

**DIGITAL BROADCASTING: REVIEW OF  
REGULATION**

**BROADCASTING AND NEW DIGITAL MEDIA:  
FUTURE OF CONTENT REGULATION.**

**SUBMISSION BY**

**RECORDING INDUSTRY ASSOCIATION OF  
NEW ZEALAND (RIANZ)**

**AND**

**INDEPENDENT MUSIC NZ (IMNZ).**

**4 April 2008**

## A. INTRODUCTION

1. This submission is jointly presented by the Recording Industry Association of New Zealand (RIANZ) and Independent Music New Zealand (IMNZ).

### **RIANZ**

2. RIANZ is the trade representation body for the New Zealand recorded music industry. RIANZ represents 61 major and independent recording companies and more than 1,000 imprint labels that account for more than 95% of the sales of commercially-released recorded music in New Zealand.
3. RIANZ also represents the rights and interests of more than 600 local recording artists and producers, almost the entire local music creative community in New Zealand.

### **IMNZ**

4. IMNZ represents 72 recording labels, all of which are 100% New Zealand owned. IMNZ represents 80-85% of New Zealand recorded music and aims to preserve cultural diversity in the domestic market. It operates to assist its member labels with domestic and export sales and in representation to Government, ministries, select committees and other bodies.

### **THE SCOPE OF THIS SUBMISSION**

5. Both RIANZ and IMNZ appreciate the opportunity to make this submission. Both would welcome the opportunity for continuing dialogue with the various Ministries in relation to this submission and the following review. We would like to be heard on these matters if such an opportunity arises.
6. The first part of this submission (**Part B**) sets out the overarching views and concerns of RIANZ and IMNZ with regard to copyright content, its digital transmission via platforms such as the internet, copyright protection and prevention of copyright infringement in this fast developing digital environment. This part is in general terms and intended as a background to **Parts C and D**.
7. The second and third parts of this submission (**Parts C and D**) deal more specifically with RIANZ and IMNZ responses to those of the questions posed by MCH in its January 2008 consultation paper "Broadcasting and New Digital Media: Future of Content Regulation" and by MCH and MED in their January 2008 discussion paper "Digital Broadcasting: Review of Regulation" which are relevant for RIANZ, IMNZ and this submission.

## B. IMPORTANCE OF UPDATING BROADCASTING LAW AND REGULATIONS IN THE DIGITAL ENVIRONMENT

8. It is clear from the foreword and the introduction to the MCH Consultation Paper, that while "broadcasting" traditionally meant the transmission of content to an audience on a one-to-many basis, with the developments in digital technology it now also includes broadcasters and other entities transmitting content to customers individually and on their demand.
9. We submit that the Government should not follow a "broadcasting-centric" approach, focusing on broadcasting in the established sense, but rather embrace a regulation of broadcasting and other transmission media under the same regime. With new business models developing fast in the media and telecommunications sectors and increasing convergence across platforms, the current broadcasting regulation system needs to be updated to address the new issues which arise with these developments. A new regime should place appropriate responsibility for content made available on old and new platforms as a top priority across all platforms and kinds of content. This regime would allow for different codes to apply to different platforms, depending *inter alia* on the amount of control the audience can exercise in receiving the content.
10. When considering regulations for broadcasting and other types of transmission to the public in this digital environment, it is important that consideration is given not only to standards of content being transmitted, but also to whether or not the content infringes copyright.
11. The problem of unauthorized digital downloading and file sharing of music is the single greatest issue for the future of the recording industry, musicians and songwriters alike. The availability of music online for free is crippling the full development of a legitimate digital market.
12. Figures from the International Federation of Phonographic Industries (IFPI) 2008 Digital Music Report show that global CD sales have fallen by 40% between 2000 and 2007.
13. In New Zealand, CD sales have fallen by 37% between 2000 and 2007.
14. Much of this decline locally and internationally is due to systematic infringement of copyright by individuals sharing music via on-line Peer to Peer ("P2P") networks on internet services controlled by ISPs. This activity is threatening the future of not just the recording industry, but all creative and knowledge-based industries. With P2P networks enabling users to download copyright material without authorisation or remuneration to rightholders, the rights and livelihoods of record companies, artists and songwriters are being seriously undermined.
15. The IFPI estimated in 2007 that over **20 billion tracks** are downloaded illegally each year via file sharing activity on internet networks.
16. Until recently, ISPs have played little role in protecting copyrighted content on the internet and copyright theft has been allowed to run rampant on their networks. In the case of infringement via P2P networks, ISPs so far have stood by, allowing a mass devaluation of copyrighted music. Estimates

suggest that no less than 80% of the music industry's Internet piracy problem comprises copyright infringing files on P2P networks.

