music has a representative board of directors made up of threshold directors (three) as well as an independent chair; independent shareholder director and artist representative director.

Recorded Music's other activities include owning and presenting the annual Vodafone NZ Music Awards; publishing the Official NZ Top40 Charts; supporting educational projects within the music industry and the work of the NZ Music Foundation through its Music Grants programme; and being a trustee of the NZ Music Hall of Fame.

From the licensing perspective, Recorded Music provides collective broadcast and online licensing services directly to music users, and offers public performance licensing through OneMusic, its joint licensing initiative with APRA AMCOS.

APRA AMCOS

APRA AMCOS is an association of New Zealand and Australian composers, songwriters, lyricists and music publishing companies that collectively administers the public performance, communication (including broadcast) and certain reproduction rights in copyright music throughout New Zealand, Australia and the Pacific.

APRA AMCOS is controlled by composers, songwriters and music publishers, with a Board of Directors elected by and from its membership. APRA represents over 60,000 New Zealand, Australian and Pacific songwriters together with many thousands more from similar societies in more than 80 countries around the world.

Independent Music NZ Inc. (IMNZ)

IMNZ is a non-profit trade association providing collective benefits and exclusive opportunities to all its members to help grow their businesses. IMNZ stands for fairness and equality for all music and encourages open and transparent systems and industry in which creative innovation is at the centre. IMNZ members include record labels, self-released artists, managers, publishers, distributors: anyone who represents (as the artist or on behalf of) an independent New Zealand music copyright. IMNZ's members release the bulk of New Zealand music, including commercially successful artists as well as niche music genres.

***M*usic Managers Forum (MMF)**

The Music Managers Forum is a national not-for-profit organisation that offers professional development and networking opportunities for New Zealand music managers, self-managed artists and anyone with an interest in becoming a manager.

Schedule 3

Financial and Commercial Analysis

Stakeholder Strategies Limited for Recorded Music New Zealand Limited

October 2017

STAKEHOLDER STRATEGIES

THIS PROJECT HAS ADDRESSED THREE KEY QUESTIONS

Project Conclusions

#	Question	ShS Conclusions
1	What matters most to music/creative sector in Copyright Review (CR)?	1. Reduce illegal leakage via addressing piracy and improving enforcement 2. Improve streaming /unit price to address "value gap" by narrowing safe harbour provisions 3. Reframe reform from "lower cost" to "higher value"
2	How can we grow the value of the creative sector?	1. Engage government and both creative and ICT communities in developing a Creative Sector strategy 2. Leverage international experience to increase GDP over time
3	How can we achieve favourable policy outcomes?	1. Attempt to find pan-sector support for value-based Creative Sector strategy development, including reaching out to digital media and ICT leaders 2. Work constructively with the new Government to advance its innovation and creative agenda

STAKEHOLDER STRATEGIES Source: ShS analysis and team input

THE PROJECT HAS ADDRESSED COPYRIGHT REVIEW TOR PUBLISHED 29 JUNE 2017

The Goals of this review are to:

- Assess the **performance** of the *Copyright Act* against the objectives of New Zealand's copyright regime (discussed further below)
- Identify **barriers** to achieving the objectives of New Zealand's copyright regime, and the level of impact that these barriers have
- Formulate a **preferred approach** to addressing these issues – including amendments to the Copyright Act, and the commissioning of further work on any other regulatory or non-regulatory options that are identified.

The Objectives are:

- Provide **incentives for the creation and dissemination of works**, where copyright is the **most efficient** mechanism to do so
- Permit **reasonable access to works for use, adaption and consumption**, where exceptions to exclusive rights are likely to have net benefits for New Zealand
- Ensure that the copyright system is **effective and efficient**, including providing clarity and certainty, facilitating competitive markets, minimising transaction costs, and maintaining integrity and respect for the law
- Meet New Zealand's **international obligations.**

RESEARCH OUTPUTS SUPPORT MOVES TO IMPROVE MARKETS FOR CREATIVE CONTENT VIA COPYRIGHT REFORM

High Level Conclusions

Copyright reform should address leakage of $50m p.a. in value from the NZ music industry

Copyright outcomes would be assisted by an effective Creative Sector (CS) strategy

Preliminary estimates indicate a significant GDP gap between NZ baseline and WIPO top quartile

Achieving balanced copyright policy and dynamic creative sector growth can be assisted by learning from international experience

COPYRIGHT VALUE TO MUSIC

STAKEHOLDER STRATEGIES

COPYRIGHT REFORM SHOULD ADDRESS LEAKAGE OF $50M P.A. IN VALUE FROM THE NZ MUSIC INDUSTRY

The New Zealand music market is hampered by significant value leakage and illegal volume

- Unlawful activity and freeloading make up an estimated 42% of the market
- Approx. $50m pa value loss is driven by poor compliance, stream ripping and the 'value gap'

There are two key mechanisms for improving market efficiency

- Industry mechanisms have been exercised within the current regulatory environment

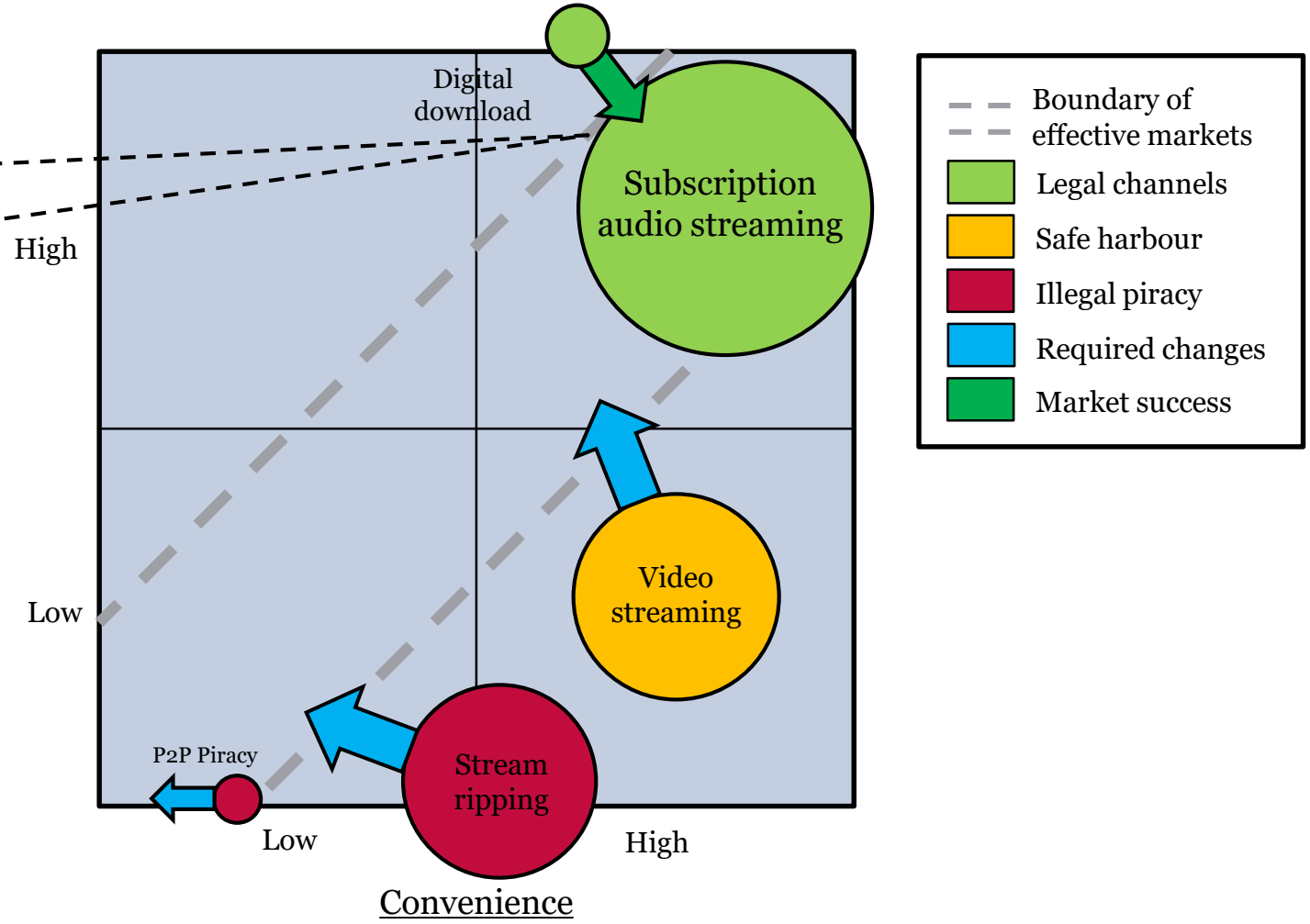
Copyright reform will help an effective and efficient digital market

International copyright interventions have successfully improved digital market efficiency

THE NEW ZEALAND MUSIC MARKET IS HAMPERED BY SIGNIFICANT VALUE LEAKAGE AND ILLEGAL VOLUME

Price and convenience of digital music consumption channels

Music industry has successfully migrated users to lower cost highly convenient channels

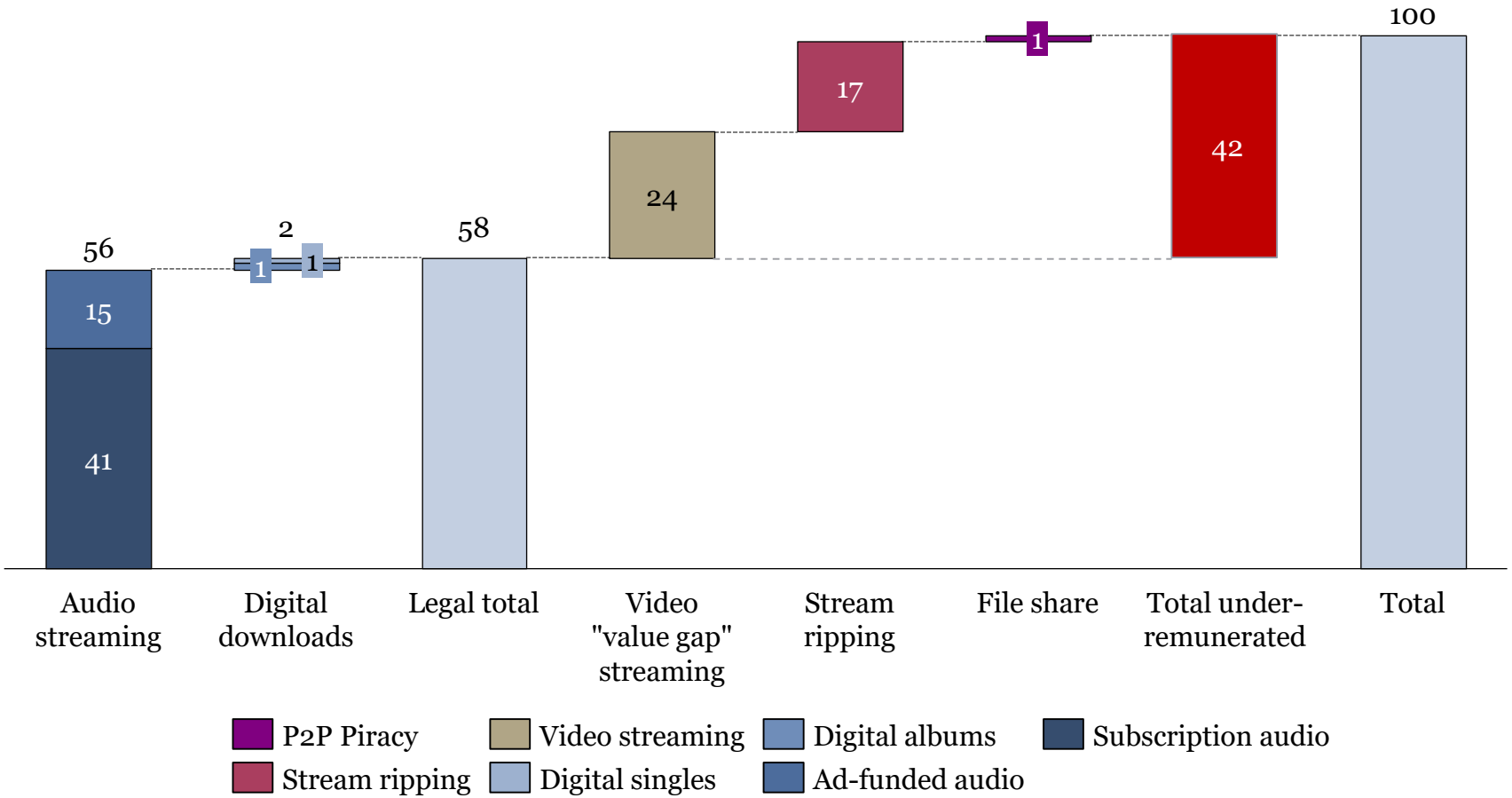


Note: Size of circle is indicative of share of market volume
Source: RMNZ; Horizon Research; ComScore Piracy Trends; ShS analysis

UNLAWFUL AND FRINGE PLAYERS MAKE UP AN ESTIMATED ~42% OF THE NZ MUSIC MARKET

Estimated total volume of digital music consumption

(%, Stream Equivalents*, 2017 Pro-rata)



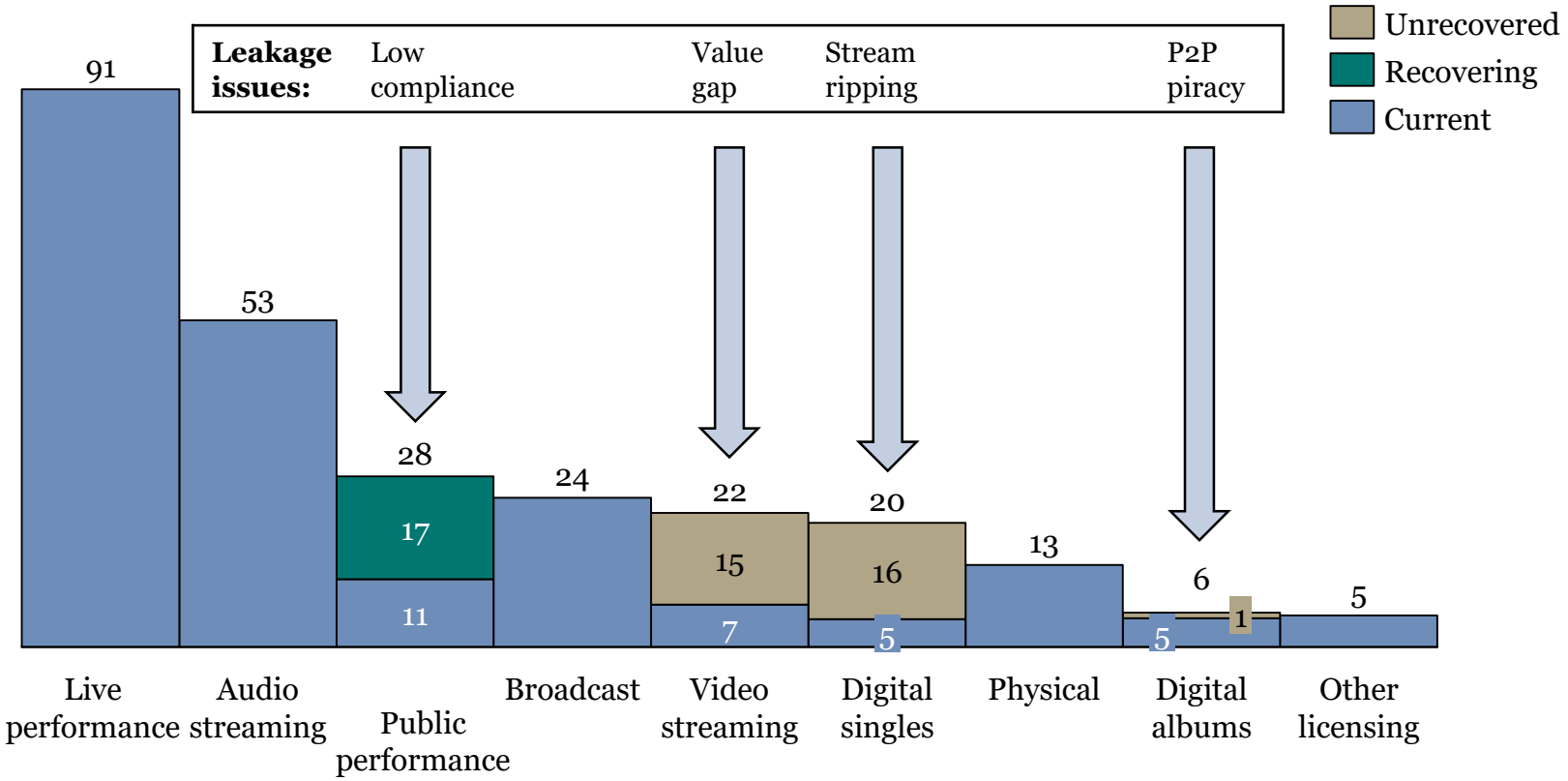
Note (*): Stream equivalents convert album and singles downloads at ratio of 380:1 and 38:1 respectively, based on 2017 NZ survey data

Source: Recorded Music; Radioscope; Horizon Research; ComScore Piracy Trends; ShS analysis

APPROX $50+ MILLION PA VALUE LOSS IS DRIVEN BY POOR COMPLIANCE, STREAM RIPPING AND THE 'VALUE GAP'

Estimated industry revenue lost through current copyright settings[1]

(NZ$ Million, 2016-2017)



Note: APRA/AMCOS data from 2016, Recorded Music Nata grossed up from 2017 first six months prorate, based on estimated coverage; (2) Recovering revenue total is an estimate based on the current share of licensing for the retail sector; (3) Dr George Barker estimates quantify lost revenue greater on a top-down basis ; (4) Copyright term is a quantifiable risk to all channels; (5) Digital singles estimates stream ripping value based on pirate user data from 2017 internet usage and NZ survey, applies average Spotify price

Source: Recorded Music; APRA/AMCOS; Label data; Horizon Research; ComScore Piracy Trends; Dr George Barker; ShS Analysis

THERE ARE TWO KEY MECHANISMS FOR IMPROVING MARKET EFFICIENCY

Market Efficiency Mechanisms

Mechanism	Description	Music industry context	How market efficiency is improved
Healthy competition	Competing for customer favour through trending towards low cost convenient services	Competitive market with cheap, user friendly streaming services	Consumers pay a fair price for a high quality experience, producers are remunerated fairly
Government regulation	Legislation implemented to address anti-competitive or unlawful behaviour	Diminishing the effect of piracy through legal clarity and effective controls	Copyright infringement is reduced and legal consumption increases

STAKEHOLDER STRATEGIES Source: ShS analysis

NZ MUSIC INDUSTRY MECHANISMS HAVE BEEN EXERCISED AND EXHAUSTED IN CURRENT REGULATORY ENVIRONMENT

More convenient services have been offered and adopted

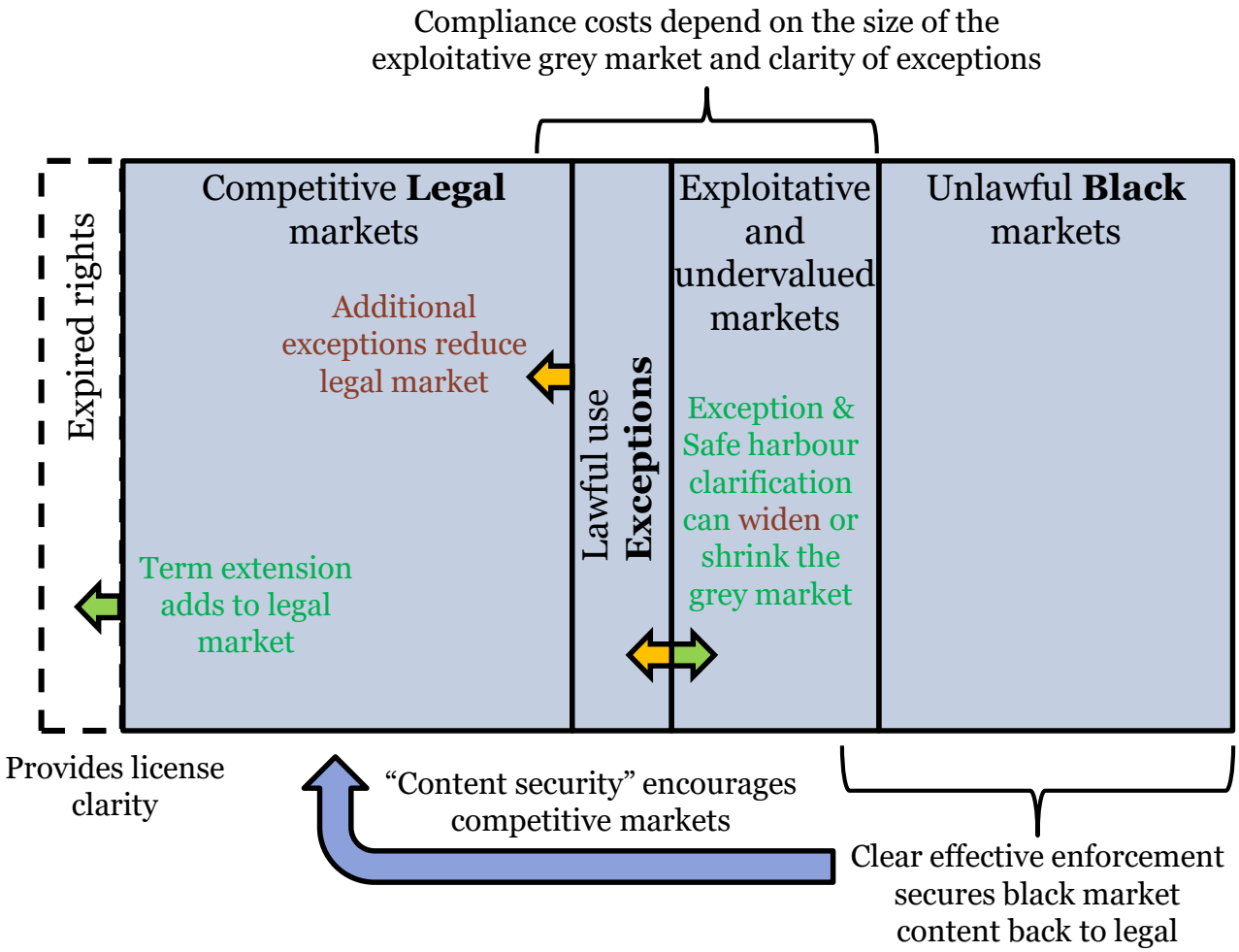
- Audio streaming is growing rapidly with the help of Spotify and Spark partnership
  - 8% more New Zealanders using the platform since 2015
- Digital downloads are decreasing
  - 9% reduction in New Zealanders using major services since 2015

Action has been taken to enforce copyright law with limited success

- Recorded Music (then RIANZ) has delivered ~15,000 takedown notices at a total cost (hard only) of $375,000 but many millions incurred on implementation
- RIANZ won 17/20 court cases with the average sum awarded at $500
- RIANZ ceased action after net value was found to be significantly negative (-$366,500)
- After six months unique piracy visits returned to pre-intervention levels

COPYRIGHT REFORM CAN HELP ACHIEVE AN EFFECTIVE AND EFFICIENT DIGITAL NZ MUSIC MARKET…

Effects of copyright to correct market leakage



Source: ShS interviews, analysis

INTERNATIONAL COPYRIGHT INTERVENTIONS HAVE SUCCESSFULLY IMPROVED DIGITAL MARKET EFFICIENCY

Efficiency of Government Interventions

Intervention	Description	Country	Effect	Comments
Infringing file sharing amendment act	3 strikes regime where rights holders sent notices to infringers, then prosecution through the Copyright Tribunal	New Zealand	55% reduction in top-200 movie piracy Immediate 23% drop in unique visits to pirate sites	Piracy volumes returned to pre-intervention levels after six months
HADOPI	Similar to New Zealand initiative above	France	25% increase in music digital sales	Piracy reduction not quantified
IPRED	Rights holders may request identity of infringers from ISPs and then prosecute (no warnings)	Sweden (majority of Europe has a version of this)	32% reduction in piracy 36% increase in music sales	Uncertain whether piracy reduction was sustained
Site blocking	First wave blocked 19 sites in 2013 Second wave blocked 53 sites in 2014	UK (25-32 countries have this)	90% reduction in visits to blocked sites 22% reduction in total piracy 16% increase in use of legal channels	Heaviest pirate users had 28% reduction and 37% increase in legal channels