17. ISPs are the "gatekeepers" of the internet and have a vital role to play in addressing copyright abuse. It is a simple and undeniable fact that every person that accesses the internet must do so through an ISP and that each ISP has the capability to exercise technical and commercial control over the traffic that is generated by its own customers. ISPs are able to act against the dissemination of illegal content in whatever form on the Internet. Therefore, meaningful and responsible co-operation of ISPs could lead to a sea-change in the music sector's ability to tackle copyright infringement and grow the legitimate online market.
18. While ISPs have profited from rapidly increasing subscriber numbers attracted by widely advertised high speed broadband connections, their co-operation in controlling rampant infringement over those connections has not been forthcoming to date. Generally, ISPs co-operate with rights holders in specific circumstances where infringing content is hosted on their own servers by removing or disabling access to the content in response to a notice from copyright owners. By contrast, infringing content hosted on users' computers and distributed via P2P networks presents greater challenges. Most ISPs have not yet taken any steps to address the massive piracy of music on P2P networks.
19. Encouragingly, governments, courts and even some ISPs in other countries are beginning to voluntarily recognise that the carriers of digital content must play a responsible role in curbing copyright piracy. ISP responsibility is increasingly becoming an accepted notion.
20. The Sarkozy Agreement (often also referred to as the "Olivennes Agreement") announced in November 2007 in France is the most significant milestone yet in the task of curbing piracy on the internet. It established a ground-breaking three-way partnership among the creative sector, ISPs and government. It will require ISPs to disconnect the internet accounts of repeat copyright infringers and to test filtering technologies that can limit unauthorised P2P file sharing activity. See the attached Schedule for more detail.

As President Sarkozy said: "The internet must not be allowed to become the Wild West, a lawless zone where outlaws can pillage works with abandon or, worse, trade in them in total impunity. It must be a medium where we protect our culture."

21. Other governments around the world are following that lead. We welcome the fact that New Zealand is now in the forefront of these forward-thinking developments: New Zealand's New Technology and Performers' Rights Amendment Bill, which is expected to pass its third reading next week, requires ISPs to adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers.
22. Annexed hereto in the Schedule is an outline of activity in various jurisdictions around the world where governments and industry are already taking action in order to secure meaningful ISP cooperation.

23. Regulation of online content delivery should not just deal with content standards, it should also now properly include a code of conduct which transmitters of content must observe with regard to protection of copyright and prevention of infringement via their delivery platforms. Such a code should clarify the do's and don'ts for ISPs and supplement the new copyright legislation requiring ISPs to adopt and reasonably implement a termination policy for repeat infringers.
24. **It is the overarching submission of RIANZ and IMNZ that ISPs have responsibilities as transmitters of content with regard to their role in protecting copyright content and preventing copyright infringement which should properly be defined in legislation and regulations. These regulations should take the form of a code of conduct which supplements the ISP provisions in copyright legislation and sets out precisely what ISPs must do in order to comply with these legal provisions.**
25. There are a number of feasible and reasonable options that ISPs can take to help rightholders address and combat copyright infringements on ISP networks. These measures can in some cases be supported by technological solutions. These solutions include warnings, suspension of a subscriber's account and eventually the disconnection of subscribers who seriously or repeatedly infringe copyright, as well as the application of filtering measures, and the blocking of access to specific protocols or to infringing sites. It is critical that the appropriate use of these options is clearly spelled out in a code of conduct applicable to all ISPs and endorsed by MCH and MED.

### **C. RESPONSES TO MCH CONSULTATION PAPER QUESTIONS**

26. The following paragraphs provide RIANZ and IMNZ position answers to those of the questions posed by MCH in its January 2008 Consultation Paper which are relevant for RIANZ, IMNZ and this submission.