Source: ITIF, *How website blocking is curbing digital piracy without "breaking the internet";* Adermon, A., Liang, C.; *Piracy and Music Sales: The Effects of An Anti-Piracy Law;* NZ Herald, *Internet piracy drops after 'three strikes' law*; ComScore, *Piracy trends*

GROWING CREATIVE VALUE

STAKEHOLDER STRATEGIES

NEW ZEALAND CAN REALISE BENEFITS BY DEVELOPING THE CREATIVE SECTOR

There are benefits for New Zealand in developing creative industries

- Potential value gap of 2.5-3% of GDP to WIPO top quartile
- There are also important non-economic gains

Other countries have realised benefits from developing creative industries

- UK capturing uplift of 0.7% of GDP
- A diverse range countries

New Zealand can develop creative industries within the Creative Sector

- Key success factors to develop Creative Sector identified
- Copyright is a precondition for an efficient and effective digital and physical market
- New Zealand can improve key success factors to develop Creative Sector

THERE IS A POTENTIAL OPPORTUNITY OF 2.5-3% GDP IN CREATIVE SECTOR CONTRIBUTION TO PURSUE

Estimated direct contribution of Creative Sector as defined by MBIE is a modest 1% of total GDP

WIPO dataset provides a means to compare Creative Sector contribution between countries

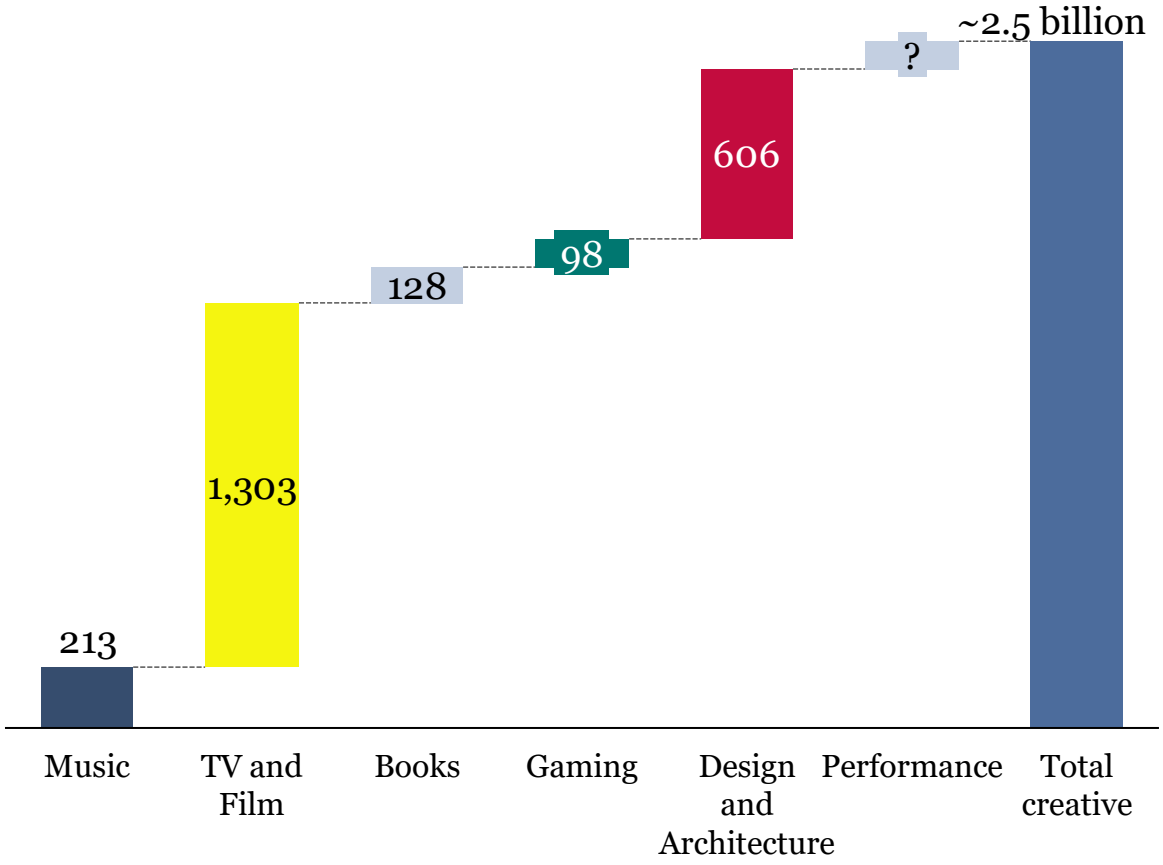
Preliminary estimate of NZ Creative Sector based on WIPO definition is 4.5% GDP

- Suggests New Zealand is below the average value estimated under WIPO approach
- Indicating a GDP gap of 2.5-3% to WIPO top quartile average

ESTIMATED CONTRIBUTION OF CREATIVE SECTOR AS DEFINED BY MBIE IS 1% OF TOTAL GDP

Estimate of Annual Direct Contribution to GDP

($M, 2014)



~1% of direct GDP; plus an estimated 2% through indirect multipliers

Note: PwC input-output multiplier analysis, reviewed by ShS; Design and architecture value limited to Discovery and Define stages; Performance estimate requires further research; TV and Film contribution validated by NZ Film Commission.

STAKEHOLDER STRATEGIES

Sources: PwC NZ: direct industry sizing for Music, Books, Tv and Film, and Gaming; The Value of Design to New Zealand, July 2017

BACKUP

ESTIMATE OF CREATIVE SECTOR OUTPUT WAS BASED ON MBIE CREATIVE SECTOR DEFINITION

Components of Creative Sector

What is created, produced, distributed and consumed in each subsector?	
Film and TV	Audio-visual content, including film, television and internet video formats like websites
Music and Sound Recordings	Musical compositions, lyrics, recorded music and other sound recordings (such as podcasts and sound effects)
Interactive Gaming	Video games for a variety of digital platforms, including PC, console, mobile, and in different formats, including virtual and augmented reality
Software and Web Design	Software products, such as websites and mobile applications, incorporating software code and other copyright works
Written Content and Print	Printed works such as books and newspapers (and their digital equivalents) as well as online-only written content like blog posts
Product Design and Architecture	Designs that are translated into three-dimensional items, such as fashion garments, furniture and architecture
Visual and Performing Arts	Visual arts (including photography, painting and sculpture) and performing arts (such as dance and theatre)

Source: Copyright and the Creative Sector, MBIE December 2016

WIPO DATASET OFFERS A MEANS TO COMPARE CREATIVE SECTOR BETWEEN COUNTRIES

WIPO Segment	Core Industries	Interdependent Industries	Partial Industries	Non-dedicated Industries
Description	Industries that are wholly engaged in protected works, from creation through exhibition to distribution and sales	Industries that facilitate the creation, production, or use of works and other protected subject matter	Industries in which a portion of the activities is related to works and other protected subject matter	Industries in which activity is partly related to facilitating broadcast communication and the distribution or sale of works and protected subject matter
Examples of Included industries	Including • Press and literature; • Music, theatre, operas; • Motion picture and video; • Radio and television; • Photography • Software, computer games; • Visual and graphic arts; • Advertising services; • Copyright collectives	• Manufacture, wholesale, and retail of TV sets, radios and other similar equipment; • Computers and equipment; • Tablets and smartphones; • Musical instruments	• Apparel, textiles, and footwear • Jewelery and coins • other crafts • Furniture • household goods, china, and glass • wall coverings and carpets • toys and games • museums	• General wholesale • General retail • General transportation • ICT (including wired, wireless, satellite, and internet)
Component included	All of the industry	Subset of the industry, based on the portion driven by works	Subset of the industry, based on portion generating works	Portion of the industry based on the volume dedicated to core to partial industries
In practice how to apportion	Use industrial classification codes	Analysis of volume drivers based on works generation and works delivery	Value chain assessment and role descriptions	Surveys generally, miles travelled estimates, freight related to creative works
% of GDP for NZ	3.3%	0.7%	0.2%	0.3%
Basis	NZ ANZSIC selected by name	Applied Australian ratio	Applied Australian ratio	Applied Australian ratio

STAKEHOLDER STRATEGIES

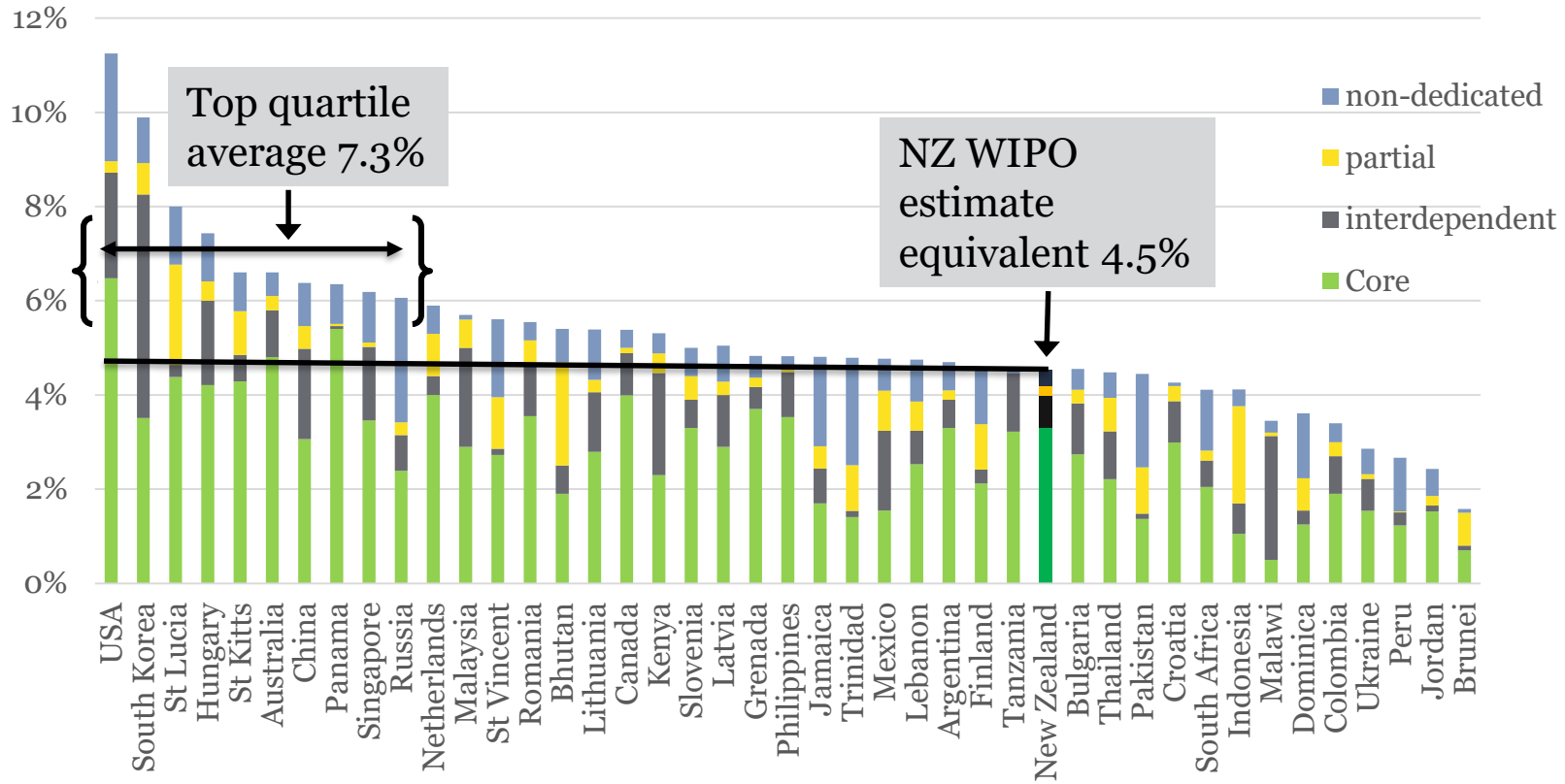
Sources: World Intellectual Property Organisation (WIPO); Statistics NZ; Preliminary ShS GDP estimate based on Australian proxy.

Preliminary

RELATIVE RANKING SHOWS GAP BETWEEN PRELIMINARY ESTIMATE OF NZ AND WIPO TOP QUARTILE GDP CONTRIBUTION

WIPO Copyright Industries Contribution to GDP

(2011 to 2014, NZ is 2013)

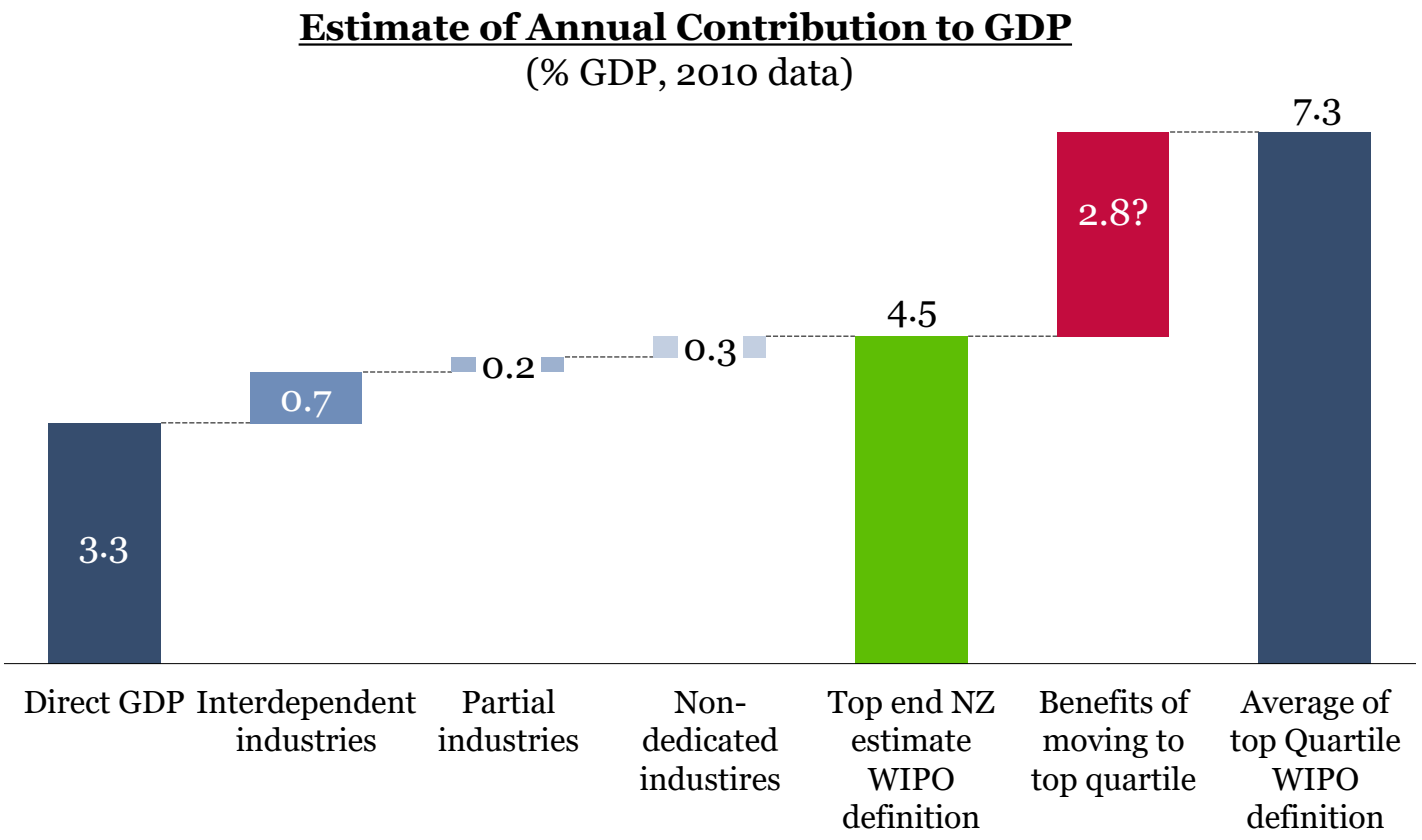


Note: NZ is not a member of WIPO but ShS has made preliminary estimates of GDP based on equivalent definitions and analogues

Sources: World Intellectual Property Organisation (WIPO); Statistics NZ; ShS estimates

Preliminary

ESTIMATE OF NZ CREATIVE SECTOR BASED ON WIPO DEFINITION INDICATES 2.8% GAP TO TOP QUARTILE AVERAGE

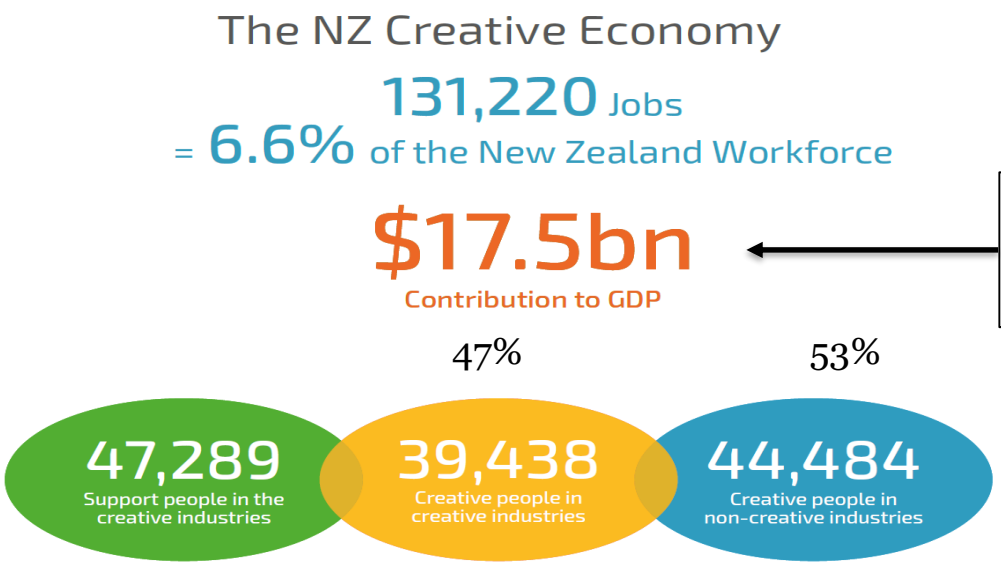


Note: Final target is based on assessment of reasonable aspiration: average of top quartile countries reporting to WIPO
Preliminary estimate of GDP gap does not imply all of this is addressable (e.g. given geographic and structural constraints)

STAKEHOLDER STRATEGIES

Sources: Statistics NZ ANZSIC codes; WIPO definitions; ShS preliminary estimate.

NZIER ESTIMATES $17.5BN GDP FROM ALL CREATIVE ACTIVITY, WITHIN AND OUTSIDE CREATIVE SECTOR



NZIER estimate of the creative sector plus creatives in other sectors

Category	Support in creative	Creative in creative	Creative elsewhere
Share (%)	36%	30%	33%
Implied GDP $NZ	6.3	5.2	5.9

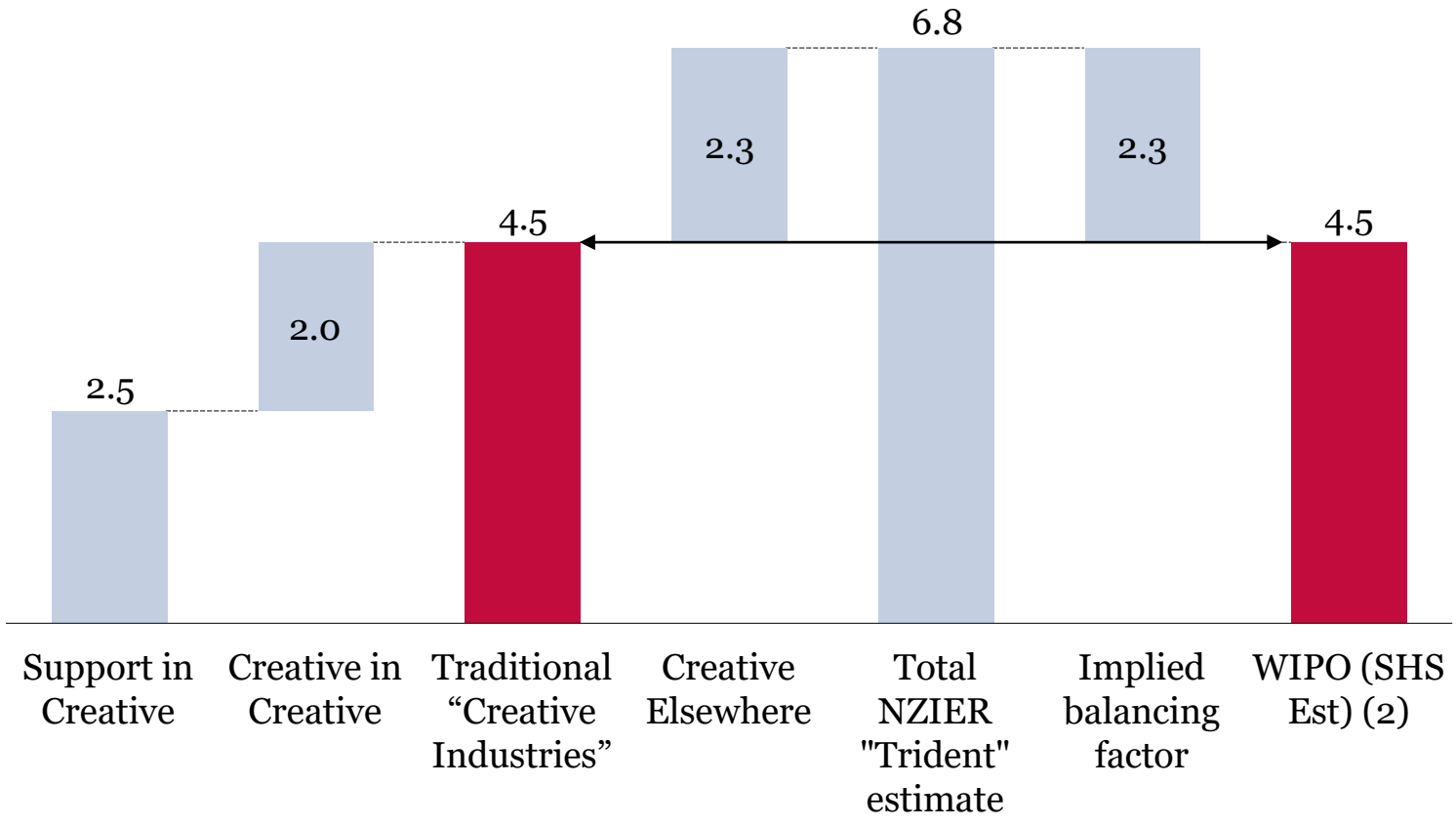
$11.5b or ~4.5% of GDP (NZIER data)

More traditional view of the creative sector in New Zealand

Source: NZIER "The Evolution of Kiwi innovation:" March 2017, Unpublished paper for WeCreate. Note: 2013 $NZ GDP data as represented in NZIER report.

NZIER "TRIDENT" AND SHS "WIPO" METHODS BOTH ESTIMATE 4.5% GDP FOR EQUIVALENT CREATIVE INDUSTRIES

Estimate of Annual Contribution to GDP (1)
(% GDP , $2010 (WIPO), $2013 (NZIER)



Note: (1) NZ is not a member of WIPO but ShS has made preliminary estimates of GDP based on equivalent definitions and analogues.
(2) Equivalence is approximate only as the measurement approach differs: NZIER data includes Design, whereas WIPO methodology does not. WIPO includes non-dedicated industries (e.g. transportation of creative work) .
Sources: World Intellectual Property Organisation (WIPO); Statistics NZ; ShS estimates; NZIER "The Evolution of Kiwi innovation" Mar 2017

THE OECD IDENTIFIES A BROAD RANGE OF ECONOMIC AND OTHER BENEFITS FROM CREATIVE SECTOR

OECD-Recognised Benefits

Economic benefits, more readily quantified	Economic and other benefits, more challenging to quantify
Generating economic growth, exports, and employment	Developing linkages to tourism, urban, and regional development
Developing intellectual property	Strengthening cultural identify and diversity
Diversifying national and regional economies	Generating beneficial externalities
Promoting research and development	Supporting education and training
Stimulating innovation	Addressing market failure by stimulating the production of public goods and addressing imperfect competition

"In many countries, the creative industries have grown faster than the economy as a whole, making them attractive to policy makers as drivers of sustainable economic growth and employment"

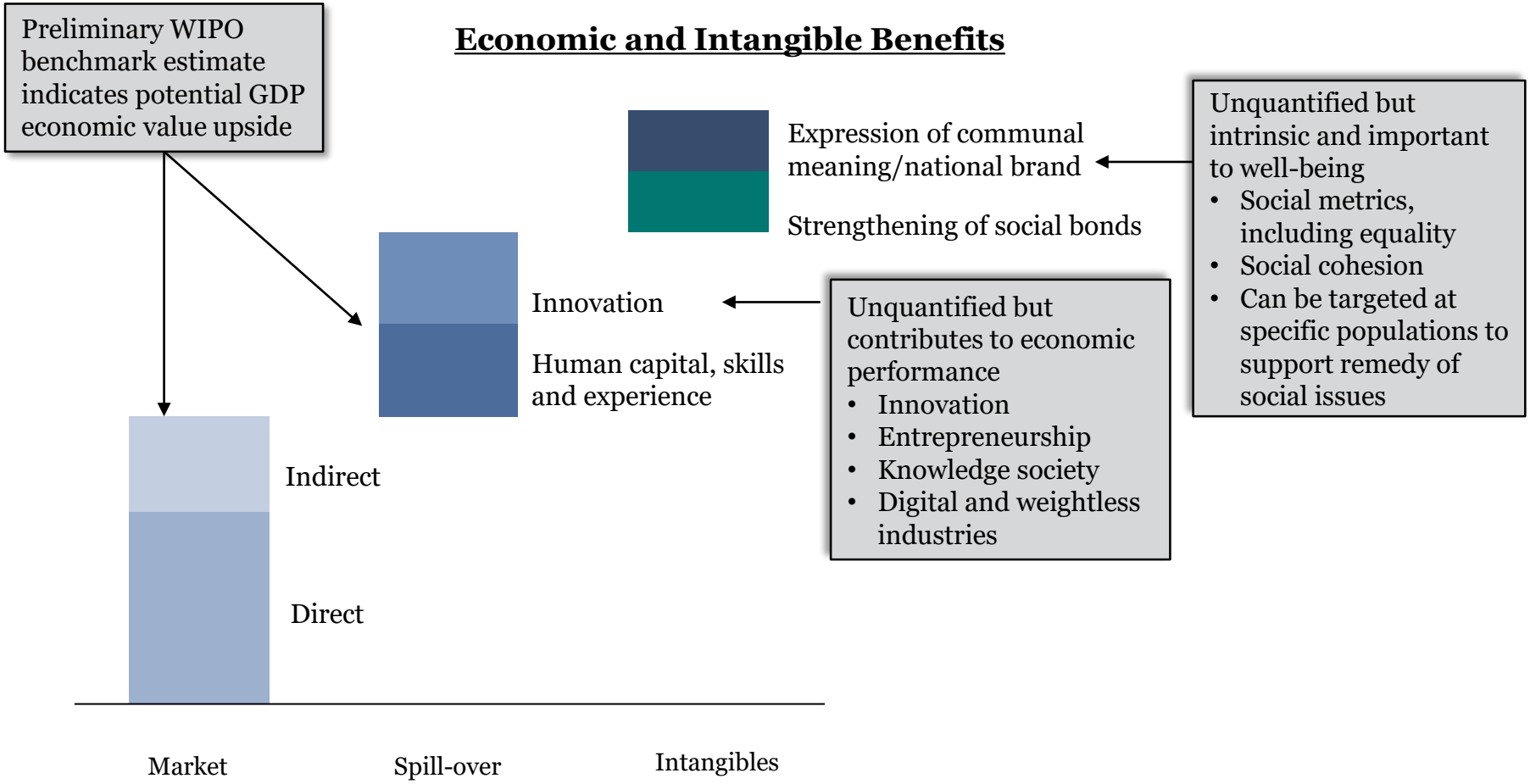
STAKEHOLDER STRATEGIES

Source: OECD 2014 Tourism and the Creative Economy http://dx.doi.org/10.1787/9789264207875-4-en

A CREATIVE SECTOR STRATEGY CAN DELIVER MORE THAN JUST INCREASED GDP

Preliminary WIPO benchmark estimate indicates potential GDP economic value upside

Economic and Intangible Benefits



Unquantified but intrinsic and important to well-being
- Social metrics, including equality
- Social cohesion
- Can be targeted at specific populations to support remedy of social issues

Unquantified but contributes to economic performance
- Innovation
- Entrepreneurship
- Knowledge society
- Digital and weightless industries

Sources: BCG Victoria's Creative and Cultural Economy; Global Creative Index 2015; ShS analysis

NEW ZEALAND CAN REALISE BENEFITS FROM CREATIVE SECTOR STRATEGY

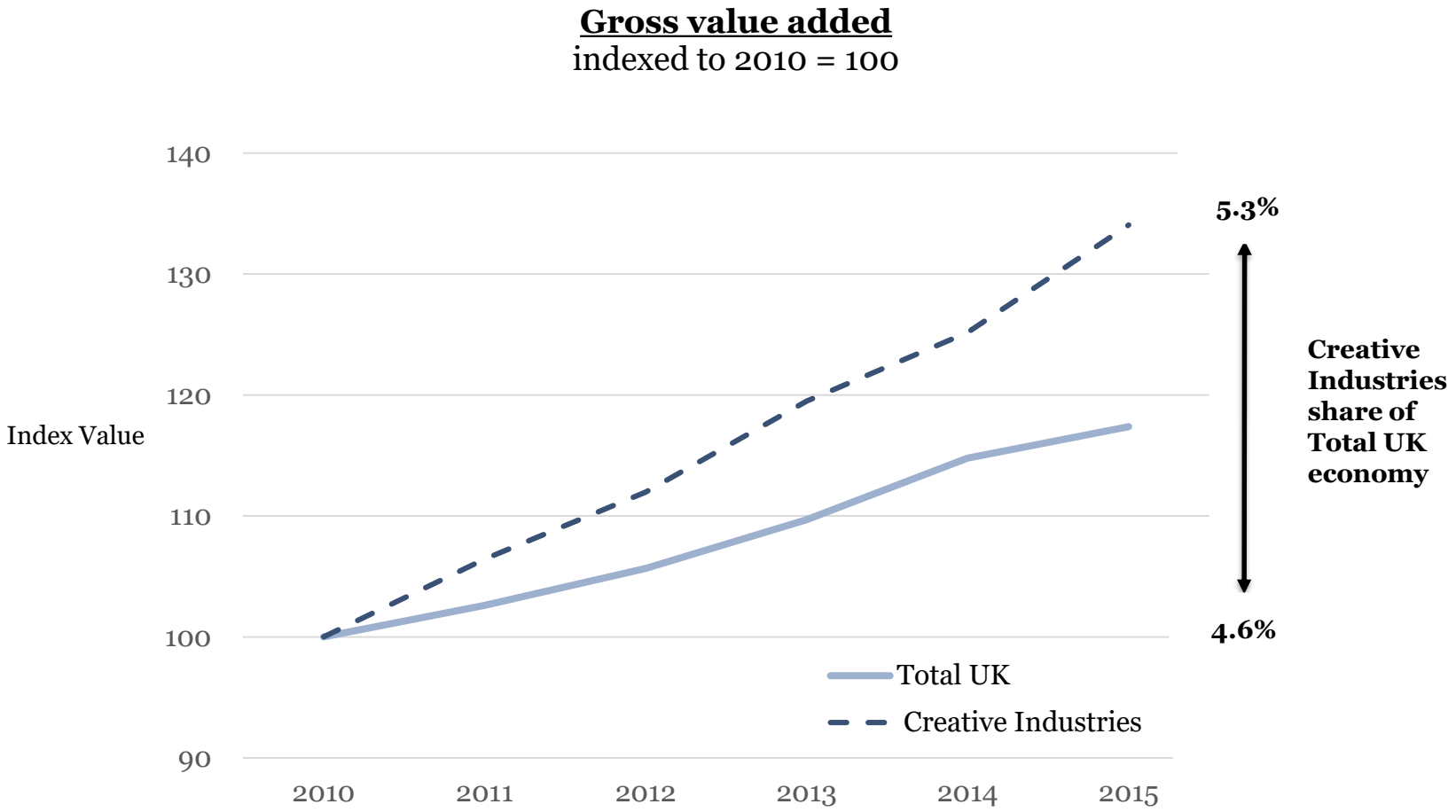
Other countries have realised benefits from developing Creative industries/Sector

- UK creative industries increased contribution to GDP from 4.6% to 5.3% in 5 years
- Like the UK, many countries have seen creative industry growth lead the economy

New Zealand can take steps to develop the Creative Sector

- Three major intervention types are used to boost creative industries internationally
- Seven key success factors arise from international experience in developing the Creative Sector
- Low supply of key success factors may block NZ realisation of benefits from high creative index
- New Zealand's rating on key success factors can be improved

UK CREATIVE INDUSTRIES INCREASED CONTRIBUTION TO GDP FROM 4.6% TO 5.3% IN 5 YEARS

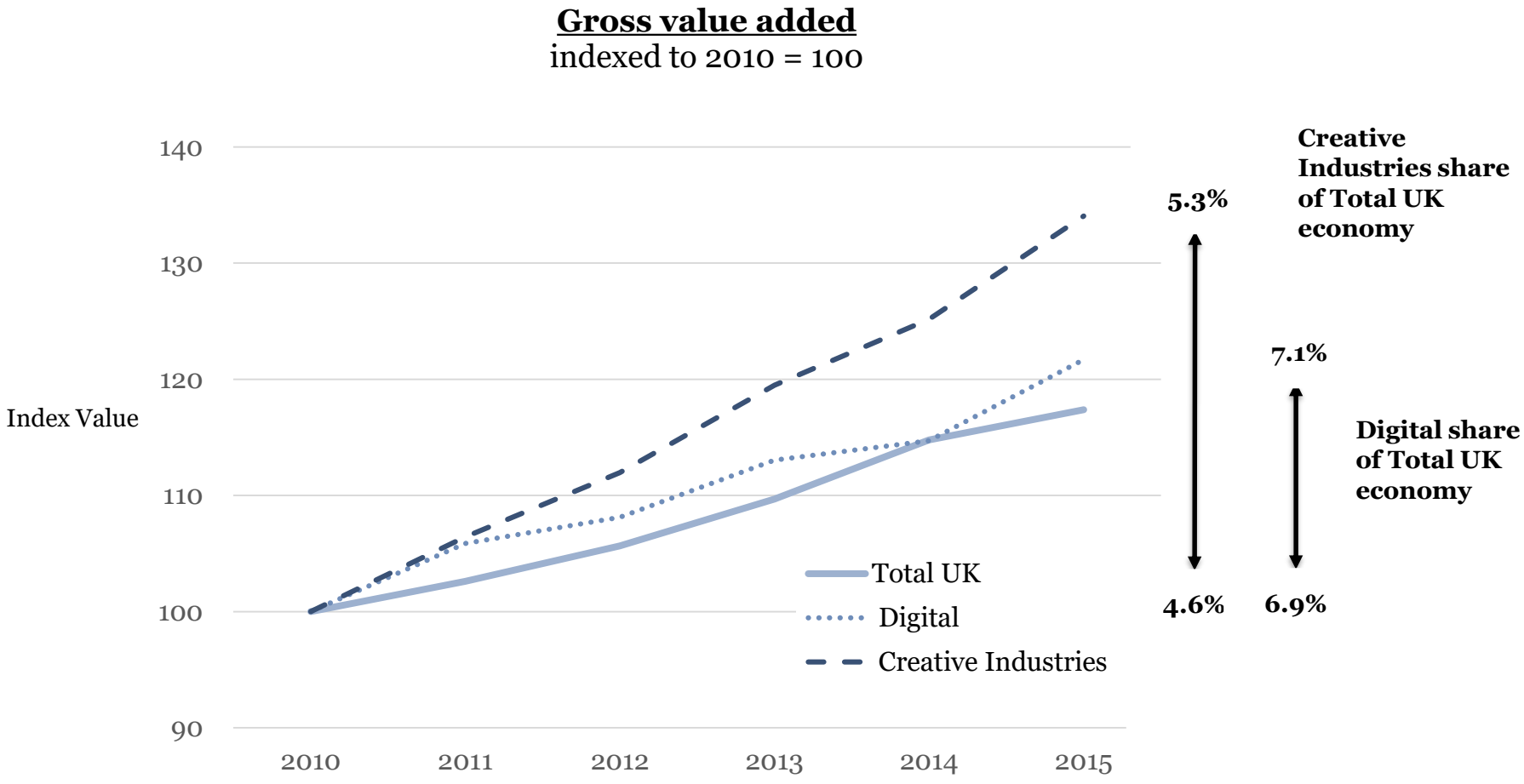


Note: First UK Creative strategy launched 2005 – value tracking followed full implementation in 2010
Source: UK Department of Digital Culture, Media and Sport (DCMS) 2016 GVA Statistics

STAKEHOLDER STRATEGIES

Backup

UK CREATIVE INDUSTRIES OUTPACED DIGITAL, BUT FROM A SMALLER BASE



Source: UK Department of Digital Culture, Media and Sport (DCMS) 2016 GVA Statistics

Backup

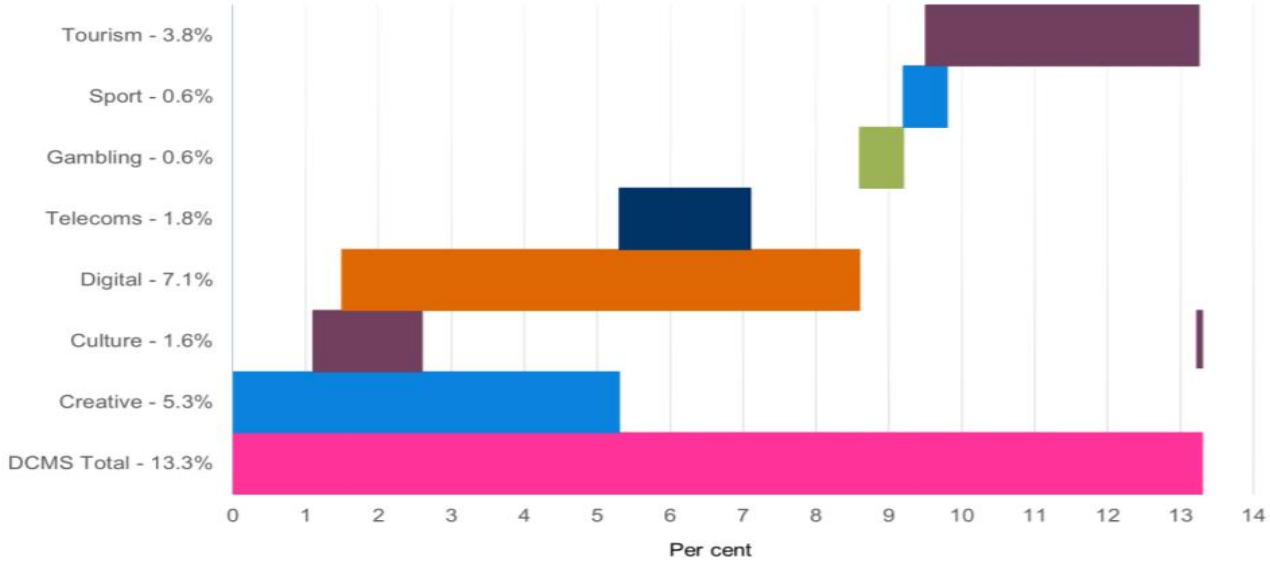
CREATIVE AND DIGITAL OVERLAP SUBSTANTIALLY

GVA Overlaps in DCMS Sectors

(%, GVA, 2015)

The Digital Sector alone made up half of the DCMS sectors' GVA in 2015 (7.1% of UK GVA), whilst Creative Industries represented over a third (5.3% of UK GVA). There is considerable overlap between the DCMS sectors for example 3.8 per cent of UK GVA is in both Creative Industries and the Digital Sector. The overlap between sectors is represented in Figure 3.4 below, and means that the individual sectors cannot be summed to get an estimate of the GVA for all DCMS sectors combined.

Figure 3.4: GVA overlaps in DCMS sectors: 2015

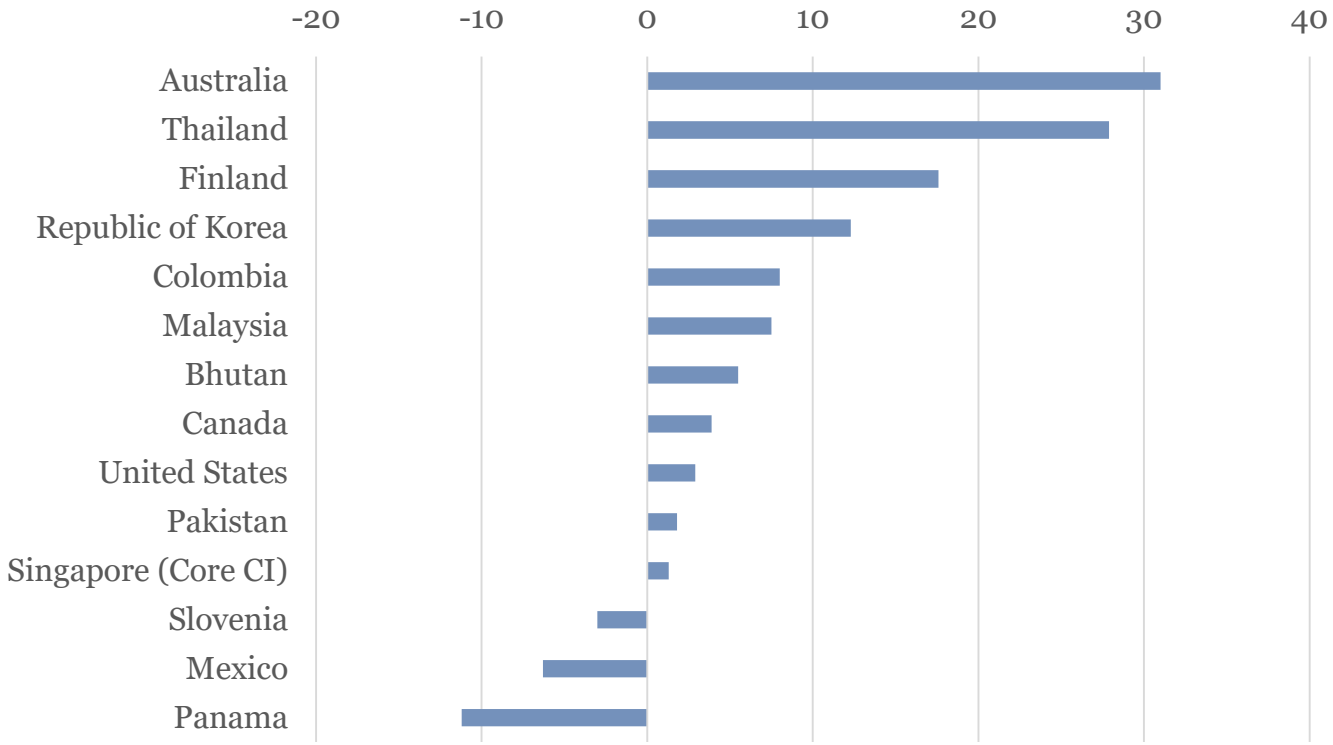


Source: UK Department of Digital Culture, Media and Sport (DCMS) 2016 GVA Statistics; https://www.gov.uk/government/statistics/dcms-sectors-economic-estimates-2016

MANY COUNTRIES HAVE SEEN CREATIVE SECTOR GROWTH LEAD THE ECONOMY

Degree to which creative industries outpaced the national economy

(Gap between growth of creative industry and economy, ranges of 3-11 years, between 1991 and 2012)



Note: Longest period available ranging from 3 to 11 years, earliest 1991 and most recent 2012; some constant and some current dollar changes.