#### **QUESTIONS OF SCOPE**

##### **QUESTION 1: What concerns are appropriate to be addressed through content regulation?**

27. In addition to the concerns already addressed in the Consultation Paper, the need for effective protection of copyright and related rights in digital content should also be addressed through content regulation, and in particular, as mentioned in the first part of our submission, ISP responsibility. This is the key prerequisite for the music industry to continue being a thriving sector, creating revenue and tax, and securing jobs in many different industries.
28. Effective copyright protection is vital to create a trusted online environment where commerce flourishes. In order to encourage the continued development of these new services, an appropriate legal framework must be

implemented and effectively enforced, providing the necessary conditions for legitimate markets to develop and prosper, providing incentives to rightholders to continue and expand their creative endeavours. Such a framework should also include adequate legal protection for digital rights management ("DRM") technologies, which enable a wide range of business models and options to be offered to consumers for enjoying music legally online.

**QUESTION 2: Should a single regulatory regime apply to all broadcasting-like content no matter how it is distributed?**

29. Whatever the regulatory regime, the overarching principle that an ISP is to act responsibly with respect to the content it delivers, depending on its capability to exercise technical and commercial control over the traffic that is generated by its customers, should apply to transmitters of content via all platforms, new and old alike.

**QUESTION 3: Should the same general regime apply, but with a less strict or detailed code for content received on the demand of individuals than for content broadcast conventionally?**

30. With respect to the issue of appropriate responsibility for transmitting third party content, we refer to our answer to question 1 and our general comments in Part B above.

**Broadcasting-like material provided from outside New Zealand**

**QUESTION 5: Should broadcasting-like content provided to audiences from overseas be subject to New Zealand's regime for content regulation?**

31. In the case of copyright, most foreign works are protected under New Zealand law pursuant to international obligations. Accordingly, when they are copied or made available in New Zealand without the rightholder's authorisation, this constitutes an infringement of New Zealand copyright law. For this reason, whether or not the infringing content originates from abroad makes no difference to the need for cooperation from ISPs. In this context we refer to the New Technology and Performers' Rights Amendment Bill mentioned in Part B above. Any additional measures that can limit infringing material coming from abroad, such as the request to regulatory authorities in other countries to take action to prevent infringement, or the provision of subsidies for internet filtering software, could be useful.

**QUESTION 6: If you answered yes, what form should regulation take, and who should regulate such content?**

32. Refer to our answer to question 5 above.

## The role of a regulator : a regulatory agency vs. self-regulation

**QUESTION 7a): Should there continue to be a state agency available in New Zealand to operate a system of content regulation?**

33. Yes, a state agency should continue to be responsible both for dealing with complaints regarding a broadcaster's or other transmitter's response, as well as to approve and where necessary make amendment suggestions to industry codes of practice. However, with respect to business arrangements between entities delivering content over new platforms with new or evolving business models, it is vital that those entities and rightholders are directly liaising with each other, with any issues dealt with through market negotiations.

**QUESTION 7b): Should broadcasters be able to regulate themselves, within the requirements of legislation?**

34. With regard to copyright issues, a code of conduct that ISPs must follow is very important. Refer to our comments in Part B above.

## The concepts guiding broadcast standards – a single set of concepts?

**QUESTION 14: Are a single set of broad concepts as a basis for content regulation more, or less, important in an era of increased choice in content and in the ways of receiving it?**

35. Broad principles like "the maintenance of law and order" certainly apply to all platforms, however there must also be specific concepts in place to address problem areas which are specific only to certain types of transmissions. For example, the issue of illegal file sharing and P2P networks is unique to ISP platforms.

**QUESTION 15a) Should the concepts currently guiding the standards applying to broadcasting continue to apply to broadcasting?; and 15b): If yes, should they apply more widely across the scope of content regulation, that is, beyond conventional broadcasting?**

36. Yes. This does not mean that new forms of transmissions cannot have more specific concepts in place.

**QUESTION 15c): Are there different concepts that should be added or substituted for those in the Act, and applied either to broadcasting or to a wider range of content?**

37. Yes. One concept to be added in the context of ISP services is the need for ISPs to cooperate in order to help rightholders control online copyright infringement.

## **D. RESPONSES TO MCH/MED DISCUSSION PAPER QUESTIONS**

38. The following paragraphs provide RIANZ and IMNZ answers to those of the questions posed by MCH and MED in their January 2008 discussion paper which are relevant for RIANZ, IMNZ and this submission.

**QUESTION 1.1: Do you agree with the objectives and principles set out for the review? Please give reasons for any proposed additions or amendments to the principles and objectives.**

39. We welcome the fact that one of the overall objectives of any proposal for regulatory change is the protection of property rights, in order to ensure that the creation of audio and/or audio-visual content is encouraged and that content is able to be exploited on fair terms. This objective will only be achieved, if steps are taken to ensure that ISPs act responsibly as gatekeepers to the Internet. Diversity of content to foster and promote expressions of national and cultural identity will be maximised if rightholders are able to effectively protect their rights in the online environment.