STAKEHOLDER STRATEGIES

Source: WIPO Guide on Surveying the Economic Contribution of the Copyright Industries 2015 Revised Edition

BACKUP

COMPARISON OF CREATIVE SECTOR GROWTH RATES TO OVERALL ECONOMY - DETAIL

Country	Period	Current or Constant values	Growth	
			Copyright industries (%)	Total Economy (%)
Singapore (Core CI)	1986-2001	Constant	8.9	7.6
Canada	1991-2002	Current	6.5	2.6
Mexico	1998-2003	Current	3.7	10.0
Colombia	2000-2005	Constant	26.3	18.3
Australia	1996-2007	Current	66.0	35.0
Malaysia	2000-2005	Constant	10.7	3.2
Finland	2005-2008	Current	20.0	2.4
Pakistan	2004-2008	Current	30.0	28.2
Panama	2002-2006	Constant	19.2	30.4
Slovenia	2002-2007	Current	49.2	52.2
Bhutan	2005-2010	Constant	15.0	9.5
Republic of Korea	2006-2009	Constant	21.9	9.6
Thailand	2002-2006	Current	36.6	8.7
United States	2009-2012	Constant	5.0	2.1

Source: WIPO Guide on Surveying the Economic Contribution of the Copyright Industries 2015 Revised Edition

THREE MAJOR INTERVENTION TYPES ARE USED TO BOOST CREATIVE INDUSTRIES INTERNATIONALLY

Intervention Types	Intervention Categories	Examples
Supply side: Interventions focus on fostering the talent pool and building out the missing elements of the value chain	• Apprenticeships • Education and school programmes • Skill development • Cluster development • Shared or common resources	"Pinewood Iskandar Malaysia Studios" addressed gap in studio infrastructure • 'Marco Polo' filmed there
Demand side: driving market growth through • Branding • Events • Laws to encourage local IP development	• International market development • Major events • Shoulder season events • Market access • Brand building	China Film Co-Production Corporation • More Chinese global film content
Market efficiency: Ensure the market is operating smoothly, especially with regards to small businesses and individual early career artists/creative talent	• SME managerial training • Finance guarantees and support • Cluster development	Mayor's Office of Media and Entertainment set up a 'one-stop shop' • NYC music industry collaboration

Sources: Sparking the Flame, BCG 2017 (study commissioned by UK Bazlegate review, assessed 240 interventions in over 20 markets); ShS research

SEVEN KEY SUCCESS FACTORS ARISE FROM INTERNATIONAL EXPERIENCE IN DEVELOPING CREATIVE SECTORS

Key Success Factor	Description	Countries demonstrating	Estimated Importance
1. Copyright settings that support creators	Favourable settings currently include: • If Safe Harbour then passive only • Fair deal or effectively limited fair use • Notification achieves cessation of illegal Legislative willingness to modify and update copyright settings to address developments	UK, Australia, EU	High – basically table stakes.
2. Industry participants have a strong voice	Creative Sector participants engage with each other and government in an effective manner, particularly to clarify where they are aligned	Across most surveyed success examples	High – stimulates collaboration and cross-pollination
3. Excellent execution to SME level	Declaration of objectives gets follow-through with supporting action, industry engagement is genuine	UK, Australia	High, particularly for top-down Government initiated
4. Government recognition, partnering	Creative Sector is defined, measured, and there is a designated touchpoint high- up in government, if not cabinet level	Across most countries, can be provided at national or regional level	High or moderate –less so with well-established creative industries
5. Digital infrastructure	Digital resources are not considered a constraint on Creative Sector or its interaction with consumers	Supports or inhibits SMEs and regions, noted for policy in Australia, UK, USA	Moderate – like copyright settings a tablestake, less relevant if domestic market is small
6. Government resources	The government provides funding to support creative industries in supply, demand, and market operation	In variable amounts, with a variety of targets	Moderate
7. Top 10 plank of economic policy	The economic impact of Creative Sector is noted to be one of the top contributors to the economy or upcoming growth of economy	Some standout examples like UK, but others like Australia regional	Moderate to lower

Source: ShS international benchmarking and research

NEW ZEALAND SCORES POORLY ON THE SEVEN BENCHMARKED SUCCESS FACTORS

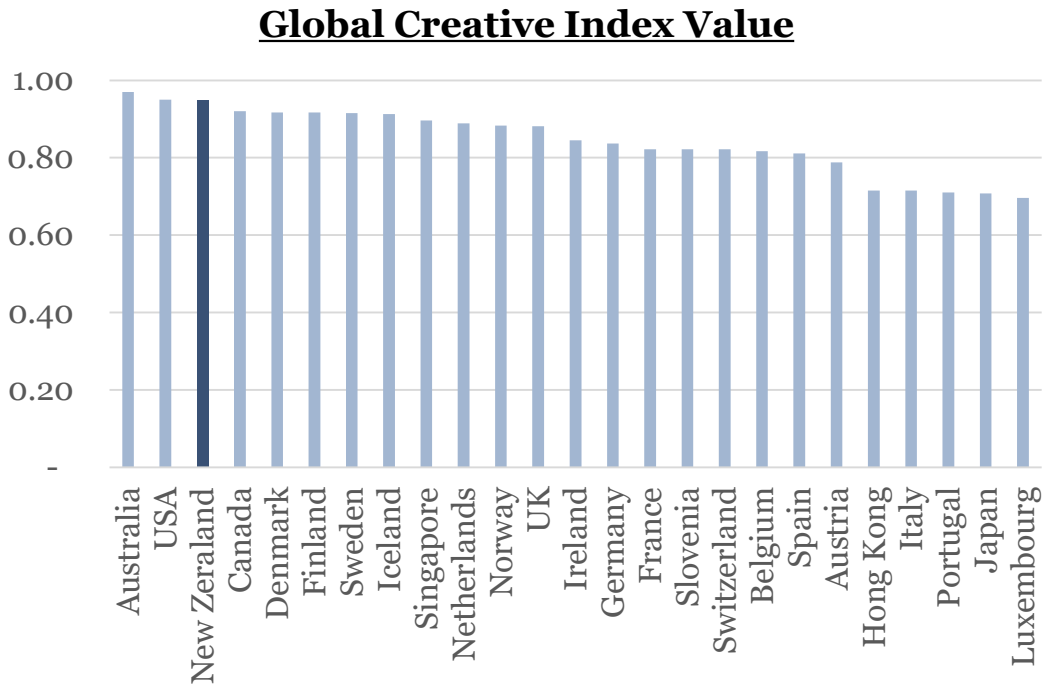
Key success factor	Australia	UK	Sweden	Norway	New Zealand
1. Copyright settings	●	◕	◕	◕	◑
2. Voice of industry participants	◕	●	◑	◕	◑
3. Execution to SME level	◕	◕	◕	◕	◔
4. Government recognition and partnering	◕	◕	◕	◕	◔
5. Digital infrastructure	◕	◕	◕	◕	◕
6. Government resources	◕	◕	◑	◕	◔
7. Top 10 plank of economic policy?	◕	●	◑	◔	○
Value out of possible 28	22	23	18	19	10

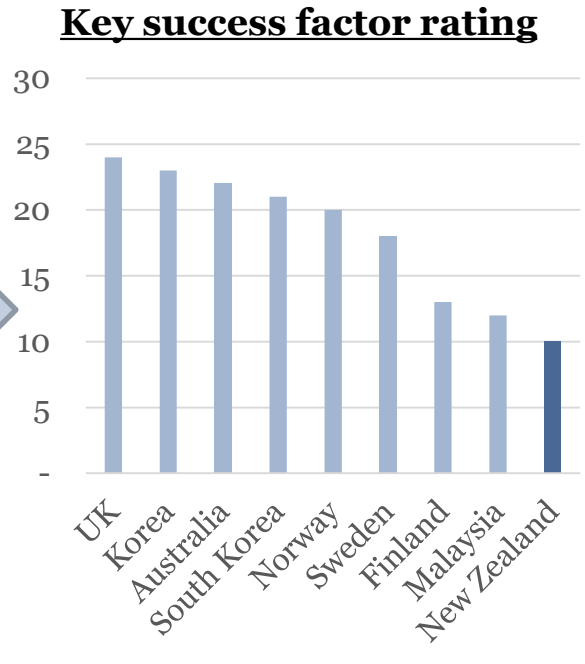
Notes: Australia assessment includes regional rather than national perspective; Value of 28 assumes equal weighting across key success factors

STAKEHOLDER STRATEGIES

Sources: ShS benchmarking: countries with creative industry strategies or development objectives.

LOW SUPPLY OF KEY SUCCESS FACTORS MAY BLOCK NZ REALISATION OF BENEFITS FROM HIGH CREATIVE INDEX





Notes: The Global Creative Index measures national capacity for creativity based on three dimensions. NZ ranks highly across all dimensions: 7th in Technology; 8th in Talent; 3rd in Tolerance

STAKEHOLDER STRATEGIES

Source: 2015 Global Creativity Index compiled by Florida/Mellander/King

NEW ZEALAND'S RATING ON KEY SUCCESS FACTORS CAN BE IMPROVED

Key success factor	NZ now	Current state	Opportunity to improve	NZ result
1. Copyright settings	◑	Piracy not adequately prevented – e.g. no site-blocking. Safe harbours do not specify passive, term is 50.	Amend copyright settings to underpin efficient effective market: safe harbours passive only, site-blocking, term etc	●
2. Voice of industry participants	◑	Cross-industry voice is nascent with WeCreate	Support growth of We Create	◕
3. Execution to SME level	◔	No creative industries strategy, definition for copyright review varies to industry self-definition at We Create	Commit to a creative industries strategy and deliver it well	◕
4. Government recognition and partnering	◔	Creative industries interact with government independently, to various degrees, without guidance of unified creative strategy	Commit to a creative industries strategy	◕
5. Digital infrastructure	◕	This has largely been delivered where immediately feasible, or is underway	Continue to deliver good performance, but tough to increase the assessment	◕
6. Government resources	◔	It is hard to know how much resource is available to creative industries given the diverse channels and programmes	Not so much invest more but coordinate investment and provide resources to administer the creative strategy development and measure creative industries	◑
7. Top 10 plank of economic policy?	○	Creative industries are not considered relevant to Business Growth Agenda	Need good measurement to assess whether this is feasible or appropriate – measure and manage	○ - ●
Value out of 28	10			18-22

POSITIVE POLICY OUTCOMES

STAKEHOLDER STRATEGIES

BALANCED COPYRIGHT POLICY AND DYNAMIC SECTOR GROWTH ARE ASSISTED BY INTERNATIONAL EXPERIENCE

Copyright Review terms of reference focus on problem identification in four sections

- But could imply a primarily cost-based approach
- Creative content has previously been framed as an input (cost) to digital production

The value of copyright is perceived differently in other jurisdictions

International experience provides useful lessons for next steps in New Zealand

- Create UK
- Creative Victoria
- EU Digital Single Market

The creative sectors wish to engage constructively on policy and strategy

MBIE ISSUES PAPER FOCUSES ON PROBLEM IDENITFICATION IN FOUR SECTIONS

Section	Description
Overview/framing	• Taking an innovation-driven perspective while • Acknowledging need for sustainable incomes to rights holders but rejects a "natural justice"- based approach
1. Rights	• Where did they come from (history and jurisprudence) • International policy benchmarking (TRIPS, FTAs, precedents) • Fitness for purpose, transaction costs
2. Exceptions	• "Holistic level" public good of access and co-creation (fair use) • Ability to us (economic analysis yet to be defined) • Cultural protection and taonga
3. Transactions	• How are transactions managed? • Licensing under the Act: what? when? workability? • Unresolved issues e.g Orphan Works
4. Enforcement	• Safe harbour • TPMs
5. Other	• Catch all for issues yet to be defined

Note (1): Subject to any potential review by the new Government
Source: MBIE Copyright Review Terms of Reference, SHS Interviews (MBIE, MCH, MFAT)

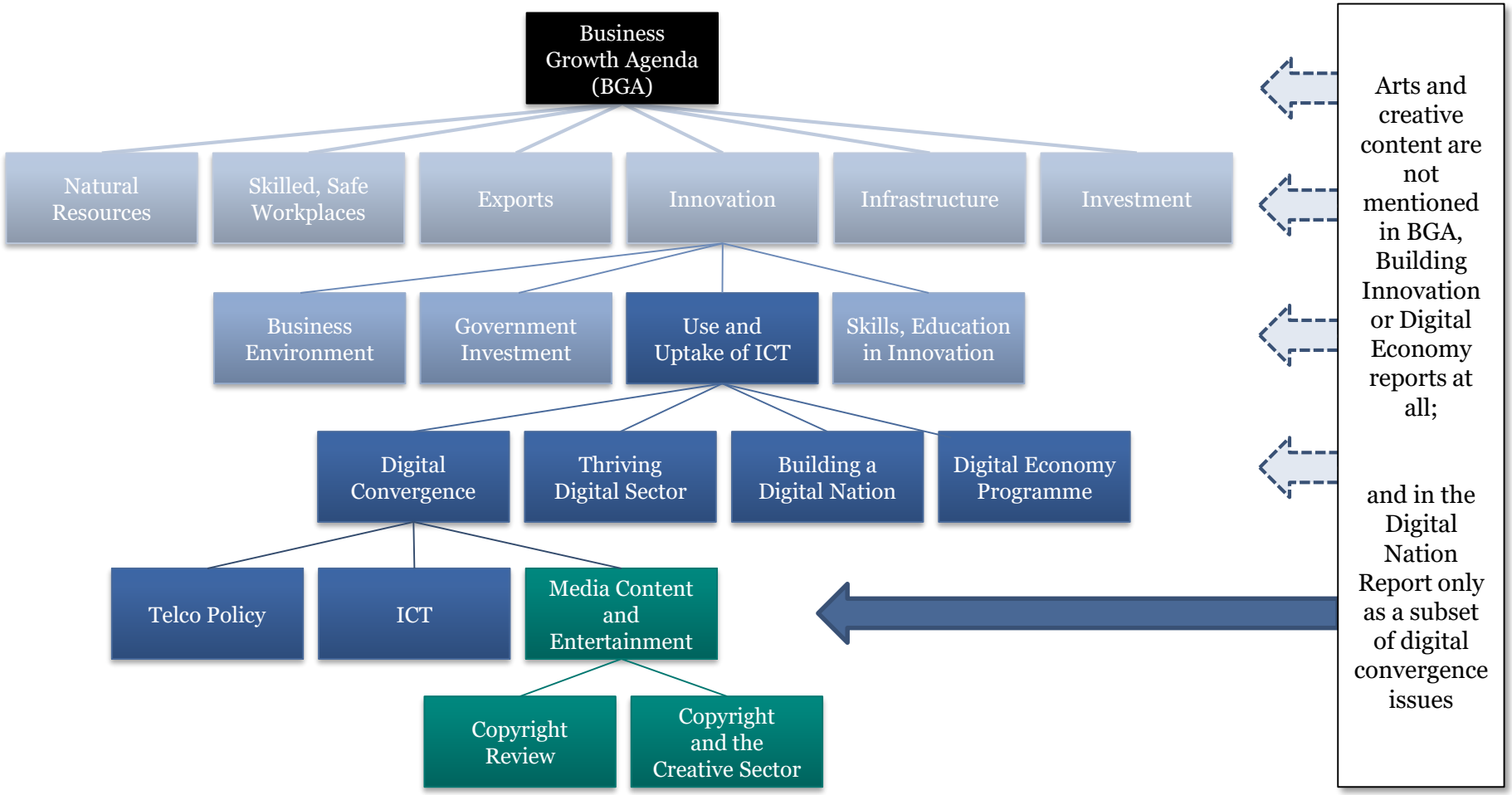
ORIGINAL COPYRIGHT REVIEW TERMS OF REFERENCE COULD IMPLY SOLELY A COST-BASED APPROACH

Copyright Review TOR	Issues Arising
1. "Provide incentives for the creation and dissemination of works, where copyright is the most efficient mechanism to do so"	• Efficiency test risks prioritising cost reduction over value creation
2. "Permit reasonable access to works for use, adaptation and consumption, where exceptions to exclusive rights are likely to have net benefits to NZ"	• Reasonable access implies Pt3/exceptions • Net benefit to NZ test can subsume rights
3. "Ensure that the copyright system is effective and efficient (including clarity, certainty, competitive markets, minimum transaction costs, and maintaining integrity and law)"	• Efficiency test is cost driven and may leave value opportunity unaddressed
4. "Meeting NZ's international obligations (Berne, WIPO, WTO, FTAs)	• Multilateral obligations are a floor • Term harmonisation lost in TPP12 • NZ-EU negotiations may update?

Source: MBIE Copyright Review Terms of Reference, SHS Interviews; Note that process and TOR may change in a change of Government

ARTS AND CREATIVE CONTENT HAVE PREVIOUSLY BEEN FRAMED AS AN INPUT (COST) TO DIGITAL PRODUCTION

Logic Structure, NZ Govt Documents - Framing of Copyright Review

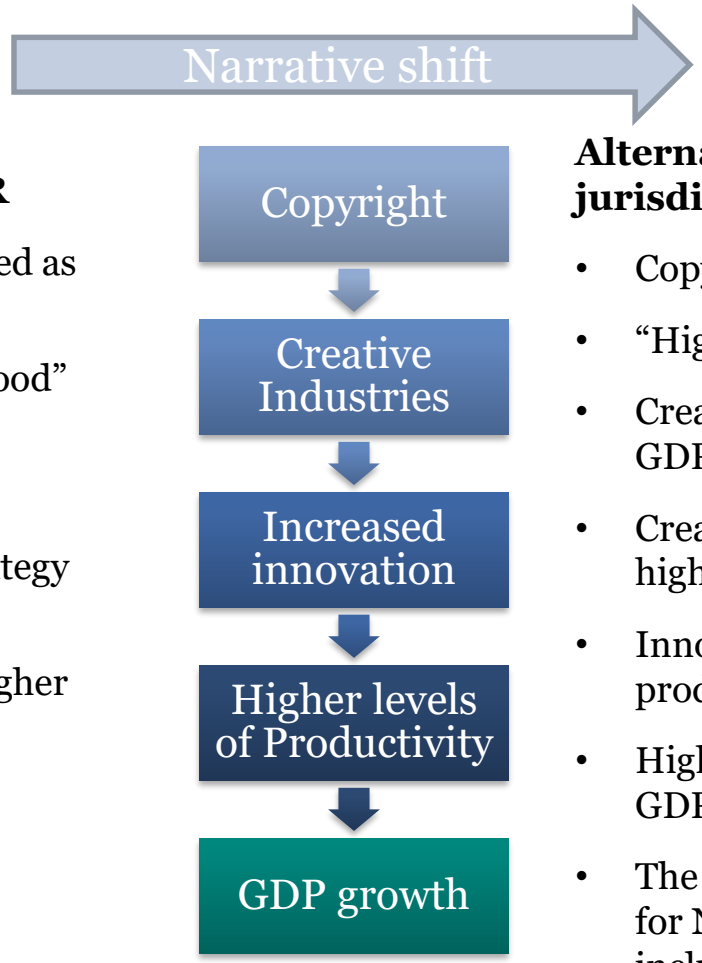


Source: MBIE BGA Programme; MBIE website; SHS analysis

COPYRIGHT VALUE IS PERCEIVED DIFFERENTLY IN OTHER JURISDICTIONS

Copyright Review TOR

- Copyright policy framed as innovation input
- "Lower input cost is good"
- ICT/digital context dominates
- Creative economy strategy is thin
- Innovation leads to higher levels of productivity
- Higher productivity delivers more GDP
- Increased GDP goal



Alternative approach in UK, other jurisdictions:

- Copyright protects creative industries
- "Higher value creation is good"
- Creative industries contribute to GDP, with high lateral spill-overs
- Creative economy strategy crucial to high value growth and cultural goods
- Innovation leads to higher levels of productivity
- Higher productivity delivers more GDP
- The objective is improved well-being for NZers, delivered by various means including GDP

Source: MBIE Copyright Review Terms of Reference, SHS research; note possible reframing following change of Government

INTERNATIONAL EXPERIENCE PROVIDES LESSONS FOR NEXT STEPS FOR NZ

The Create UK Model has important lessons for New Zealand

- Strong government leadership chaired by a Ministerial task force
- Partnership with industry champions
- Measurable results and documented progress
- Appropriate copyright protection seen as **fundamental**

Australia (esp. Victoria) recognises the spill-over benefits of its creative sector

Useful lessons are provided by the EU Single Digital Market reforms

- The EU appears to be achieving positive results

A wide range of international studies show links between creativity and innovation.

THE CREATE UK MODEL CONTAINS USEFUL LESSONS FOR NEW ZEALAND

UK Government Prioritises Creative Sector

Level 1 includes 25 ministries

- Department of Digital, Culture, Media and Sport (DCMS)

Senior business and government leaders champion specific work streams

Tangible goals and metrics support an action orientation

- Double creative services exports by 2020
- Grow share of global investment to 15%
- Grow share of creative businesses in UK
- Ensure higher proportion of creative start-ups survive 1 year+

Creative Sector Strategy

Guiding principles:

1. Developed for and by industry
2. Offers a shared vision
3. Is action oriented

Objectives

- Define and provide infrastructure
- Collaborate to innovate
- Support a UK IP environment to encourage development of IP assets
- Talented, skilled, and productive workforce
- Show UK creativity fuelled by diverse talent
- Encourage regional creative clusters

Sources: UK government website https://www.gov.uk/; Department for Digital, Culture Media & Sport

VICTORIA RECOGNISES ECONOMIC, SPILLOVER, AND INTRINSIC BENEFITS OF CREATIVE SECTOR

Hallmarks	Benefit type	Tangible benefits that will result
A vibrant and rich, cultural and creative sector with prolific, innovative industries	• Intrinsic	Victorian creative workers have • Opportunities to develop their practices and skills; • Produce significant work
Thriving creative industries	• Economic • Spillover	Cultural and creative businesses and organisations have • Access to skills, infrastructure, audience • Support to grow and options in space, facilities and resources • Undertake collaborative projects
Creativity is applied to add value across industry, education and public sectors	• Economic • Spillover	Collaboration occurs between • Creative sectors and industry, education and public services, • For commercial, creative, social or other purposes • Awareness of creative services influencing outcomes elsewhere
Arts and creativity valued by the local community	• Intrinsic • Spillover	• Affordable opportunities to engage with, study and pursue careers in the cultural and creative sectors. • Public events stimulate and inspire
Strong international engagement	• Intrinsic • Spillover • Economic	Attract tourists from across the globe Cultural and creative practitioners, businesses and other organisations export

STAKEHOLDER STRATEGIES

Source: Creative State Global City: Creative industries taskforce report November 2015 (Victoria)

USEFUL LESSONS ARE PROVIDED BY THE EU DIGITAL SINGLE MARKET REFORMS

EU Commission sought to update and validate its law "for the digital age" by:

- Vigorous anti-piracy measures
- Passive/active differentiation narrowing safe-harbour provisions
- Low cost, accessible exceptions, incentivised legal use
- Ensuring law technology neutral and supportive of digital creativity

EU DSM is seeking progress on priority areas for rights holders while ensuring consumer and SME interests were also respected; process is ongoing.

A similar approach could reduce risk for Government by building a broad consensus across digital and creative content communities

- Finding shared interests with ICT to drive joint creative/digital sector growth
- Working jointly on lifting the value of the combined sectors
- Contributing to higher overall levels of innovation and creativity

STAKEHOLDER STRATEGIES

Source: European Commission, Digital Single Market; SHS benchmarking

THE CREATIVE COMMUNITY WISHES TO MAKE A CONSTRUCTIVE CONTRIBUTION TO POLICY AND STRATEGY

The Creative Sector is increasingly working together within the WeCreate framework

There is an appetite for deep, evidence based engagement with Government

The Creative Sector is:

- Willing to explore common interests in shared value growth with digital media and the ICT sectors
- Keen to participate in evidence-based broad Creative Sector strategy

The Creative Sector would support creation of a Ministerial Task Force to partner with industry to grow the Creative Sector

Copyright is a necessary and basic ingredient of any thriving creative economy.

Schedule 4: Legal and Legislative Issues for Issues Paper on the Review of the Copyright Act 1994

Andrew Brown QC and Recorded Music New Zealand Limited

23 November 2017

Contents

(1) Review of the enforcement provisions and enforcement mechanisms in the Copyright Act

(a) Site Blocking Injunctions

1. The IFPI estimates that in 2016 users illegally downloaded 21.3 billion individual tracks via BitTorrent; 4.5 billion tracks via Cyberlockers and 3.3 billion tracks via stream ripping services. This produces a total of 29 billion tracks downloaded via these channels alone.

2. In the EU (particularly the UK), Australia and many other countries (including in India, Indonesia, Singapore, Malaysia, South Korea and Thailand) the availability of site blocking injunctions to stop users from accessing illegal websites has been one of the most important measures in preventing access to these websites. Almost always the content on illegal websites is hosted outside the jurisdiction and local ISPs cannot "take down" the infringing material, as it is not hosted on their servers. Therefore, an increasing number of countries around the world have adopted a legal basis to require local ISPs to prevent their subscribers from accessing specific foreign websites by way of blocking. A summary prepared by IFPI showing the availability of site blocking injunctions in many overseas jurisdictions is attached as **Appendix A**.

3. In Europe, the EU Information Society Directive in 2001 contained an obligation[1] on all member states of the EU to ensure that rights holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or a related right. This resulted in s 97A of the UK Copyright, Designs and Patents Act 1988 **(UK CDPA 1988)**:

> "97A.- (1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.
>
> (2) In determining whether a service provider has actual knowledge for the purpose of this section, a court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to -
>
> (a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013); and
>
> (b) the extent to which any notice includes-
>
> (i) the full name and address of the sender of the notice;
>
> (ii) details of the infringement in question.
>
> (3) In this section "service provider" has the meaning given to it by regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002]"

[1] Directive 2001/29/EC of the European Parliament and of the Council of May 22 2001 on the harmonisation of the certain aspects of copyright and related rights in the information society.

4. This provision gives the High Court power to grant an injunction against a service provider (ie ISP) where that service provider has actual knowledge of another person using its services to infringe copyright.[2] What needs to be shown is not actual knowledge of any specific infringement by a specific individual. A service provider may be given actual knowledge of infringement by receipt of a sufficiently detailed notice and a reasonable opportunity to investigate the position.[3]

5. The injunctive relief against the ISP may require the ISP "to take measures which contribute to … preventing further infringements of that kind". The appropriate order may be one blocking access to particular sites from which infringing material is communicated to the public.[4]

6. Successful action has been taken in the UK to block multiple P2P file sharing and streaming sites and has recently been extended to a "live" blocking ie a block limited to when the live content is being streamed.[5] This latter development has addressed a growing problem of live streaming (in that case Premier League Football) without authorisation on the internet. In particular, experience is that the operations of streaming servers (used to make available infringing streams to the public) have increasingly been moved to off shore hosting providers who do not co-operate with rights holders' requests to take down content either at all or in a timely manner.[6]

7. Recorded Music suggests using s 97A as an example provision because the New Zealand Copyright Act is substantially taken from the UK CDPA 1988 and the UK drafting style is consistent with the New Zealand statute.

Issues for Issues Paper

8. It is by no means clear from the wording of s 92B of the New Zealand Act that the High Court has jurisdiction to issue site blocking injunctions. This uncertainty is further muddied by restrictions in New Zealand on the scope and jurisdiction over "authorising" infringing acts.[7] This is explained further in the next section.

9. Rather than have uncertainty, Recorded Music seeks the inclusion in the New Zealand Act of a provision (equivalent to s 97A of the UK CDPA 1988) to unequivocally confirm the High Court's jurisdiction to issue site blocking injunctions.

(b) Reviewing the restrictive act of "authorising" an infringing act so as to provide liability on parties who authorise an infringing act within New Zealand but are located outside New Zealand

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

> **16 Acts restricted by copyright**

2 Copinger & Skone James on Copyright 17th ed para 21-25.
3 *20th Century Fox Film Corporation v British Telecommunications PLC* [2011] EWHC 1981 (Ch) at [149].
4 Copinger & Skone James on Copyright 17th ed at [21] – [256].
5 *FAPL v British Telecommunications Inc* [2017] EWHC 480 Ch.
6 Ibid at [15].
7 S 16(i) Copyright Act 1994 – discussed in section 2(b) of this document.

> (1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34, the following acts *in New Zealand*:
>
> …
>
> (i) to authorise another person to do any of the acts referred to in any of paragraphs (a) to (h).

11. In *Inverness Medical Innovations Inc. v MDS Diagnostics Ltd*[8], Woodhouse J stated:

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

Woodhouse J made it clear in the following paragraph that "a territorial restriction applies to what is authorised".[9]

12. Accordingly, copyright in a work is directly infringed only by a person who, without the consent of the owner, **authorises** another to do **in New Zealand** one of the acts set out in s 16(1)(a) to (h). "Authorisation" is a separate act of infringement from the act that is itself infringed. As a result of *Inverness the act of authorising must occur in New Zealand*. This is different from the position applying in the UK which was in part the model for the New Zealand provision.[10]

United Kingdom

13. Authorisation is dealt with in section 16 of the UK CDPA 1988, which states:

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

14. So, the act of "authorising" is not included as one of the acts restricted by the copyright and in respect of which the owner of the copyright has the exclusive right in the United Kingdom. Instead, the act of "authorising" is dealt with separately in s 16(2). The importance of this is that in the UK, the territorial restriction on the scope of a copyright owner's exclusive rights does not apply to authorising. This means that in the UK the act of authorising can occur anywhere in the world, and still amount to being a statutory tort.

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8 93 IPR 14 at [250].
9 At [251].
10 See cross-referencing footnote in s 16(1) of Copyright Act 1994 which sites s 16(1), 4 of UK CDPA.

15. In *ABKCO Music & Records Inc. v Music Collection International Ltd*[11], the UK Court of Appeal rejected the argument that s 16(2) had no extra territorial effect and that, hence, it could not apply to a licence granted outside the UK. Hoffmann LJ noted[12] that while in principle the law of copyright is strictly territorial in its application, citing *Deff Lepp Music v Stuart-Brown*,[13] he stated that in his view the reason why s 16(2) places no limit upon the place of authorisation is that the requirements of territoriality are satisfied by the need for the act authorised to have been done within the United Kingdom.

16. Neill LJ similarly held that s 16(2) required no territorial limitation, stating[14]:

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

Relevance of issue of authorisation to P2P file sharing networks and streaming sites

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

18. In New Zealand the territorial limitation on the act of authorising leads to anomalies particularly in relation to possible action against infringing file-sharing websites and streaming sites.

19. As already noted in the discussion on site blocking injunctions, it is unclear whether s 92B provides appropriate jurisdiction for such injunctive relief. But in order to trigger s 92B it is necessary to establish that a person (A) is infringing copyright in a work or works without the consent of the copyright owners by using the services of ISPs – the "triggering act". Person (A) could be:

    (a) The *users of* P2P file sharing sites in New Zealand who are account holders of a New Zealand ISP; or

    (b) The *operators* of P2P file sharing/streaming sites.

20. Without exception operators of P2P file-sharing websites and streaming sites do not host these on servers in New Zealand. Therefore, on the clear and plain meaning of s 16 at present it would not be possible to rely on *authorisation* on the part of the operator of an off-shore website as being the "triggering act" under s 92B.

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11 [1995] RPC 657 (*"ABKCO"*).
12 *ABKCO*, at 660.
13 [1986] RPC 273.
14 *ABKCO*, at 663.

Issue for Issues Paper

21. New Zealand is out of step with the UK and is failing to provide effective enforcement against those who *authorise* (from off-shore) infringing acts in New Zealand. This anomaly needs urgent attention and could easily be solved by re-drafting s 16 of the New Zealand Copyright Act to accord with the UK provision. Recorded Music therefore seeks inclusion in the Issues Paper the redrafting of the authorisation provision in this way.

(c) Changing the standing rules in s 123 to allow licensees that are not exclusive licensees to sue for infringement – particularly (but not exclusively) where the licensee is a licensing body

22. Under s 123 Copyright Act 1994 only exclusive licensees may bring proceedings for infringement of copyright. The definition of "exclusive licence" in s 2 is restrictive and means:

> "A licence in writing, signed by or on behalf of a copyright owner, authorising the licensee, *to the exclusion of all other persons (including the copyright owner)*, to exercise a right that would otherwise be exercisable exclusively by the copyright owner."

23. In New Zealand, as a result of action taken by the Commerce Commission under the Commerce Act 1986, licensing bodies are no longer able to obtain exclusive licences from copyright owners (as part of their mandates). These must be *non-exclusive*. This then prevents licensing bodies from taking court action pursuant to their mandates, despite this being the clear wish of the copyright owner.

24. In the UK, an amendment to cater for such standing problems was introduced in 2003, allowing some non-exclusive licensees the right to bring proceedings. The change itself was brought about at the insistence of broadcasters who argued[15] that where (as, for example, in the case of acquired programming such as films) the broadcaster was not the owner or exclusive licensee of the rights in the underlying works, broadcasters would be unable to take action against infringers. Licensors might become reluctant to grant licences or they might charge higher fees. Licensors might be reluctant to take action themselves or not have the funds to do so. Where the on-demand service consisted of a large number of clips, it might not be feasible for the numerous owners in the rights to take action, but it would be vital for them to be able to do so.

25. In the event the UK Government considered that it was reasonable for entities to be able to act against infringements connected to their activities in circumstances where they were neither the owner nor the exclusive licensee, but the owner of copyright in the content wished them to act.[16] The UK therefore enacted s 101A to allow standing to non-exclusive licensees:[17]

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15 Copinger & Skone James 21 – 33.

16 *Consultation: Analysis of responses and Government Conclusions*, para 8.6 cited in Copinger & Skone James para 21 – 33.

17 "[101 A.- (1) A non-exclusive licensee may bring an action for infringement of copyright if-
(a) the infringing act was directly connected to a prior licensed act of the licensee; and
(b) the licence-
(i) is in writing and is signed by or on behalf of the copyright owner; and
(ii) expressly grants the non-exclusive licensee a right of action under this section.

26. As can be seen, the term "non-exclusive licensee" means the holder of a licence authorising the licensee to exercise a right which remains exercisable by the copyright owner. It is necessary for the non-exclusive licence to be in writing and signed by or on behalf of the copyright owner. Further, it is necessary that the licence should expressly grant the licensee a right of action under the provision.

27. All of the remaining safeguards for copyright owners and defendants which are provided for exclusive licensees in s 123 of the New Zealand Copyright Act are also then provided for in respect of non-exclusive licensees.[18] This provides a sensible model to give standing but with appropriate safeguards.

Issue for Issues Paper

28. Recorded Music therefore seeks the enactment of a provision equivalent to s 101A of the UK CDPA 1988 which provides standing for non-exclusive licensees.

(d) Review of ss122A-U and the Copyright (Infringing File Sharing) Regulations (the three strikes legislation)

The Aim of the Infringing File Sharing provisions: Legislative Background

29. The Infringing File Sharing provisions introduced into the Copyright Act under the Copyright (Infringing File Sharing) Regulations 2011 have now been in actual operation for 5½ years.

30. The objectives behind the Infringing File Sharing provisions were set out in a Cabinet Proposal issued on 16 December 2009. They were to enact a bill that "provide[s] an efficient, low-cost and credible regime to deter individuals from infringing copyright through using peer-to-peer (P2P) file sharing technologies" and "to ensure measures, procedures and remedies are effective, proportionate and dissuasive".

31. These aims were re-stated and amplified in the General Policy Statement when the Copyright (Infringing File Sharing) Amendment Bill was introduced into Parliament.

32. The General Policy Statement noted that the prevalence of infringing file sharing in the current digital environment was having "a negative cumulative effect on New Zealand's music, film and software industries" and recorded the *aims* of the legislation as follows:

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(2) In an action brought under this section, the non-exclusive licensee shall have the same rights and remedies available to him as the copyright owner would have had if he had brought the action.
(3) The rights granted under this section are concurrent with those of the copyright owner and references in the relevant provisions of this Part to the copyright owner shall be construed accordingly.
(4) In an action brought by a non-exclusive licensee by virtue of this section a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.
(5) Subsections (I) to (4) of section 102 shall apply to a non-exclusive licensee who has a right of action by virtue of this section as it applies to an exclusive licensee.
(6) In this section a "non-exclusive licensee" means the holder of a licence authorising the licensee to exercise a right which remains exercisable by the copyright owner.]"

[18] See s 101A (5) of the CDPA 1988, compare with s 124 of Copyright Act 1994 (NZ) Limited.

"This Bill provides a regime that aims to –

- deter file sharing that infringes copyright;
- educate the public about the problem;
- compensate copyright owners for damages sustained from copyright infringement by file sharing;
- provide sanctions for serious copyright infringers;
- limit ISP liability that may result from account holders' infringing file sharing."

Key Issues – cost of notices, certain aspects of notice regime, no reporting required by ISPs, Copyright Tribunal awards and delays

33. *Cost of notices*: Recorded Music has consistently submitted that the current cost of the notices at $25 each has meant that the intent to educate has been thwarted to a very considerable degree. Due to cost constraints, Recorded Music has had to limit the number of notices it could have and would have sent. Other rights holders have simply not participated, citing cost as the issue. The cost of notices has also meant that when IPAPs have made mistakes in sending non-complying notices (and there are many of these) all these costs are borne by Recorded Music with no recompense or ability to recover these wasted costs (at $25 per notice).

34. *Contribution only*: In addition, even if successful in the Copyright Tribunal against an account holder, only a contribution to the total cost of all notices sent to the account holder is awarded as recoverable by Recorded Music.

35. *No prescribed form*: The Copyright Act provides for regulations to prescribe the form of detection, warning and enforcement notices. The regulations do prescribe *certain categories of information* which must be set out in every infringement notice (Regulation 5(1)). However, beyond that, notices can be issued in any form by the IPAP.

36. In Recorded Music's experience, the absence of a standard prescribed form of infringement notice, has caused consistent problems in the accuracy of notices sent by IPAPs to account holders. In particular:

    (a) All required information in Notices has not always been included because there is no prescribed form; and

    (b) Infringement notices are sent with no letterhead so many account holders consider notices a scam.

37. *Incorrect notices, delays, invalidity and cost*: There have been various examples where incorrect notices or delays in sending notices have resulted in such notices being invalidated with costs still being unfairly borne by Recorded Music. Examples include:

    (a) A declined (only one) decision due to an incorrect notice being sent. *Recorded Music NZ Limited v Telecom NZ 2011* [2015] NZCOP 1, describes a situation where one of the notices issued was not correct. Subsequently, upon identification of a further infringement by the same account holder, an

enforcement notice in the *correct form* was then issued. Recorded Music then filed an application with the Copyright Tribunal under s122J.

Copyright Tribunal member Glover held that the non-conformity of the warning notice was "more than minor" and declined to make any award, noting:

> "The Tribunal appreciates the difficulty that this may cause for rights owners, who are of course not responsible for sending infringement notices, yet who bear the consequences of any errors in these notices that cause them to be invalidated.";

(b) The use of historic or redundant email addresses for certain account holders;

(c) The invalidation of up to 10% of sent notices flowing from the use of legacy systems;

(d) In one case, over 200 notices being thrown away by a disgruntled staff member;

(e) The required information on warning and detection notices not being included for 2 months; and

(f) In numerous cases, challenge notices not being sent by the IPAP to rights holders *within the required time frame* resulting in subsequent invalidation of these notices.

38. *Sometimes only email addresses*: Recorded Music understands the constraint on the ISPs that they only use the addresses provided by their customers. However, if they are email addresses, it often means the notices are not opened by the account holders. This has often been the refrain heard once matters progress to the Copyright Tribunal. Alternatively, when physical addresses are used the account holder tends to take more notice of them – ie physical communications appear more "official".

39. *No mechanism within the regime for transparency as to compliance*: The regulations do not provide for any formal accounting or other records to be kept by IPAPs in relation to *their* compliance under ss 122A to 122U. As such, the majority of instances of non-compliance identified above were done so by Recorded Music itself, or brought to its attention in an informal way. We naturally ask the question, were there more?

40. *Low awards and no account of the impact of "uploading" on the market*: The maximum deterrent sum awarded to date under Regulation 12(2)(d) has been $600 awarded on 19 February 2013 in respect of 6 instances of infringement. Recorded Music points to Regulation 12(1)(b) which provides for a maximum award of $15,000.

41. The Legislature clearly contemplated that, in certain situations, an award of that amount or close to it is required. The Copyright Tribunal decision covering the largest number of individual infringements to date, ie 100 infringements (COP 013/12) has resulted in a total deterrent sum of only $540. This amounts to a deterrent of just $5.40 per infringement. The total award in that case was $797.17, being approximately 5% of the maximum amount awardable.

42. The average deterrent fee per track across all of the Copyright Tribunal awards is just $68.95.

43. Recorded Music also believes that the quantum of awards is limited as the Copyright Tribunal only considers the impact of "downloading" whereas most damage is caused by the "uploading" that occurs from an account holder's computer, often in their absence. We understand the Copyright Tribunal considers it has little room in this regard to take a more expansive view on the impact of uploading on the market.

44. In summary, the amounts presently awarded are, in Recorded Music's view, insufficient to ensure the regime is having the full deterrent effect it hoped to have.

45. *Delays in decisions by the Copyright Tribunal*: An important aspect of a deterrent system is for the timely issuing of decisions so that these are delivered a short time after the application to the Copyright Tribunal. Timely decisions then enable the rights holders to give publicity to them and in turn that acts as a deterrent.

46. The time taken on average for Copyright Tribunal staff to *process* a complaint and assign it to Copyright Tribunal members has been 40 days ie staff have handled the administration and processing of complaints efficiently.

47. However, there have been delays in the *issuing of final decisions or awards* by the Copyright Tribunal itself. A table showing the length of time for the issuing of decisions is set out below:

Reference:	Submitted:	Finalised:	Days:
COP 005/12	31/08/12	29/01/13	152
COP 004/12	05/09/12	05/02/13	154
COP 013/12	27/10/12	19/02/13	116
COP 009/12	08/10/12	21/02/13	137
COP 012/12	18/10/12	07/03/13	141
COP 017/12	22/12/12	16/04/13	116
COP 001/13	13/01/13	22/04/13	100
COP 002/13	17/02/13	27/06/13	131
COP 014/12	02/11/12	01/07/13	242
COP 008/13	03/05/13	16/07/13	75
COP 009/13	10/05/13	19/07/13	71
COP 015/12	23/11/12	23/07/13	243
COP 005/12	07/09/12	01/08/13	329
COP 003/13	24/02/13	20/08/13	178
COP 012/13	31/05/13	02/09/13	95
COP 006/13	22/03/13	04/09/13	167
COP 010/13	21/05/13	04/09/13	107
COP 001/14	24/02/14	04/08/14	162
COP 010/14	25/06/14	18/11/14	147
COP 022/14	18/08/14	20/02/15	187

48. As can be seen one of the cases took 329 days for a decision to issue with many others taking 4 months or more. This is indefensible.

Issues for Issues Paper

49. Recorded Music seeks a review of ss 122A-U and the Copyright (Infringing File Sharing) Regulations to address the issues just highlighted.

(e) Re-examination of the jurisdiction of the Copyright Tribunal

50. The roles of the Copyright Tribunal are as follows:

(a) To decide references of proposed or existing licensing schemes.

(b) To decide references of individual licences. These are relatively rare.

(c) To decide illegal file sharing (s 122A to U) cases.

(d) Determining matters relating to "Crown Use" under ss 62 and 63 and possibly some other minor matters under the Copyright Act.

51. A recognised function of the Copyright Tribunal is to mitigate the monopoly power of licensing bodies. This is recognised by the UK MMC Report in 1988. It was an important factor too during the Copyright Tribunal's decision in *Radio Rates* case in 2010.

52. Recorded Music has been a user of the Copyright Tribunal. In 2009 – 10 it was the applicant in a three week hearing before the Copyright Tribunal relating to rates payable by commercial radio stations for playing sound recordings on air (the *Radio Rates* case). Recorded Music has also filed several other references with the Copyright Tribunal but these settled prior to hearing.

53. Recorded Music has also actively filed cases with the Copyright Tribunal under the Illegal File Sharing Provisions in ss 122A – U and the Copyright (Illegal File Sharing) Regulations.

54. Recorded Music has a number of serious concerns over the performance of the Copyright Tribunal and its lack of procedural rules so as to ensure the timely bringing to a hearing of references made before it. Such references are often major pieces of litigation worth millions of dollars.

55. The specific issues (briefly stated) which Recorded Music and other licensing bodies have with the Copyright Tribunal are:

(a) The failure to give priority to Copyright Tribunal matters. This has manifested itself in the Copyright Tribunal not keeping applications progressing speedily to a hearing and allowing lengthy procedural delays;[19]

(b) The lack of Copyright Tribunal rules which has led to unnecessary procedural disputes – including enabling respondents to slow down the progress of a reference. In the *Radio Rates* case counsel for the respondents raised the issue as to whether discovery was even available in the Copyright Tribunal. The lack

[19] Specific instances and dates can be provided.

of any specific rules on this meant that there had to be a one day hearing to argue this basic point – thus leading to further delays. Further there are no clear rules as to what power the Copyright Tribunal has where parties do not comply with orders so that failure to meet timetables has no consequence;

(c) Delays in file sharing decisions (see previous section of this document); and

(d) Delays in appointments where recusals occur. Further the divided responsibility between Justice (administration) and MBIE (appointments and policy) has led to substantial delays in this area.

56. Recorded Music is aware that in August 2017 the Tribunals Powers & Procedures Bill was introduced into Parliament. This Bill is obviously in limbo now as a result of the election. The Bill confirms s 214 of the Copyright Act (with slight amendment) still remains intact ie:

> "The Tribunal may regulate its procedures as it sees fit, subject to this Act and any Regulations made under it."

57. Under the Bill some machinery provisions are to be enacted enabling the Copyright Tribunal to strike out proceedings in certain circumstances, to issue summonses and to deal with contempt of court. But these are largely incidental powers. Clause 19 introduces a new section 224A which will enable the chairperson of the Copyright Tribunal to issue practice notes for any type of proceedings dealt with by the Copyright Tribunal but only if he or she thinks fit.

58. Recorded Music considers there is a strong case to be made for transferring the Copyright Tribunal's jurisdiction to the High Court. If the Copyright Tribunal is to be kept, the Tribunals Powers and Procedures Bill will not achieve the necessary reform of the Copyright Tribunal. More prescriptive and explicit rules are required as in the UK Copyright Tribunal Rules 2010. A fully developed template of such rules for New Zealand has previously been provided to the Ministry at no charge and is referred to in the list of documents attached as **Schedule 5** to these submissions

Issues for the Issues Paper

59. The issues which Recorded Music wishes to have included are:

(a) Whether the Copyright Tribunal should be retained or its jurisdiction transferred to the High Court;

(b) If the Copyright Tribunal is to be retained, the need for rules similar to the UK Copyright Tribunal Rules 2010.

(2) Review of the Safe Harbour exemptions for internet service providers

60. Safe Harbour protection for internet service providers was first introduced in the United States in the Digital Millennium Copyright Act (DMCA) 1998.[20] In Europe this was introduced in the European E-Commerce Directive in 2000.

61. In New Zealand safe harbours for internet service providers ('ISPs') were put in place by the Copyright (New Technologies) Amendment Act 2008. As in the EU, the safe harbour provisions in New Zealand[21] grant immunity to internet service providers in their supply of three types of services – acting as a mere conduit, caching and hosting.

62. These immunities were conferred in the relatively early days of the internet and were expressed in broad terms – particularly in respect of the exemption for hosting[22] ie "stores material provided by a user of the service".[23]

63. In the last five years concerns have arisen that this exemption is too widely expressed. It is now clear, with the benefit of hindsight, and taking into account the growth in different types of hosting in websites that the protections for ISP's granted in New Zealand in 2008 in respect of "hosting" activities were insufficiently discriminating as to scope and extent of activities around storing user-uploaded content.

64. "Hosting" includes the passive storage/hosting of third party websites (and their content) for commercial companies and individuals. But equally "hosting" has provided protection for user-uploaded-content (UUC) sites such as You Tube which receive, index, categorise and commercialise user-uploaded content. Recorded Music strongly contends that these latter types of hosting/storage ISPs go well beyond the original purpose and intent of the intended ISP immunity. Under the "safe harbour immunity" such ISPs are providing (via unauthorised user-uploads) free and unauthorised copies of creative content (copyright works) to the public. Such sites are also (through advertising on their site) monetising for their own benefit that user-uploaded creative content.

65. By making available for free the copyright works uploaded by unauthorised users, websites such as You Tube have dramatically affected the ability of musicians, composers and recording artists to earn a living from their own copyright works. This is explained further below.

The United States – The original 'safe harbour'

66. In the United States s 512 DMCA established a 'safe harbour' for online intermediaries who:[24]

    (a) Do not have actual knowledge that the material is infringing;

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20 Section 512 DMCA.

21 SS 92B – E.

22 Definition of 'internet service provider' in s 2 refers to where a person "*hosts* material on websites or other electronic retrieval systems …".

23 Section 92C.

24 *Phoenix Center Policy Paper Number 53* (Phoenix Center Policy Paper)*:* Fixing Safe Harbor: An Economic Analysis; T. Randolph Beard, George S Ford, Michael Stern; Phoenix Center Policy Paper Series, August 2017, p 6.

(b) Do not have "red flag" knowledge;

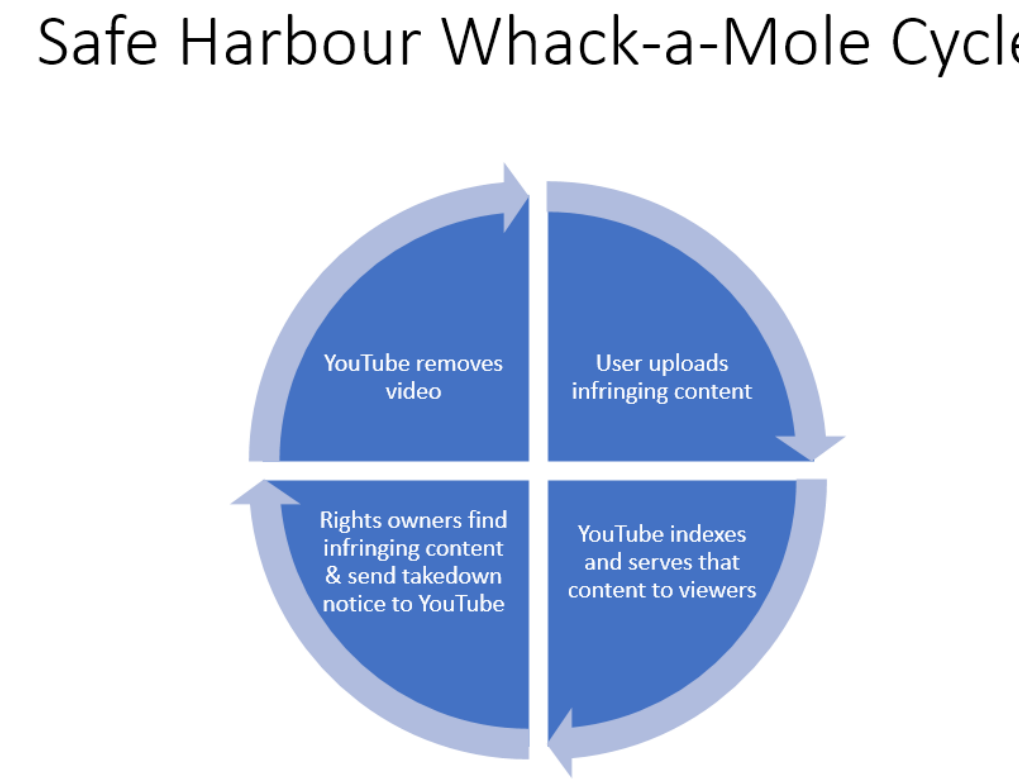
(c) Do not engage in "wilful blindness" of infringing activity;

(d) Do not interfere with standard technological measures used by copyright owners to identify or protect copyrighted works; and

(e) Do not receive financial benefit directly attributable to the infringing activity.