**QUESTION 2.1: Do you agree that the diversity scenario summarised above is a desirable state for New Zealand to work towards achieving?**  
**QUESTION 2.2: Do you agree with the threats and issues identified in the [above] table? Please identify any threats or issues with which you do not agree, and provide reasons.**

**QUESTION 2.3: Are there any further threats and issues for consideration that you believe have not been identified?**

**QUESTION 2.4: Which of the threats and issues (identified in the table or in your response to question 2.3) do you consider to be the top three priorities for action?**

40. Yes, we agree that the diversity scenario as described in the Discussion Paper is a desirable state for New Zealand to achieve. However, the rightholders in the music industry will be not able to participate in the envisaged content driven market, competing on quality and diversity of interest, if they are not able to enforce their rights in the online environment, and do not have the cooperation of ISPs to combat digital piracy. Digital piracy should explicitly be mentioned among the 8 threats to diversity listed in the Discussion Paper. They form part of the rise of cybercrime (threat no. 5) and also influence the lack of local content (threat no. 4), since artists and producers no longer will have the motivation and/or the financial means to continue their creativity if digital piracy cannot be meaningful addressed.

**QUESTION 3.1: Should New Zealand maintain the status quo in all respects? If so, why? If not, what are the priority areas for change?**

**QUESTION 3.2: if some change is necessary, should this generally be at the level of (a) updating existing arrangements, (b) restructuring the regime in line with market developments, or (c) reforming the regime? Please give reasons for your views.**

41. In our view regardless of which of the three packages of measures is chosen, the particular concern set out in the Discussion Paper, that the ability to trade

in content will be compromised if appropriate understandings on the value of IPRs, and appropriate digital rights management tools, are not reached, and if there is limited public understanding of copyright issues, is of utmost importance and needs to be addressed in any of the approaches described in the paper.

**QUESTION 4.10: To what extent would it be appropriate for a media programme to address issues of internet safety?**

42. Any media programme should entail the issues of the risks involved in using illegal services and the necessity of warning consumers of the computer viruses and spyware that are rife on P2P networks. If a programme included such detail, it would be very appropriate.

**QUESTIONS 6.5 to 6.8: Distribution issues - availability of content in relation to QUESTIONS 6.5 to 6.8:**

43. With respect to the acquisition and licensing of rights, we encourage the Government to maintain the current "light touch" approach to the regulation of copyright and content rights. Rightholders in the music industry negotiate directly with broadcasters and other transmitting entities, and the relevant talks with ISPs in this regard are still very much at a preliminary stage. More development can be expected in this area in the next couple of years, with technologies maturing and being further developed. Therefore a light touch approach in order to allow the market and in particular the licensing of rights to sufficiently regulate itself is necessary.

**QUESTION 6.9: Which of the options for dealing with consumer understanding of the copyright framework do you support? Please give reasons for your views.**

44. We welcome that the Discussion Paper recognises that infringements can be harder to prove given the relative anonymity and global nature of the internet. We fully agree with the conclusion that the cooperation of both customers and industry players is therefore crucial in any copyright framework (and in this context we have already set out at length the necessity of ISP cooperation – please refer to our comments in Part B above). For this reason we submit that it would by no means be an option to only maintain the status quo. Rather, as suggested as Approach B in the Discussion Paper, (new) initiatives should be launched in relation to consumer understanding of the necessity of a functioning copyright framework, including educational websites, government warnings, advertising campaigns and school initiatives. This approach can be combined with Approach C, suggesting a reform of the existing copyright framework with regard to digital media: this is indeed already under way in the form of the current copyright revision. Please refer to our comments in Part B above.

**QUESTION 6.10: In addition to criminal penalties, do you favour a stronger role for the state in promoting media literacy as a means of promoting internet safety? What other interventions would be practical, given the overseas origin of much of the material in question?**

45. Yes. A stronger role for the state in promoting internet safety and awareness of copyright law issues would be welcome. Please refer to our answers given in Part B above.

**QUESTION 6.11: Which of the options for dealing with “orphan works” do you support? Please give reasons for your views.**

46. The 5 principles established by IFLA and IPA provide a useful framework for the issue of orphan works. We submit that the best starting point for action is Approach A, which entails an assessment of the scope of the problem, and industry efforts to agree some principles on the treatment of orphan works. Once this assessment has been made, it will be possible to determine which further steps, including Approaches B and C, are most appropriate.