67. Under the DMCA intermediaries must also have "reasonably implemented" policies for addressing "repeat infringers". They must also expeditiously address an infringement upon notification that it is facilitating the distribution of infringing material – "notice and takedown".[25]

68. However s 512 DMCA has failed to address and deal with serious and ongoing digital piracy. Notice and take down has proved to be a matter of gamesmanship. Sites that actively host and categorise, index and commercialise user-uploaded content such as You Tube receive notices from rights holders to *remove* illegally-copied content. This has become little more than a game (colourfully but accurately called "endless whack-a-mole")[26] where notified content is removed with various degrees of responsiveness but is quickly replaced with new infringing files for the same content.[27] This is depicted in the following diagram:



25 Ibid, at p 6 – 7.

26 Phoenix Center Policy Paper n 5 p 8; *Endless Whack-A-Mole: Why Notice-and-Staydown just makes sense* – http://cpip.gmu.edu/2016/01/14.

27 Ibid at p 8.

69. In 2016 the global music industry alone notified almost 15.5 million URLs for takedown and sent over 250 million de-list notices to search engines.[28] Further, IFPI estimates that almost 96% of the takedown notices are sent to the same sites in relation to the same content. These numbers indicate that there is a real problem and a need for notice and stay down. Currently, nothing is stopping the files from being uploaded again and again and again.

70. The US Copyright Office is presently undertaking a detailed review of s 512 DMCA and the efficacy of the notice and take down provisions. It is anticipated that results of the review will be publicly reported during the first quarter of 2018. It is now well accepted that the US DMCA system is no longer fit for purpose.

European Union: Clarifications to the application of copyright to UUC services and Safe Harbour Hosting Immunity

71. In the European Union the same experience has been encountered. The limited liability afforded by safe harbour protection for intermediaries which *host* content has promoted the success of platforms with high shares of infringing material to the detriment of right holders and competing services (which do not seek to rely on safe harbour protection).

72. Legislation has been proposed in Europe to clarify the liability of UUC services for the communication to the public of protected content uploaded by their users and to clarify that services playing an "active role" in relation to that content (e.g. by organising its presentation or promoting it) do not qualify for safe harbour protection,[29] thereby requiring "active" intermediaries to obtain licences for copyrighted content.[30]

73. The European Commission identified drivers for change within the European copyright framework as being the large amount of content uploaded without any involvement of the right holders and the legal uncertainty hampering the negotiation of agreements for the use of content on user uploaded content services. These drivers were identified as leading to no or limited possibilities for right holders to determine the conditions under which their content is used by services storing and giving access to large amounts of protected content uploaded by their users. As a consequence, a dysfunctional online market has resulted with missed agreements and revenues for right holders.[31]

74. Faced with the *value gap* being created for creative content copyright owners, the EU has a general objective to achieve a digital copyright marketplace and value chain that works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.[32]

The Problem: ISP's providing user-uploaded content

75. The problem being encountered in the US, the European Union (and also replicated in New Zealand) is that rights holders have no or limited control over the use and the

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28 Source: IFPI.

29 Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 Final (September 14, 2016).

30 Phoenix Center Policy Paper n5 p 11.

31 *European Commission*, Impact Assessment on the modernisation of EU copyright rules, SWD (2016) 301 final, part 1/3 at p 135.

32 Ibid at p 134.

remuneration for the use of their content by services storing and giving access to large amounts of protected content *uploaded by their users*. The European Commission has summarised the problems as follows:[33]

(a) Today, copyright protected content is no longer distributed directly by a digital service provider to end users. Instead, access to online content often takes place at the end of a process in which several parties participate. As a result, right holders do not always have control over the way their content is distributed online.

(b) Increasing amounts of content is accessed through content-sharing platforms that make available protected content uploaded by their users without any involvement of the rights holders. Almost immediately a sound recording is released someone will upload it to content-sharing platforms.

(c) Such user-uploaded content services often provide the public with large amounts of protected content. In addition to giving access to the content, these platforms provide functionalities such as categorisation, recommendations, playlists, or the ability to share content. These services use copyright protected content in order to attract and retain users to their websites thereby increasing the value of their services. Access to such content is generally "free" for users and the service draws its revenues, directly or indirectly, from advertising and user data.

(d) Right holders are not necessarily able to enter into agreements with service providers for the use of their content. This affects right holders' possibility to determine whether, and under which conditions, their content is made available on the services and to get an appropriate remuneration for it.

(e) Some online service providers refuse to negotiate any agreement. In other cases, platforms have offered right holders agreements for a share of the revenue generated by advertising placed around their content. Such agreements are different from copyright licensing agreements as the platforms argue that they are not under a legal agreement to negotiate with right holders and that they enter into such "monetisation agreements" on a purely voluntary basis.

(f) Right holders are not in a position to keep their content away from these platforms. When uploaded content is infringing, they can only ask the platforms to take down the content, in each individual case, which leads to significant costs for them and appears insufficient to them given the large scale of uploads. A decrease in the value of copyright protected content has thus occurred.

(g) Online content service providers who acquire licensed content from right holders and distribute that protected content directly to end users find themselves at a competitive disadvantage – they negotiate and conclude licences with right holders in order to operate their services while online platforms distributing user uploaded content have no or limited content acquisition costs. This is notably the case in the music industry. Although the user experience is almost identical across the two types of service (on demand access to vast catalogues of sound recordings), the two services operate in different legal frameworks.

[33] Ibid, discussed at length at p 137 to 143.

(h) In respect of UUC services, right holders find themselves in a "take it or leave it" situation. They must either accept the terms offered by the service or continue to send notifications for each individual content which can be infringed thousands of times. Even if major user uploaded content services have put in place measures such as content identification technologies, their deployment remains voluntary and is subject to the conditions set by the services.

(i) When content is disseminated online, an act of communication to the public takes place which may, depending on the circumstances, involve more than one actor. With some exceptions, national case law is not very clear as to who engages into an act of communication to the public when content is uploaded on a sharing website.

(j) Consequently, right holders are confronted with large use of their content on user uploaded content services, have no or limited control over the use of their content, and fail (or have difficulties) to enter into agreements for the use of their content and obtain a fair market-based remuneration.

The Problem: Notice and Takedown should be Notice and Stay Down

76. In the EU the immunity of host providers is substantially shaped by article 14 of the E-Commerce Directive which is modelled on the "**notice-and-takedown**" system of US law and states that hosting providers shall be liable for the information only upon learning of the infringing content and not taking appropriate action to remove or disable access to it.[34]

77. As mentioned above, the real challenge with notice and takedown is the absence of a notice and stay down obligation. Service Providers, once notified of an infringement, should ensure (i) that all copies of the same work or recording are removed; and that (ii) they do not reappear on the service in the future (notice and stay down).

78. Notice and stay down has been introduced by courts in some jurisdictions, including in Germany and Italy. The EU Commission published a Communication on 28 September 2017 highlighting that online platforms have to 'step up' in the fight against illegal content.[35] In particular, platforms should take measures to dissuade users from repeatedly uploading illegal content, e.g. by using and developing tools to prevent the reappearance of previously removed content.

Position in New Zealand

79. In New Zealand Recorded Music has first-hand experience of problems with notice and take down and the "endless whack-a-mole" cycle.

80. In New Zealand there is a dedicated team acting on behalf of owners of copyright in sound recordings, who use New Zealand's geographical position as "open for business" while Europe is closed, to send take down notices to active platforms such as You Tube and Google itself. Their frustrating experience has been that these

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[34] (Non-) regulation of online platforms and internet intermediaries – the facts: Context and overview of the state of play; Eva Inés Obergfell and Alexander Thamer, *Journal of Intellectual Property Law & Practice,* 2017, Vol 12, No 5, p 435; at p 438.

[35] Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions Tackling Illegal Content Online Towards An Enhanced Responsibility Of Online Platforms, COM(2017) 555.

notices result in creative content being taken down only for it to reappear shortly afterwards or where notices are ignored altogether.

81. For example (in the case of one New Zealand artist's sound recordings) set out below is a chart showing take down notices sent and the number of links taken down as a result. As can be seen there is a substantial disparity between notices and the number of links removed.

First Example	Take Down Notices Sent (containing links to infringing copies)	Links Taken Down
Site Category		
UUC	3,092	2,861
Cyberlockers	1,747	1,522
Social - UUC	627	625
MP3 sites	584	178
Other	536	132
Linking/Referral	532	64
Social - Link/Referral	393	286
BitTorrent Indexing	275	65
	7,786	**5,733**

Second Example		
Site Category		
Other	23,791	4,199
Linking/Referral	20,436	5,877
MP3 sites	13,857	6,326
Cyberlockers	10,285	9,241
BitTorrent Indexing	8,628	1,896
UUC	290	215
Social - Link/Referral	103	62
Social – UUC	4	4
	77,394	**27,820**

82. Also set out below are two charts providing statistics as to the operation of take down notices sent to the top 15 infringing domains *worldwide* (in comparison to just one New Zealand example above) in both the last seven days and the last 12 months (up to 16 November 2017). Again there is a substantial disparity between notices sent and links removed. These statistics demonstrate many notices are ignored. IFPI's experience is that even if links are taken down they reappear on these sites a short time later, or the sites do not take down all the URLs to the same content from the beginning.

Top 15 Infringing Domains in the last 7 days ie 9 - 16 November 2017

Rank	Domain	Links Found	Unique Notices	Takedown Response %
1	share-online.biz	8,684	389	86
2	mp3goo.io	6,948	4	0
3	hitfile.net	6,436	164	87
4	turbobit.net	6,239	496	81
5	chomikuj.pl	4,105	73	100
6	rapidgator.net	3,794	780	100
7	mp3.get.az	2,909	1	0
8	zippyshare.com	1,732	440	80
9	mp3xd.cc	1,622	1	0
10	mp3clan.net	1,406	110	0
11	mp3zoop.com	830	2	0
12	dbr.ee	815	70	2
13	mp3clan.com	658	9	0
14	minhateca.com.br	570	46	97
15	omerta.is	474	29	0

Legend: 50-84% above 85% Response % = Take-downs / Links Actioned

Sites are marked in red when the average is below 50%

Top 15 Infringing Domains in the last 365 days ie up to 16 November 2017

Rank	Domain	Links Found	Unique Notices	Takedown Response %
1	chomikuj.pl	1,329,819	7,317	100
2	uploaded.net	886,027	299,267	99
3	rapidgator.net	614,873	37,094	99
4	share-online.biz	375,637	16,909	100
5	hitfile.net	308,261	5,348	99
6	mp3stune.org	214,854	64	0
7	minhateca.com.br	198,887	8,377	64
8	vibeclouds.net	180,321	386	0
9	instamp3.me	171,819	47	0
10	mp3cube.net	170,316	380	0
11	turbobit.net	169,825	16,759	98
12	musicmp3tex.com	114,958	94	0
13	mp3koi.com	112,284	162	0
14	mp3clan.com	104,624	781	33
15	mp3clan.pro	90,121	24	100

Legend: below 50% 50-84% Response % = Take-

Sites are marked in red when the average is below 50%

Issues for the Issues Paper

83. Recorded Music wishes to have considered as part of the Copyright Review, a clarification of the safe harbour exemptions to internet services providers contained in ss 92B-E including:

    (a) A review of the definition of 'internet service provider' in s 2 to exclude from safe harbour protection those entities that host and provide access to works uploaded by their users, and that assume an active role in making those works available to the public.

    (b) Redrafting of the notice and take down provisions in s 92C so as to ensure that uploaded content that is the subject of a notice is removed permanently (notice and stay down); (or alternatively)

    (c) Service Providers, once notified of an infringement, should ensure (i) that all copies of the same recording are also removed; and (ii) do not reappear in the future (notice and stay down).

(3) Permitted uses – Part 3 Copyright Act

(a) Continued use of Part 3 as a legislative mechanism for exceptions: No Fair Use

84. A consistent feature of New Zealand's Copyright Act since 1913 has been the use of legislation to define permitted uses – ie where it is considered that the public interest in availability requires an adjustment to the exclusive rights being granted to copyright owners.

85. A number of exceptions in Part 3 of the Copyright Act (Permitted Uses) affect sound recordings.[36]

86. Recorded Music strongly supports the continued use of special legislative provisions in Part 3 as a means of catering for exceptions and permitted uses. In this regard it is important to remember that there is an international treaty framework for the law governing exceptions. The Berne Convention to which New Zealand is a signatory contains[37] a general limitation and exceptions or permitted uses must meet the "three-step test". The three requirements are:

- Such use must be confined to 'special cases';
- The permission given does not conflict with the normal exploitation of the work; and
- The permission does not unreasonably prejudice the legitimate interests of the author.

87. These three tests are cumulative. In the EU Member States and many other countries such as New Zealand the three step test is taken into account when considering and implementing a number of permitted act provisions.[38]

88. The TRIPS agreement also requires New Zealand to "confine limitations or exceptions to exclusive rights" to cases complying with the Berne three step test and, in the case of sound recordings, to those provided in the Rome Convention.

89. The experience of Recorded Music in 2007 in working with MBIE officials in consulting on the exceptions for format shifting[39] and time shifting[40] was that this was a sensible and logical process. It also enabled consideration of the Berne three step test by officials. The solutions reached were not outcomes that could have been produced by a court under a so-called "fair use" exception similar to that applying in the US. Officials were able to form judgments on policy issues and then make what is ultimately a legislative decision. This in turn was then tested through the Select Committee process.

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36 Ss 41- 43, 63 – 66, 79 – 91.
37 Article 9(2).
38 Copinger & Skone James 17th ed 9-02.
39 S 81A.
40 S 84.

Issue for the Issues Paper

90. Recorded Music strongly supports retention of the Part 3 legislative mechanism and does not support any fair use exception importing US law (and the uncertainty as to outcome arising from that system).

(b) A new parody and satire permitted use

Parody and Satire exception

91. Recorded Music is prepared to engage in a discussion with MBIE concerning a new permitted use for parody and satire. This would need to be on a principled basis so as provide some safeguards for the rights of copyright owners of sound recordings (and underlying musical compositions). These principles would need to include the following:

(a) Inclusion of a criterion of no confusion between the parodied work and the original work – that makes parody different and distinct from plagiarism.

(b) Inclusion of a criterion of not using excessive copyrighted materials from an original work makes parody different and distinct from copyright infringement.

(c) True parodies of a copyright work are very rarely substitutable for the original work and accordingly will not impair the market for the original work.

(d) Any act of commercial use should be excluded for the purpose of Parody.

(e) Any commercial use of a Parody must be covered by a relevant Licence from the copyright owner.

Issues for the Issues Paper

92. Recorded Music supports consideration of a new exception in Part 3 allowing for parody and satire in respect of copyright works but with careful consideration of the principles listed in this paper. The Australian exception of Fair Dealing for the purpose of parody and satire in ss 41A and 102AA may be a possible model.

(c) Sections 81, 87/87A are now rendered obsolete by technology, have elements of unfair discrimination with other copyright works or have been unwittingly extended in scope by subsequent changes to definitions

93. There is an unfair distinction between how the musical work copyright and the sound recording copyright are treated under ss 81, 87 and 87A of the Copyright Act.

94. Under s 32(3) of the Copyright Act, a person playing a sound recording in public *must* have permission (represented in the form of a licence) from the copyright owner.[41]

[41] Section 32(2) provides:

> "The playing or showing of a work in public is a restricted act only in relation to a sound recording, film, or communication work."

Case law holds that the definition of "in public" is very broad and means any playing or performance that is not domestic or private in character. As a result, the playing of a sound recording or musical work in business premises can amount to a playing in public.[42]

95. There are three categories of permitted act in Part 3 which have been rendered obsolete by technology or have elements of unfair discrimination with other copyright works or have been unwittingly extended in scope by subsequent changes to definitions in 2008:

(a) The free public playing or showing of a communication work (s 87);

(b) The free public playing or showing of a communication work that is simultaneous with reception (s 87A); and

(c) The playing of sound recordings for the purposes of a club, society, etc. (s 81).

Sections 87 and 87A

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

97. The meaning of "communication work" in both ss 87 and 87A is broad and will capture any radio or television content: i.e. "a transmission of sounds, visual images, or other information, or a combination of any of those, for reception by members of the public, and includes a broadcast or a cable programme".[43]

98. Section 87, as presently worded, results in a safe harbour which applies to free-to-air and now pay-per-view communication works. The wording of s 87A also results in a safe harbour which applies to free-to-air but not to pay-per-view communication works. The net effect has been the creation of two serious anomalies.

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

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

Second anomaly: ss 87 and 87A do not apply to musical works

100. Sections 87 and 87A do **not** permit the playing of the underlying *musical work* in public for free. Accordingly, the performance of a musical work in public contained in a broadcast/communication work **will** amount to an infringement of copyright unless the person using the work has a licence from APRA (representing the collective rights management of the copyright owners of musical works ie the composers). There is **no** "safe harbour" for this situation as regards musical works.

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42 *APRA v Commonwealth Bank of Australia* (1992) 25 IPR 157 at 171.

43 Section 2 of the Act.

101. So, there is a **mismatch** between the rights of the composer (musical composition) on the one hand, and the absence of rights for the owners of copyright in the sound recording on the other. Sections 87 and 87A provide an unjustified distinction between sound recording copyright owners compared to musical work copyright owners.

102. The safe harbours provided in ss 87 and 87A affect *solely* owners of the sound recording copyright. In contrast, an owner of a musical work copyright **is** entitled to charge for the performance of its work in public. However importantly,[44] a musical work cannot be broadcast/communicated without being incorporated into some form of sound recording, that is, without the sound recording being made available to broadcasters/persons communicating it (except in the cases of live performances).

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

104. Both the UK Copyright Tribunal and the Canadian Board of Copyright during copyright licensing hearings, have held that equal treatment and value should be afforded to both musical works and sound recording works. Likewise the New Zealand Copyright Tribunal has held that as a matter of law, both copyrights are the same.[45]

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

Amendment of United Kingdom precedent to ss 87 and 87A

106. The United Kingdom provides a helpful precedent for reform of current legislation. Exceptions provided in s 67 and s 72 of the CDPA 1988 did not apply to rights of composers, lyricists and music publishers, administered by PRS for Music. So whilst a charity or not-for-profit organisation could use broadcast or recorded music without a PPL licence, it still required a licence from PRS. Concern was expressed from both right holders and music users that the exceptions did not balance interests correctly and did not conform with Article 8(2) of the Rental and Lending Directive. This directive requires member states to provide a right to equitable remuneration for owners of copyright sound recordings and performers when commercially reproduced sound recordings are broadcast or are otherwise communicated to the public.

107. In 2003, and again in 2011, s 72 of the CDPA was amended to exclude the public broadcasting of **certain sound recordings** from the class of permitted activities in respect of copyright.

108. Section 72 of the CDPA, after the 2011 amendment, now reads as follows:

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

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

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

72 Free public showing or playing of broadcast

(1) The showing or playing in public of a broadcast ... to an audience who have not paid for admission to the place where the broadcast ... is to be seen or heard does not infringe any copyright in –

(a) the broadcast;

(b) any sound recording (except so far as it is an excepted sound recording) included in it; or

(c) any film included in it.

(1A) For the purposes of this Part an "excepted sound recording" is a sound recording—

(a) whose author is not the author of the broadcast in which it is included; and

(b) which is a recording of music with or without words spoken or sung.

(1B) Where by virtue of subsection (1) the copyright in a broadcast shown or played in public is not infringed, copyright in any excepted sound recording included in it is not infringed if the playing or showing of that broadcast in public—

(a) [...]

(b) is necessary for the purposes of—

(i) repairing equipment for the reception of broadcasts;

(ii) demonstrating that a repair to such equipment has been carried out; or

(iii) demonstrating such equipment which is being sold or let for hire or offered or exposed for sale or hire.

(2) The audience shall be treated as having paid for admission to a place—

(a) if they have paid for admission to a place of which that place forms part; or

(b) if goods or services are supplied at that place (or a place of which it forms part)—

(i) at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast..., or

(ii) at prices exceeding those usually charged there and which are partly attributable to those facilities.

(3) The following shall not be regarded as having paid for admission to a place—

(a) persons admitted as residents or inmates of the place;

(b) persons admitted as members of a club or society where the payment is only for membership of the club or society and the provision of facilities for seeing or hearing broadcasts ... is only incidental to the main purposes of the club or society.

(4) Where the making of the broadcast ... was an infringement of the copyright in a sound recording or film, the fact that it was heard or seen in public by the reception of the broadcast ... shall be taken into account in assessing the damages for that infringement.

109. Virtually all commercially released sound recordings are encompassed within the definition of "excepted sound recordings" confirmed in s 72(1A).[46] The *effect* of this amendment is that a person showing or playing in public a broadcast containing such recordings requires a licence from the owner of the sound recording work[47] - ie a PPL licence (PPL is Recorded Music's counterpart in the UK).

110. It is significant that the UK legislature elected in 2011 to further broaden the category of "excepted sound recordings" so that an even greater range of sound recordings require the necessary licence.[48]

111. Accordingly, under the 2003 and 2011 amendments to the CDPA, a person showing or playing in public commercial sound recordings included in a radio or television broadcast must obtain a licence from the owner of the sound recording copyright work.

The broadening of activities permitted under ss 87 and 87A

112. The broadening of activities permitted under the 2008 and 2011 amendments to the Copyright Act further dilute the rights of the sound recording copyright owner in the public performance arena.

113. The definition of "communication work" is far broader than the previous definition of "broadcast". Under the broader definition, *any* type of transmission of sound will be included within s 87 (and new s 87A as well).

114. The pre-amended version of s 87 was specifically *limited* to apply only to broadcasts that were played on radio or television in public or cable programmes. The broadcaster (such as a radio or television station) was required to have a licence for the use of the radio spectrum and therefore could be contacted by both Recorded Music and APRA to ensure that their broadcast of music was licensed.

115. Due to the broadening of s 87 to cover any "communication work", a sound recording covered by s 87 could be transmitted by any person (either located in New Zealand or overseas). The owner of a sound recording work will therefore in many cases not know whether its sound recording being communicated (and subsequently played by a business in public) has been licensed or not. This is especially so for any international communications streamed over the Internet.

116. Accordingly, there is an inevitable outcome from the current position that a sound recording copyright owner will not obtain royalties from the communication of its work. Allowing licensing of the persons who *play* the communication work (including a sound recording) in public would ensure that some remuneration would flow back to the sound recording copyright owner. Such licensing is presently not available because of the unequal "safe harbour" created by ss 87 and 87A between sound recordings and the underlying musical compositions.

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46 *Copinger & Skone James* on Copyright, 16th edition, para 9-220.

47 *Copinger & Skone James on Copyright*, 15th edition, para 9-200 (page 571); 16th edition para 9-220 (page 656-7).

48 In particular, the 2011 amendment removed a carve out for broadcasts shown or played in public which "form part of the activities of an organisation that is not established or conducted for profit", so that a license now **is** required in those circumstances (whereas prior to 2011 no such license was required).

Distinction between different types of music service providers based on whether the service is free

117. The effect of ss 87 and 87A is to create a distinction between those businesses that play sound recordings supplied (at a fee) by a Music Service Provider (**MSP**),[49] and those businesses that play sound recordings contained in "communication works" (including radio and television broadcasts). The former must pay a license fee to Recorded Music, while the latter presently is not required to do so. Yet the activities are closely comparable.

118. The source of the distinction is the fact that under current MSP licences operated by Recorded Music, the MSP is required to notify Recorded Music of the business customers which the MSP supplies with its music service. This is to ensure that Recorded Music itself has licensed, or can initiate licensing, of such business customers for the public performance of sound recordings at the relevant premises.

119. However under ss 87 and 87A, no such licence is required from Recorded Music where that premises plays radio or television broadcasts. Therefore businesses that play such broadcasts at their premises have an unfair advantage over those that choose to play music services provided by MSPs. This is despite the services being of equal value to businesses, in that they both provide ambient entertainment for the staff and customers of those premises. This odd distinction does not appear to be justified.

120. **For music users**, this distinction as well as the consequences of extending "broadcast" to "communication" results in:

    (a) Complexity – in every licence category there are carve outs for some users but not others, yet the same business category is in play and the same activity is happening – i.e. music being played to create an atmosphere for each of the relevant business' customers. Those who do pay simply cannot get why the "other guy does not";

    (b) Confusion – "do I need a licence or don't I and, if I do from APRA, why do I need to get one just from them and not from you?". In addition, since it is so confusing "just find me and see if you can sue me";

    (c) Misconception and misunderstanding – "oh but I thought"; "sorry you are incorrect"; and

    (d) Cost – due to the cost of explaining, advising, checking, enforcing and otherwise making all the schemes complicated (because they are), the cost of overall licensing goes up and this is passed on to users.

The extent of use of sound recordings

121. There has been an increase in commercial usage of music as a service and entertainment format to attract and retain customer to business premises, thereby increasing turnover and profitability. This has resulted in a greater number of music videos (which contain sound recordings and are always owned and/or controlled by the same copyright owners of those sound recordings)[50] being played in public by

[49] See para 3 above.

[50] Although music videos are a substantial property right of copyright owners and a commonly understood term, the Copyright Act does not provide a definition that specifically relates to this unique creation.

businesses. Businesses therefore obtain real value from Recorded Music's members copyright content. Because of this, it is inequitable that such business do not pay for the playing of such copyright works in public.

122. Furthermore, when first enacted, s 87 was only intended to provide a safe harbour for free-to-air broadcasts and cable programmes. However, as a result of the amendments made in 2011, the safe harbour improperly extends to pay-per-view linear communications.

123. Any business or organisation that wishes to use music can do so without obtaining first the permission of the copyright owners. The onus for business compliance with copyright law falls, not upon the infringing party, but upon the infringed parties - the copyright owners.

124. Recorded Music, acting for and on behalf of those sound recording copyright owners, must firstly establish that a business is using sound recordings, and then license the use of the sound recording copyrights being used. Recorded Music therefore devotes much of its licensing resources to contact businesses to establish whether that business requires a licence.

125. To ensure that its members' sound recordings are not infringed, Recorded Music must go to extraordinary lengths to ensure compliance and enforcement. This is in part as a direct result of the ss 87/87A distinction between sound recordings played on the radio or television (which is permitted) and those played from a CD or digital device (which must be licensed).

126. This is also complicated by the fact that all businesses are required to obtain a licence from APRA for the performance of the underlying musical work being broadcast on the radio or television.

127. In 2012 APRA and Recorded Music established a joint venture (**One Music**) to license the public performance of musical works and sound recordings in the retail and hospitality sectors. This streamlined initiative has been very positively received by business owners. However, the establishment of One Music does not in any way remove the need to repeal the anomalous provisions in ss 87/87A which in fact operate as a barrier to a streamlined single licence. MBIE officials and previous Minister Foss accepted that sections 87/87A are anomalous.

128. Further, the WPPT Agreement (Art 15) and the EU (Rental) Directive 8(2) standard is to guarantee sound recording right holders the right for "indirect" public performance (i.e. by means of a public performance of a radio or television broadcast) of their recordings. The NZ law is in that respect out of step with the international standards.

Rather, for legal definition purposes, a music video must be awkwardly phrased as being a Film (as that term is defined in the Act) presented in synchronisation with Sound Recordings (as that term is defined in the Act).

Issues for Issues Paper

129. Recorded Music therefore seeks amendment of ss 87 and 87A to remove the anomaly between sound recording copyrights and the musical works copyright. The current situation is inequitable and causes real confusion for owners and users of music.

130. The suggested amendments to ss 87 and 87A are as follows (adapting the language used in s 72 of the UK CDPA but also including a reference to excepted films):

Section 87

(1) The free public playing or showing of a communication work (other than a communication work to which s 87A applies) does not infringe copyright in:

(a) the communication work; or

(b) any sound recording or film included in the communication work (except insofar as it is an **excepted sound recording** or an **excepted film**).

(1A) For the purposes of section (1) an **excepted sound recording** is a sound recording:

(a) whose author is not the author of the communication work in which it is included; and

(b) which is a recording of music with or without words spoken or sung.

(1B) For the purposes of section (1) an **excepted film** is a film:

(a) whose author is not the author of the communication work in which it is included; and

(b) which is a film comprising wholly or principally music with or without words spoken or sung.

131. In s 87A, the same amendments would be made as follows:

(1) [As per the statute]

(2) The free public playing or showing of a communication work to which this section applies does not infringe copyright in –

(a) the communication work; or

(b) any sound recording or film that is played or shown in public by reception of the communication work (except insofar as it is an **excepted sound recording** or an **excepted film**).

(2A) For the purposes of section (2) an **excepted sound recording** is a sound recording:

(a) whose author is not the author of the communication work in which it is included; and

(b) which is a recording of music with or without words spoken or sung.

(2B) For the purposes of section (2) an **excepted film** is a film:

(a) whose author is not the author of the communication work in which it is included; and

(b) which is a film comprising wholly or principally music with or without words spoken or sung.

Section 81

132. The playing of a sound recording as part of the activities of, or for the benefit of, a club, society or other organisation is a *permitted act* under the Copyright Act. This does *not* infringe copyright in the relevant sound recording provided the conditions at s81(2)(a) to (c) are met by the relevant organisation. Those conditions are likely to be met by the majority of clubs and societies. A "safe harbour" is again created.

133. However, as with ss 87 and 87A, s 81 does **not** permit the playing of the underlying *musical work* for free. The playing of a sound recording in the circumstances set out in s 81 **will** amount to an infringement of copyright in the *underlying musical work* unless the person has a licence from One Music.

134. Section 81 therefore also contains a mismatch between the rights of the composer of the musical work on the one hand, and the absence of rights for the owners of copyright in the sound recording on the other.

Issues for Issues Paper

135. Recorded Music seeks amendment of s 81 of the Copyright Act for the same reasons as those provided in relation to ss 87 and 87A.

136. Until 2011, the UK CDPA 1988 contained a provision (s 67) which was almost identical to s 81[51] and which was used as the model for the New Zealand provision.

137. Section 67 was repealed by the UK Legislature in 2011.

138. An important part of the rationale for the repeal of the UK s 67 was concern as to the inequality of a situation in which the UK equivalent of APRA was able to collect a license fee, whereas the UK equivalent of Recorded Music was not.[52]

139. The UK repeal provides a precedent for a possible amendment to the New Zealand Copyright Act.

140. Recorded Music therefore seeks repeal of s 81 (following the precedent of the UK).

141. Given that s 81 is only targeted at sound recordings, and *unlike* ss 87 and 87A does *not* cover communication works more generally, the inclusion of an exclusion from the "safe harbour" for sound recordings is not a workable solution. This is because after the exclusion there would be nothing left of the provision.

(4) Term Harmonisation

142. The issue of term harmonisation was the subject of detailed consideration during the TPPA negotiations and the passage of the Trans Pacific Partnership Amendment Act 2016 (not in force).

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[51] As with ss 87 and 87A, the New Zealand provision was in fact drawn from s 67 of the UK Copyright, Designs and Patent Act 1988.

[52] UK Intellectual Property Office, "Consultation on Changes to Exemptions from Public Performance Rights in Sound Recordings and Performers' Rights", paras 40 and 41, 2008. Other key factors were the need for consistency with EC law and international treaty arrangements.

143. The economic basis for the Ministry's approach to copyright term and its proposal for a separate phase-in was based on a report written by Dr Henry Ergas in 2009. Relying on the Ergas Report, the New Zealand Government estimated that the **average cost** to New Zealand from extending the copyright term for certain rights (including sound recordings) from 50 to 70 years would average around $55 million per year. This reliance on Ergas was evidenced in:

    (a) The *National Interest Analysis* dated 26 January 2016 which contains eight statements to the effect that:

        > "… the average cost to the New Zealand economy of the planned extension of the term of copyright from 50 to 70 years would be $55 million annually."[53]

    (b) Secondly, in the TPPA New Zealand negotiated a phase-in for the extension of term of copyright.[54] This would enable New Zealand to phase-in an extended term for *up to eight years*. Officials at MBIE's presentation on the Targeted Consultation Document, including Mr Rory McLeod (who was lead negotiator for the IP Chapter for the New Zealand Government) have made it clear that the possible phase-in provision was negotiated because of New Zealand's view as to the **cost** to it of copyright term extension;

144. Since the TPPA Amendment Act there have been two fresh developments.

145. First, Dr George Barker, currently director of the Centre for Law & Economics at the Australian National University (ANU) and visiting fellow at the London School of Economics, is in the process of completing and will be providing a further submission to take account of new information, including as to *shorter term rules*.

146. Dr Barker's work notes that the underlying calculations used in the Ergas Report in 2009 are not available and MBIE officials have not been able to produce these or even scrutinise the calculations themselves.

147. Even if all of Ergas' assumptions are adopted, and one uses the out-dated sales data from 2003-08 that he relied on, it is clear that, correcting the Ergas Report for its arithmetical errors, the most that could be claimed for the *average annual cost to the New Zealand economy of copyright term extension for recorded music is $250,000.00* ***not the $17 million for sound recordings claimed by the Government****.* This calculation also involves accepting the Ergas assumption that there is no benefit whatever from copyright extension to New Zealand authors, publishers, recording artists, film makers and other creatives. This is not a tenable assumption.

148. Secondly, since the TPPA, detailed economic analysis has been conducted separately by PwC and by Dr George Barker. This clearly shows that the assumptions in the Ergas Report as to export revenues earned from New Zealand sound recordings are outdated and no longer current.

149. The PwC Export Earnings Report (which is referred to in the list of previously supplied documentation as noted in **Schedule 5** attached), concludes at the commencement of that report as follows:

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53 This is repeated at pages 17, 22, 24, 85-86, 240, 241, 248-249 and 258 of the NIA. The calculations came from the Ergas Report.

54 See National Interest Analysis pages 85 and 199; Article 18.83(4)(d) TPP Intellectual Property Chapter.

Total overseas earnings for New Zealand musicians is estimated as $74.9m between the 2014 and 2016 years. For the longer five year period between 2012 and 2016, total overseas earnings is estimated as $100.5m.

Annual average earnings for the 2012 to 2016 period is estimated as $20.1m, and for the 2014 to 2016 period annual average overseas earnings are estimated as $25.0m. This is equivalent to the annual export earnings from around 3.7m bottles of wine exports or over 800 international university students.

Earnings from recordings and publishing (i.e. from copyright protected works) makes up 85% of overseas earnings, while earnings from live performance makes up 15% of overseas earnings.

Overseas earnings by New Zealand musicians are **approximately 40%** of the music GDP (direct value added) generated by New Zealand content.

150. Recorded Music considers this data significant and therefore requests the Ministry reframe the Music industry and potentially many others within the Creative Sector as an opportunity for export **value** rather than import **cost**.

Issues for the Issues Paper

151. Recorded Music submits that New Zealand's copyright term should be harmonised with major overseas trading partners for literary, dramatic, musical, artistic works, sound recordings, films and communication works. These should be in accordance with the provisions in the Transpacific Partnership Agreement Act 2016. However, there should be no phase-in period.

(5) Performers' Rights

152. The Targeted Consultation document released by MBIE in February 2016 noted that the TPPA required New Zealand to join the WPPT. This required that "performers be given a set of rights in relation to live aural performances and sound recordings made from their performances".[55] This has resulted in the new subparts 1-9 of Part 9 of the Copyright Act 1994 in the TPPA Amendment Act 2016 (not in force).

153. The Targeted Consultation document proposed an approach to performers' rights in the form of (1) *moral rights* of identification and to object to derogatory treatment, and (2) *property rights* to authorise the reproduction, distribution and rental of sound recordings made from their performances. The approach taken to both moral and property rights was said to "mirror" the recognition of those same rights in the United Kingdom.[56]

154. However, the proposed performers' rights regime does not, as Recorded Music understands it, propose to implement article 15 of the WPPT for performers for broadcasting and communication to the public.

155. The United Kingdom – our so-called "mirror" – complied with its article 15 WPPT obligation by enacting s 182D of the UK CDPA 1988, which provides that a performer is entitled to equitable remuneration from the owner of the copyright of a sound recording when that recording is played in or communicated to the public.

156. Neither the Targeted Consultation document nor the TPPA Amendment Act make any reference to equitable remuneration nor to article 15 of the WPPT. The only reference to the provision is to be found in the earlier National Interest Analysis (NIA) for the WPPT. There it is stated that article 15 "imposes no obligations on Parties [to the Treaty]".[57] In a *footnote only*, the NIA says "Article 15 provides for equitable remuneration for secondary uses but allows Parties to make a reservation so that no obligation is imposed by the Article." The same comment is made with respect to article 9 of the WPPT.[58]

157. In this regard Recorded Music notes that:

    (a) An Artist Direct Scheme has been in operation between Recorded Music and New Zealand's record labels since 1995. This scheme authorises Recorded Music to distribute 50% of the Recorded Music revenues to New Zealand featured bands and artists directly. This is a return to featured performers on each relevant sound recording akin to performers' rights operated in the United Kingdom; and

    (b) There are real concerns over the costs associated with creating and maintaining a bespoke new structure for repatriating the revenue generated by a right of foreign performers to equitable remuneration for broadcasting and communications in New Zealand – ie relative to the size of Recorded Music and

55 Consultation Document at [104].
56 At [113] and [125].
57 National Interest Analysis at p 5.
58 At p 4.

the revenues it collects – in particular when foreign artists receive payments for these uses in New Zealand from their labels by virtue of their recorded contracts.

158. Recorded Music therefore accepts the way in which performers' rights have been dealt with in the TPPA Amendment Act 2016 and would support that form of implementation in review of the Copyright Act.

Issues for Issues Paper

159. Recorded Music supports inclusion of Performers Rights in the Issues Paper and the enactment of provisions consistent with those in the TPPA Amendment Act 2016 (not in force).

(6) Summary of Issues for Issues Paper

Site Blocking Injunctions

160. It is by no means clear from the wording of s 92B of the New Zealand Copyright Act that the High Court has jurisdiction to issue site blocking injunctions. This uncertainty is further muddied by restrictions in New Zealand on the scope and jurisdiction over "authorising" infringing acts.

161. Rather than have uncertainty, Recorded Music seeks the inclusion in the New Zealand Act of a provision (equivalent to s 97A of the UK CDPA 1988) to unequivocally confirm the High Court's jurisdiction to issue site blocking injunctions.

Change to Authorisation Provision

162. New Zealand is out of step with the UK and is failing to provide effective enforcement against those who *authorise* (from off-shore) infringing acts in New Zealand. This anomaly needs urgent attention and could easily be solved by re-drafting s 16 of the New Zealand Copyright Act to accord with the UK provision. Recorded Music therefore seeks inclusion in the Issues Paper the redrafting of the authorisation provision in this way.

Standing for Non-Exclusive Licensees

163. Recorded Music therefore seeks the enactment of a provision equivalent to s 101A of the UK CDPA which provides standing for non-exclusive licensees.

Review of File-Sharing Provisions

164. Recorded Music seeks a review of ss 122A-U and the Copyright (Infringing File Sharing) Regulations to address the issues highlighted in this Schedule.

Jurisdiction and Powers of Copyright Tribunal

165. The issues which Recorded Music wishes to have included are:

(a) Whether the Copyright Tribunal should be retained or its jurisdiction transferred to the High Court; and

(b) If the Copyright Tribunal is to be retained, the need for rules similar to the UK Copyright Tribunal Rules 2010.

Review of Safe Harbour Exemptions

166. Recorded Music wishes to have considered as part of the Copyright Review, a clarification of the safe harbour exemptions to internet services providers contained in ss 92B-E including:

(a) A review of the definition of 'internet service provider' in s 2 to exclude from safe harbour protection those entities that host and provide access to works uploaded

by their users, and that assume an active role in making those works available to the public;

(b) Redrafting of the notice and take down provisions in s 92C so as to ensure that uploaded content that is the subject of a notice is removed permanently (notice and stay down); (or alternatively)

(c) Service Providers, once notified of an infringement, should ensure (i) that all copies of the same recording are also removed; and (ii) do not reappear in the future (notice and stay down).

No Fair Use Provision: Retention of Part 3 Mechanism

167. Recorded Music strongly supports retention of the Part 3 legislative mechanism and does not support any fair use exception importing US law (and the uncertainty as to outcome arising from that system).

Inclusion of Parody and Satire Exception

168. Recorded Music is willing to consult on a possible new exception in Part 3 allowing for parody and satire in respect of copyright works but with careful consideration of the principles listed in this paper. The Australian exception of Fair Dealing for the purpose of parody and satire in ss 41A and 102AA may be a possible model.

Removal of anomaly in ss 87/87A

169. Recorded Music seeks amendment of ss 87 and 87A to remove the anomaly between sound recording copyrights and the musical works copyright. The current situation is inequitable and causes real confusion for owners and users of music.

170. The suggested amendments to ss 87 and 87A are as follows (adapting the language used in s 72 of the UK CDPA but also including a reference to excepted films):

Section 87

(1) The free public playing or showing of a communication work (other than a communication work to which s 87A applies) does not infringe copyright in:

(a) the communication work; or

(b) any sound recording or film included in the communication work (except insofar as it is an **excepted sound recording** or an **excepted film**).

(1A) For the purposes of section (1) an **excepted sound recording** is a sound recording:

(a) whose author is not the author of the communication work in which it is included; and

(b) which is a recording of music with or without words spoken or sung.

(1B) For the purposes of section (1) an **excepted film** is a film:

(a) whose author is not the author of the communication work in which it is included; and

(b) which is a film comprising wholly or principally music with or without words spoken or sung.

171. In s 87A, the same amendments would be made as follows:

> (1) [As per the statute]
> (2) The free public playing or showing of a communication work to which this section applies does not infringe copyright in –
>
> (c) the communication work; or
>
> (d) any sound recording or film that is played or shown in public by reception of the communication work (except insofar as it is an **excepted sound recording** or an **excepted film**).
>
> (2A) For the purposes of section (2) an **excepted sound recording** is a sound recording:
>
> (a) whose author is not the author of the communication work in which it is included; and
>
> (b) which is a recording of music with or without words spoken or sung.
>
> (2B) For the purposes of section (2) an **excepted film** is a film:
>
> (a) whose author is not the author of the communication work in which it is included; and
>
> (b) which is a film comprising wholly or principally music with or without words spoken or sung.

Removal of s 81

172. Recorded Music seeks amendment of s 81 of the Copyright Act for the same reasons as those provided in relation to ss 87 and 87A.

173. Until 2011, the UK Copyright, Designs and Patents 1988 contained a provision (s 67) which was almost identical to s 81 and which was used as the model for the New Zealand provision.

174. Section 67 was repealed by the UK Legislature in 2011.

175. An important part of the rationale for the repeal of the UK s 67 was concern as to the inequality of a situation in which the UK equivalent of APRA was able to collect a license fee, whereas the UK equivalent of Recorded Music was not.

176. The UK repeal provides a precedent for a possible amendment to the New Zealand Copyright Act.

177. Recorded Music therefore seeks repeal of s 81 (following the precedent of the UK).

178. Given that s 81 is only targeted at sound recordings, and *unlike* ss 87 and 87A does *not* cover communication works more generally, the inclusion of an exclusion from the "safe harbour" for sound recordings is not a workable solution. This is because after the exclusion there would be nothing left of the provision.

Harmonisation of Copyright Term

179. Recorded Music submits that New Zealand's copyright term should be harmonised with major overseas trading partners for literary, dramatic, musical, artistic works, sound recordings, films and communication works. These should be in accordance with the provisions in the Transpacific Partnership Agreement Act 2016. However, there should be no phase-in period.

Inclusion of Performance Rights

180. Recorded Music supports inclusion of Performers Rights in the Issues Paper and the enactment of provisions consistent with those in the TPPA Amendment Act 2016 (not in force).

APPENDIX A

representing the recording industry worldwide

Website Blocking Update

November 2017

The volume of infringing content remains alarming: IFPI estimates that in 2016, users illegally downloaded 21.3 billion individual tracks via BitTorrent; 4.5 billion tracks via cyberlockers and 3.3 billion via stream ripping services. This adds up to **29.0 billion tracks downloaded** via these channels alone. One of the most important measures to stop users from accessing illegal websites is to require access providers to block access to these websites. Website blocking measures are of particular importance if the sites are located / operated from outside the jurisdiction. Therefore, a number of countries around the world have established procedures whereby right holders can request local access providers to prevent their subscribers from accessing specific websites, including foreign websites. This paper includes an worldwide overview of website blocking, and a summary of the developments in selected countries where website blocking actions were successful.[59]

- Globally, more than 2,800 unique domain names providing access to copyright protected content have been blocked, with some 1,800 of these blocked sites being dedicated to or containing illegal music.

- ISPs have been ordered to block users' access to copyright infringing sites in at least 27 countries. A legal basis for website blocking is available in many more countries around the world, including in most EU Member States (by virtue of Article 8.3 of the EU Copyright Directive). See also the website blocking map at the end of this paper.

- The Pirate Bay, as well as a high number of related mirror and proxy sites, have been ordered to be blocked in 18 countries: Argentina, Australia, Austria, Belgium, Denmark, Finland, France, Iceland, Indonesia, Ireland, Malaysia, Norway, Portugal, South Korea, Spain, Sweden, Turkey and the United Kingdom.

- Blocks have been implemented by mobile network operators in Argentina, Belgium, Finland, India, Ireland, Italy, Malaysia and South Korea.

- In Portugal and Denmark, ISPs and right holders have agreed on Codes of Conduct / Memorandums of Understanding whereby ISPs would block access to infringing sites voluntarily (Portugal), or ISPs would block access to sites if one ISP was ordered to do so by a court (Denmark).

- Regarding costs: It has been established that the costs for implementing the blocks are generally low, and that they should be borne by ISPs because they are minimal and part of ISPs' costs for running their businesses. Regarding legal costs, if the ISP choses to oppose the request or application to implement a website block, and it is unsuccessful, it should also bear the legal costs of the right holder. This has been supported in many court decisions, recently in the UK and in France.

- In general, courts around the world, including the Court of Justice of the European Union

[59] This paper does not include a list of the numerous countries where there is a legal basis for website blocking that has not yet been tested. This can be provided upon request.

(CJEU) have confirmed that website blocking is a proportionate measure taken to protect copyright and as such strikes a fair balance between the protection of intellectual property and other fundamental rights.

- Website blocking is effective when blocks are implemented at DNS and IP level because (i) it leads to a reduction of usage of the blocked site; (ii) if multiple sites are blocked, it can result in a decrease of overall piracy; and (iii) it can have a positive impact on the usage of legitimate services. A recent study[60] found that the website blocks of 53 sites in the UK resulted in:
  - 90 per cent drop of visitors to blocked sites;
  - 22 per cent drop in overall piracy;
  - 6 per cent increase in visits to paid legal sites (e.g. Netflix); and
  - 10 per cent increase in videos viewed on legal ad-supported streaming sites (e.g. BBC).