**QUESTION 6.12: Would the establishment of a collection agency as an aspect of the regime be workable in New Zealand?**

47. As set out in Question 6.11 above, the first step which needs to be taken is to follow Approach A, scoping the problem and reviewing feasible options. Once this has been done, the need for and the feasibility of a collection agency can be assessed.

## SCHEDULE

### **Outline of activity in various jurisdictions around the world where governments and industry are already taking action in order to secure ISP cooperation in controlling copyright infringement:**

Over the last 6 months, a sea-change in attitude can be witnessed in countries around the world, with governments examining the issue of ISP cooperation and taking an active role in seeking to ensure that ISPs act responsibly in helping to control online infringement. The need for meaningful ISP cooperation, including in the P2P context, is increasingly becoming a widely accepted principle.

#### AUSTRALIA

Rightholders have held collective and individual discussions with ISPs on a code of conduct regarding piracy, but unfortunately no agreement has yet been reached. The Government is engaged in talks with ISPs and most recently the new communications minister has said that he would “watch any UK legislation on this issue with particular interest”.

#### BELGIUM

In Belgium a court ordered an ISP to prevent its users from infringing copyright using P2P. The Court of First Instance in its decision regarding ISP ‘Scarlet’ last June considered an expert report setting out a number of technical solutions to address copyright on P2P networks and accepted that content filtering is feasible, effective and not unreasonably burdensome for the ISP (SABAM v. Scarlet (formerly Tiscali), Court of First Instance decision of 28 June 2007).

#### EU

The issue of ISP responsibility has been raised in several EU initiatives, including the recent Content Online Consultation and the recently adopted Regulatory Framework for Electronic Networks and Services (the so-called “Telecom Package”) which is currently being discussed in the EU Parliament.

The Sarkozy Agreement (or “Olivennes Agreement”) brokered last November has triggered wide-reaching discussions with ISPs across Europe. The EU Commission has expressed interest in a possible EU-wide agreement or legislative treatment.

#### FRANCE

The Sarkozy Agreement (or “Olivennes Agreement”), an agreement among ISPs, the Government and film and music rightholders was announced in November 2007. Under this agreement ISPs have agreed to issue warning messages to subscribers when they are notified that the subscribers’ IP addresses are being used to disseminate infringing files. If users ignore these warnings, their accounts will be

suspended or eventually terminated. ISPs have also agreed to test filtering technologies, as well as to apply them, if the results are convincing and their application proves technically and financially realistic. The draft law implementing the Sarkozy Agreement is expected to be presented by the Government within the next weeks, with a view to adoption in July.

## HONG KONG

The Government is currently looking into ISP issues as part of a broader consultation on the protection of digital content, and recommendations are expected shortly. The Government has already expressed interest in the adoption of an industry-wide code of practice which will address takedown and termination.

## JAPAN

The major ISP trade associations in Japan have agreed with rightholder organisations including Recording Industry Association of Japan (RIAJ) to launch a consortium in cooperation with the National Police Agency (NPA) to discuss and implement effective countermeasures against P2P infringement. The countermeasures to be discussed will include notices sent to infringing users at the request of rightholders, termination of the accounts of repeat infringers, and a more streamlined process for disclosure of user details. In addition, upon request by a rightholder, the police will pursue criminal sanctions against wilful infringing users.

The consortium will be launched in April, and will discuss guidelines for implementation of these countermeasures with the goal of starting operation by the end of the year.

## KOREA

The Government is in the process of finalising a law on ISP responsibility to implement the country's obligations under a Free Trade Agreement with the US. The new law will include an obligation for ISPs to adopt and implement a policy for the termination of repeat infringers. In the meantime Korea has passed a modern and useful law on filtering over P2P networks. The law is broad enough to cover not only P2P services, but also other services that enable users to transmit works. The scope of this new legislation has not been tested yet in courts.

## THE UK

The UK Consultation Paper "Creative Britain" published on 22 February 2008 states that the UK Government is committed to legislate on the issue of ISP cooperation by April 2009, if no voluntary agreement has been reached by then. Although "finding voluntary, preferably commercial solutions, remains the ideal", the Government has indicated that it intends to swiftly introduce legislation if suitable arrangements between ISPs and rightholders are not forthcoming or prove insufficient.