SUMMARY OF DEVELOPMENTS IN SELECTED COUNTRIES

ARGENTINA

In March 2014, music right holders secured an injunction from a National Court of the First Instance which agreed that The Pirate Bay was infringing Argentinian copyright law. Following the judgment, the country's National Communications Commission (CNC) ordered all ISPs in the market to block access to the site.

AUSTRALIA

Both film and music companies filed individual website blocking cases in respect of The Pirate Bay, Kickasstorrents and other sites following amendments to the Copyright Act which came into effect in June 2015. The Act introduced a judicial procedure whereby right holders can apply for injunctive relief against ISPs in respect of "online locations" (e.g. websites) outside Australia whose primary purpose is to infringe, or to facilitate the infringement of copyright. The court may take a number of factors into account before issuing the injunction, including the flagrancy of the infringements and whether blocking is a proportionate response in the circumstances, and it may order that the parties establish a landing page to inform subscribers as to the reason why the site has been blocked. The Law also addresses the allocation of costs – ISPs will not be liable for the right holders' legal costs in bringing the blocking proceedings unless the ISPs elect to appear in court and contest the application (in which case, liability for legal costs would be at the court's discretion). Regarding the costs of implementing the order, the Explanatory Memorandum clarifies that it will be open to the court to give appropriate directions.

In November 2016, the Federal Court in Australia issued a judgment in two cases making orders requiring ISPs to block access to 59 individual URLs associated with The Pirate Bay, Torrentz, Torrenthound, Isohunt, and the film streaming site Solarmovie. In April 2017, the Federal Court in Australia also ordered ISPs to block access to Kickasstorrents and related proxy sites in a case coordinated by music right holders. The Court followed the previous decision in the film companies' case and ordered the Applicants to pay the ISP's costs in complying with the order (but excluding set-up/capital costs and the cost of the optional landing page to which the relevant domains could redirect), assessed at the rate of AUD 50 per blocked domain. In

[60] Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behaviour (April 2016): https://techpolicyinstitute.org/wp-content/uploads/2016/04/UK-Blocking-2-0-2016-04-06-mds.pdf

addition, the applicants were ordered to pay the ISPs legal costs incurred in relation to the compliance costs issue. Further cases have been filed since then and are still pending.

AUSTRIA

In November 2017, Austria's Supreme Court ordered 7 major ISPs to block access to 13 websites linked to The PirateBay, Isohunt, 1337x and H33T. The Court confirmed that these websites are infringing the communication to the public right, according to recent case law by the Court of Justice of the European Union, and that the blocking order is consistent with fundamental rights and the EU Net Neutrality Regulation. Importantly, the Court expressly rejected the previous appeal court's decision, finding that nothing in EU law or national law requires right holders to bring any direct actions against the sites or hosting providers before seeking a website blocking order. The appeal court had argued that website blocking measures should be treated as "subsidiary" and that they can only be brought once all other remedies are exhausted but the Supreme Court overruled this "subsidiarity principle".

Earlier in July 2015, the Commercial Court of Vienna issued a preliminary injunction against Austria's largest ISP requiring it to block access to The Pirate Bay and three other BitTorrent sites (IsoHunt, 1337x.to, H33t.to). Two further sites were blocked following actions brought by the film industry with the injunctions confirmed in all instances, including at Supreme Court level.

The actions are a result of a case brought in 2011 by film companies requiring access providers to block access to "kino.to" - a popular portal for streaming infringing movies. Although kino.to went offline following criminal actions against it, the proceedings continued and resulted in a reference to the (CJEU). The CJEU issued its judgment in March 2014 confirming that website blocking is compatible with EU law and with the Charter of Fundamental Rights of the European Union (see below under EU for further details).

BELGIUM

In September 2011, an appeal court made orders requiring the ISPs Telenet & Belgacom to block their customers' access to The Pirate Bay, and further orders were made against all Belgian ISPs subsequently requiring the blocking of alternative domain names of The Pirate Bay (Depiraatbaai.be and baiedespirates.be). The ISPs' final appeal was rejected in October 2013 by the Supreme Court which confirmed that website blocking measures can be ordered by criminal courts as preventive measures. In August 2013, a criminal court ordered two ISPs to block 10 further BitTorrent sites.

DENMARK

There are currently 115 websites blocked in Denmark following court orders and agreement by ISPs to block certain sites under a voluntary Code of Conduct. Under the Code (1) Right holders can notify website blocking orders obtained in respect of one Danish ISP to other ISPs in the market which will block access to the site as soon as possible, but no later than seven days; (2) in case of domain changes ISPs will also block access to the new domain provided that (a) it is the same site, and (b) right holders bear the responsibility of notifying the ISPs; (3) ISPs, together with right holders and the competent ministry have worked on the content of a landing page if a user tries to access a blocked site.

EU

On 27 March 2014, the CJEU issued an important ruling on website blocking, in a case initiated by the film industry in Austria in respect of the pirate streaming site kino.to. The ruling confirms that website blocking is available under Article 8(3) EU Copyright Directive and that intermediaries such as access providers can be required to block access to copyright-infringing sites. The ruling also confirmed that copyright is a fundamental right and that the

injunction in question is not inconsistent with the fundamental rights of the ISPs (freedom to conduct a business) and the users' fundamental freedom of information.

Importantly, the CJEU did not adopt the negative aspects of the Advocate General's opinion which suggested that right holders should pursue infringers directly before seeking blocking injunctions, and may be required to pay ISPs' costs in relation to blocking. This does not prevent a national court from declining an injunction where it considers a right holder should have pursued an infringer directly, or from making a costs order against a right holder, but it is important to note that the CJEU did not follow the Advocate General on these points.

On 14 June 2017, the CJEU handed down its decision in the case of *Brein v Ziggo* (Case C-610/15), The Pirate Bay case. This is an important EU case relating to both the communication to the public right and website blocking injunctions in the context of BitTorrent sites.

The CJEU held that the making available and management of an online file sharing platform such as The Pirate Bay (TPB) is an act of communication to the public. In this case, unauthorised copyright works were made available online by users of TPB. However, by indexing the torrent files, the operators of TPB could not be considered to provide mere physical facilities and played an "essential role" in making the copyright works available. Therefore, the CJEU considered that the making available and management of a platform such as TPB was an "act of communication". Since the operators of TPB could not be unaware that a large number of torrent files on the platform related to copyright works published without consent, there was a communication to a "new public".

While the judgment itself does not elaborate on the legal basis for website blocking (Article 8.3 of the EU Copyright Directive), it implicitly confirms website blocking actions as such, as per the Court's previous case law.

At the end of 2015, the Regulation on the Telecom Single Market was adopted which includes a provision on net neutrality under which ISPs are prohibited from implementing unnecessary traffic management measures. However, there are a number of exceptions from the principle, i.e. ISPs can be required to block access to infringing sites if ordered to do so by a court or based on voluntary agreements.

FINLAND

In April 2016, a Finish court ordered ISPs to block access to the BitTorrent site Kat.cr, and ISPs were required to bear their own legal costs and the costs of implementing the orders. The action was brought under copyright law amendments, which came into effect in June 2015.

The Pirate Bay was already ordered to be blocked in October 2011 in a case against the country's largest ISP Elisa with the court holding that the injunction is reasonable and proportionate. The order was confirmed on appeal, and in October 2012 Elisa's application to further appeal to the Finnish Supreme Court was rejected.

FRANCE

In April 2015, the Paris High Court ordered ISPs to block access to the BitTorrent site T411, and earlier in December 2014 the court required four ISPs to implement all appropriate measures to block access to The Pirate Bay including several proxy and mirror sites. Further sites relating to The Pirate Bay were ordered to be blocked in October 2015. In July 2016, the Paris High Court ordered access providers to block access to BitTorrent sites Limetorrents.cc, Torrentreactor.com, Torrentfunk.com and Torrenthound.com and to numerous proxy and mirror

sites. Most recently in November 2017, a blocking order was obtained in respect of the website extratorrent and associated mirror sites.

The legal basis for website blocking (Article 8.3 of the EU Copyright Directive) had been previously tested in a case in 2012 regarding Google's auto-complete function, and in a case initiated by the film industry against major French access providers and search engines where the court granted the remedies sought and ordered (i) ISPs to block access to the 16 streaming sites in question; and (ii) search engines to ensure that links to these sites do not appear in search results. The Paris Court of Appeal confirmed the injunction in March 2016. Unlike the first instance, the Court of Appeal held that ISPs and search engines have to bear the cost of implementing the measures. In July 2017, the Court of Cassation (the highest court in France) confirmed the previous court's decision and ordered ISPs to bear the costs of implementing website blocks in relation to the 16 streaming sites and ordered search engines to bear their costs for delisting the websites. The case is of importance for website blocking litigation in Europe and beyond where ISPs oppose paying the costs of implementing such orders.

GERMANY

In November 2015, the Federal Court of Justice ruled that an access provider can be required to block access to an infringing website, based on general principles of tort law ("Störer" liability), as there is currently no statutory legal basis for website blocking. However, the Court required right holders to make efforts to pursue the site or the hosting provider directly.

ICELAND

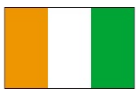
In October 2014, local music right holders were successful in their application against six ISPs requiring them to block access to The Pirate Bay.

INDIA

Almost 300 sites are currently blocked in India: In February 2012, an injunction was issued by the Calcutta High Court to block the website songs.pk. This was followed up by a judgment from the Calcutta High Court in March 2012 ordering 387 ISPs to block access to 104 copyright infringing websites. In February 2013, an order was issued against the same ISPs (including mobile network providers) requiring them to block access to a further 162 websites. In September 2013, a further court order was obtained to block another 38 websites.

INDONESIA

In 2011, the Ministry of Communication and Information ordered 20 infringing websites to be blocked. In November 2015, Indonesian authorities ordered ISPs to block access to a further 22 infringing websites, following a complaint filed by music right holders. The complaint has been filed under regulations adopted in 2015, which were based on copyright amendments adopted in September 2014. A further 23 websites were ordered to be blocked in October 2016.



IRELAND

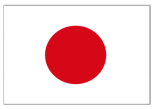
On 12 June 2013, the High Court of Ireland ordered six ISPs to block access to The Pirate Bay with the ISPs bearing their own costs of implementing the orders. The legal basis for a website blocking injunction was implemented in February 2012. Major ISP Eircom had already blocked access to The Pirate Bay as part of a litigation settlement in 2010.

In December 2013, in an action initiated by Irish record labels, five Irish ISPs agreed to orders requiring them to block access to BitTorrent site KickAss.to.

In April 2017, film companies were successful in their application against eight ISPs requiring them to block access to three streaming sites.

ITALY

There are more than 80 music sites blocked in Italy based on criminal law and on an administrative procedure (AGCOM regulation) which came into effect at the end of March 2014. Under the regulation AGCOM (national communications regulatory authority) has the power to order ISPs to block access to infringing websites upon consideration of a complaint filed by a right holder and there is a "fast-track" procedure for websites responsible for massive copyright infringements.



JAPAN

Discussions about website blocking continue in an inter-ministerial working group, which was set up in summer 2015 following the publication of the government's IP Strategy Report.

MALAYSIA

In November 2013, the Malaysian Communications and Multimedia Commission (SKMM) exercised its powers under the Telecommunications Law requiring Malaysian ISPs to block access to five notorious websites including Kickass.to, Torrentz.eu and Extratorrents.cc. Previously in June 2011, similar orders were issued in respect of 10 sites including The Pirate Bay, MegaUpload, Depositfiles and Filestube.

MEXICO

In 2015, the governmental Industrial Property Institute (IMPI) issued an important decision in respect of Mexico's popular forum site "Ba-k.com" which ranks among the top pirate sites in Mexico. IMPI found the administrator of the site directly liable for copyright infringements, ordered a fine, and confirmed an earlier preliminary injunction against Mexico's major ISPs requiring them to permanently block access to the site.

NETHERLANDS

As referred to above, in June 2017, the CJEU issued its decision in the case of *BREIN v Ziggo* (Case C-610/15). Following the decision, local right holder association (BREIN) successfully applied for a preliminary injunction requiring the ISPs to block access to The Pirate Bay pending the outcome in the merits proceedings.

NORWAY

In September 2015, the Oslo City Court ordered major ISPs and mobile network providers to block access to The Pirate Bay as well as six other sites, following an application by a right holder coalition. The action is the result of amendments to the Copyright Act which came into effect in July 2013. The law introduced a legal basis for website blocking and made improvements regarding the right of information. In June 2016 and January 2017, film companies successfully applied for a number of streaming sites to be blocked.

PORTUGAL

ISPs in Portugal have voluntarily agreed to block access to over 1,100 copyright infringing websites. The initiative is a result of a Memorandum of Understanding (MoU) regarding copyright infringements online which was signed in July by various right holder associations from the music, film, book and software sectors together with ISPs, advertisers and consumer trade associations. The MoU was co-signed by the competent governmental body for cultural affairs (IGAC). Under the MoU, right holders can submit complaints to the IGAC in respect of "predominantly copyright infringing sites" regardless of where they are located and the IGAC will then order ISPs to block access to the site at DNS level within 15 days. The blocks will be in place for one year, following which right holders will have to apply again for the sites to be blocked.

Website Blocking is also available under the implementation of Article 8(3) of the EU Copyright Directive which was confirmed by the Lisbon IP Court in February 2015, with the Court ordering major ISPs (including mobile network providers) to block access at DNS level to The Pirate Bay and a number of sub-domains.

RUSSIA

Since 2015, website blocking has been available in Russia for music right holders (since 2013 for AV right holders). The law requires right holders to apply for a website blocking order with the competent court and once the judgment is issued it will be notified to all ISPs in the market by the telecommunication regulatory authority Rozkomnadzor (RKN). In order to respond to the increasing problem of circumvention sites (e.g. mirror, proxy sites), legislative amendments were adopted in June 2017. Under the new amendments, right holders can notify these new domains, which have to be "confusingly similar", to the Ministry of Communications which has to forward the application to the RKN within one day. The new domains can be ordered to be blocked within a few days, without a court order.

SINGAPORE

In July 2014, important amendments to the Copyright Act were adopted allowing right holders to obtain an injunction against access providers in respect of infringing websites ("flagrantly infringing online locations"). The law and the implementing regulation came into effect in December 2014. In February 2016, film companies were successful in their first website blocking case against a streaming site.

SOUTH KOREA

Over 160 unique domain names have already been ordered to be blocked by the Korean Communications Standard Commission (KCC), in coordination with the Ministry of Culture, Sports and Tourism. In 2011, KCC ordered ISPs to block 41 sites distributing infringing copies of movies and music. In November 2013, the KCC ordered the blocking of Grooveshark. Grooveshark's appeal against the decision was rejected in September 2014, and the decision cannot be appealed. In October 2014, the Korean Communications Standard Commission issued blocking orders in respect of the cyberlocker 4shared and the BitTorrent site Bitsnoop. 4shared appealed the decision in court but their appeal was ultimately dismissed by the Supreme Court and the site remains blocked in South Korea.

SPAIN

There are currently three music sites blocked in Spain and a pending application in respect of seven BitTorrent sites. In October 2014, the administrative body empowered by Spain's Sinde law (IPC) issued orders against access providers requiring them to block access to The Pirate Bay, and against search engines requiring them to delist search results linking to The Pirate Bay. The administrative court authorised the orders in March 2015. Another order

was issued by the IPC and confirmed by the administrative site in respect of Goear in early 2016. Sinde law procedures that were filed in July 2016 against the BitTorrent sites Divxtotal and Todocvcd remain ongoing.

Website blocking measures are also available under recent amendments of the Penal Code which came into effect in July 2015, and under the national implementation of Article 8(3) EU Copyright Directive which was the legal basis for a recent decision issued by a court in Barcelona ordering major access providers to block access to a popular forum site. On 25 July 2016, a court in Barcelona ordered seven major ISPs to block access to "exvagos", a popular forum site, in the first website blocking case in Spain based on civil law. The court ordered ISPs to implement effective measures in respect of the site within 72 days following the decision, and to bear right holders' legal costs.

Blocking can also be achieved using criminal procedures in Spain, for example, the linking website Bajui was recently blocked as part of a criminal investigation.

SWEDEN

On 13 February 2017, the Court of Appeal reversed a lower court judgment and ordered the ISP to block access to hundreds of URLs providing access to The Pirate Bay and Swefilmer. The decision found that Swedish law must be interpreted in light of Article 8(3) of the EU Copyright Directive, which allows right holders to obtain injunctions against ISPs requiring them to block access to copyright infringing websites, even though EU law has not been explicitly implemented into Swedish law. In addition, the court of appeal held that website blocking does not violate fundamental rights and it ordered the ISP to pay the right holders' legal costs and the costs of implementing the website block. In case of non-compliance, the ISP is subject to a fine. The judgment is final and cannot be appealed.

THAILAND

Legislation has recently been passed in Thailand providing for website blocking by the government through filing a petition with the court on the basis of criminal law. Implementing regulation were adopted subsequently.

TURKEY

Website blocking is possible under current legislation and right holders have obtained injunctions in respect of more than 2,500 sites. The government is currently working on further legislation to improve the procedure.

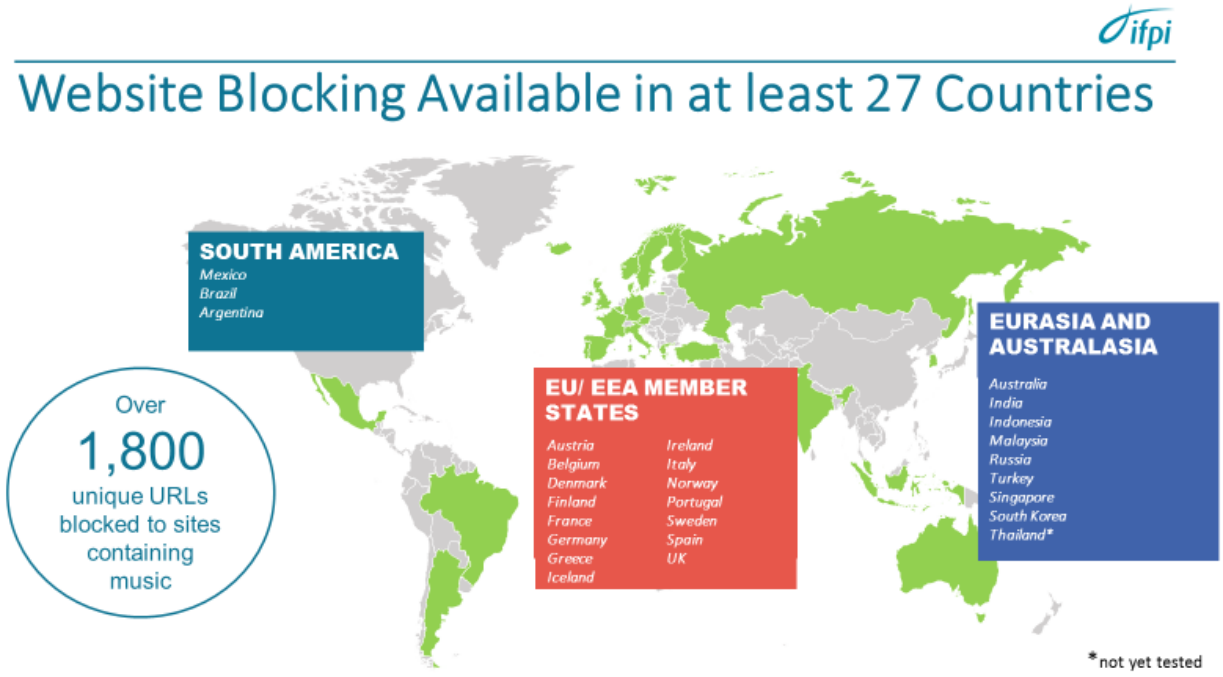
UK

Website blocking has been successful in the UK with 63 music sites being ordered to be blocked following music right holders' initiatives. In May 2012, British record companies obtained orders for five major ISPs to block access to The Pirate Bay, and a sixth ISP was ordered to do so in June 2012. The ISPs all either consented to or did not oppose the court orders. In December 2012, following a request from the recording industry, the Pirate Party UK agreed to shut down a proxy service which enabled circumvention of the block by ISPs. Recently UK ISPs, have also blocked access to a number of torrent proxy sites.

In February 2013, the record industry obtained orders requiring UK ISPs to block three additional BitTorrent websites: Kat.ph, H33T.com and Fenopy.eu. In October 2013, the High Court ordered the six largest ISPs to block access to 21 more copyright infringing BitTorrent and aggregator sites, and in October 2014, ISPs were ordered to block access to another 21 copyright infringing BitTorrent sites.

In February 2015, music right holders obtained blocking orders in respect of 17 aggregator sites. The ISPs will block via a combination of IP address and DNS blocking. The orders include provision for additional IP addresses and domains to be included if the block is being circumvented. The ISPs must pay their own legal costs and the costs of implementing the blocks.

Most recently, in March 2017, the High Court granted the first "live blocking" order in relation to a case brought by the Football Association Premier League. The order is unique in that it requires six ISPs to block access not to a particular website, but rather to a streaming server that provides unauthorised access to copyright content. The order is "live" in that it only has effect at the time when live Premier League match footage is being broadcast, and only for the duration of the season (*i.e.*, from 18 March 2017 to 22 May 2017). Also, as right holders noted that the streaming servers used to provide access to the unauthorised content routinely change, the order provides for the list of target servers to be "re-set" each match week during the Premier League season.



Schedule 5: List of Relevant Previously Supplied Documentation through 2010 - 2017 (inclusive) by Recorded Music to the Ministry of Business, Innovation & Employment (MBIE and previously MED)

1.	2010 - 2011	PPNZ Music Licensing Limited to MED – Submissions on Interest and section 87 etc.
2.	2012 - 2013	PwC - Economic Contribution NZ Music Industry 2013
3.	2012	PPNZ Music Licensing Limited to MED - Letter to Minister - section 87 etc.
4.	2012	PPNZ Music Licensing Limited to MED - Power Point Presentation section 87 etc.
5.	2013	Music Map with One Music; Recorded Music and APRA AMCOS
6.	2015	PwC - NZ Music Industry Infographic 2014
7.	2015	PwC - Economic Contribution NZ Music Industry 2014
8.	2015	Recorded Music to Copyright Tribunal – Updated Submissions on section 122a
9.	2015	Recorded Music to MBIE – Memorandum on section 122a
10.	2015	Recorded Music to MCH – Submission on Convergence
11.	2016	PwC - Music Industry Infographic 2015
12.	2016	PwC - Economic Contribution NZ Music Industry 2015
13.	2016	Recorded Music to MBIE – Real time captures notice & takedown
14.	2016	Recorded Music to MBIE – Content ID Analysis
15.	2016	Recorded Music & Andrew Brown QC – Draft Copyright Tribunal Rules
16.	2016	Recorded Music to Select Committee – Submissions relative to WPPT and recommended treatment of Performers' Rights
17.	2016	European Proposal - Directive on Single Digital Market
18.	2015	IFPI – Fair Digital Markets Presentation
19.	2017	DMCA Notice & Takedown Article
20.	2017	Horizon Research – Tracking Report - March 2017

21.	2017	Recorded Music & Others – Power Point Presentation to Jacinda Ardern and Clare Curran - April 2017
22.	2017	IFPI – Global Music Report
23.	2017	PwC – NZ Music Export Earnings Report – July 2017
24.	2017	IFPI – Global Music Insight Report
25.	2017	Horizon Research – Listening to Music Report – October 2017
26.	2017	IFPI – State of the Global Music Industry Presentation by Lauri Rechardt – Director of Licensing and Legal Policy, IFPI November 2017

Notes:

27.	Other information has been supplied but is not pertinent for current purposes.
28.	Various confidential legal opinions from Andrew Brown QC have also been supplied but are subject to legal privilege.
29.	Numerous submissions were provided by Recorded Music to both MBIE & MFAT in relation to Term Harmonisation but these have been left from the current submissions and will be referred to further independently.

RECORDED MUSIC NZ

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