



## Music Rights Australia's Submission

September  
2020

### Contents

<b>1.</b>	<b>About Music Rights Australia</b>	<b>2</b>
<b>2.</b>	<b>Introduction</b>	<b>3</b>
	Music Today	3
	Effect of COVID 19	3
<b>3.</b>	<b>Position on aspects of rights protection</b>	<b>5</b>
	Safe Harbour in the Aus-UK FTA	5
	Advertising on Illegal Sites	7
	Advertising Standards and Self-Regulation	9
	<b>Appendix A</b>	<b>12</b>

RESPECTING AND PROTECTING CREATIVITY

ABN 90 071 726 906 ACN 071 726 906  
PO Box Q20, Queen Victoria Building, NSW, 1230  
t: +61 2 8569 1177 | f: +61 2 8569 1181 | email: [info@musicrights.com.au](mailto:info@musicrights.com.au) | web: [www.musicrights.com.au](http://www.musicrights.com.au)  
Liability Limited by a scheme approved under Professional Standards Legislation

Music Rights Australia thanks the Department of Foreign Affairs and Trade (**DFAT**) for the opportunity to comment on rights protection issues that may arise in the development of the Intellectual Property (**IP**) Chapter of the Free Trade Agreement (**FTA**) with the United Kingdom (**UK**).

## 1. About Music Rights Australia

Music Rights Australia (**MRA**) is an organisation that protects the creative interest of artists within the Australian music community. MRA represents over 100,000 songwriters and music publishers through their association with the Australasian Mechanical Copyright Owners' Society (**AMCOS**) and the Australasian Performing Right Association (**APRA**)<sup>1</sup>, and more than 125 record labels – both independent and major – through the Australian Recording Industry Association (**ARIA**)<sup>2</sup>.

---

<sup>1</sup> See [www.apraamcos.com.au](http://www.apraamcos.com.au)

<sup>2</sup> See [www.aria.com.au](http://www.aria.com.au)

## 2. Introduction

### Music Today

Currently, it is helpful to consider the Australian music industry as pre COVID 19 and post COVID 19. Data from the pre COVID 19 period does not reflect where income for artists and recording labels is coming from today, but it is hoped with the appropriate legislative environment those revenues can return to pre COVID 19 levels albeit from other new and innovative revenue sources. Until live performance and national and international touring returns, streaming and online performances are expected to be significant sources of income for the industry.

Prior to the COVID 19 pandemic, growth in the record music industry was fuelled by the growth in licensed music streaming services.

The IFPI *Global Music Report 2019*<sup>3</sup> stated:

*"In Australia, the total market increased by 11.0% (US \$4.4m) to \$446.6m.*

*.....*

*Streaming incomes continued their dramatic growth in Australia, with total streaming revenues rising by 40.9% (US 81.5m) to US 280.5m during 2018, following growth of 60% (US 74.8m) in 2017 and 87.3% (US 57.9m) in 2016. Streaming contributed more than twice as much to recorded music industry revenues in Australia in 2018 than it did in 2016 and nearly ten times as much as in 2014.*

*Overall, streaming revenues constituted 62.8% of the total Australian music market and 71.4% of all sales revenues in 2018."*

The APRA AMCOS *Year in Review 2018/2019* reported that by the end of the financial year, audio streaming revenue had reached \$105 million, an increase of 28.2% from the previous year. Public performance revenue was \$92.4 million, which was 19.6% of the 2018/2019 reported revenue<sup>4</sup>.

### Effect of COVID 19

Post COVID 19 streaming revenues for recorded music are proving to be robust but live performance incomes have disappeared as festivals and live events have been cancelled.

In the hope of generating income, many performers, labels and event organisers are moving to online streaming to keep in touch with their fans and to support themselves.

More than ever the ability to make money in the online environment is crucial for the sustainability of the music industry.

---

<sup>3</sup> IFPI, *IFPI Global Music Report 2019* p 64.

<sup>4</sup> APRA AMCOS, *Year In Review 2019* p 4-5.

Pre COVID 19, there were significant challenges for rights holders online as dominant digital platforms incorrectly exploited safe harbour protections, which were introduced when the internet was in its infancy.

### 3. Aspects of Rights Protection

#### Safe Harbour exceptions should not form part of the Australia UK FTA

It is the music industry's position that safe harbour exceptions or any other broad exceptions which chip away creators' rights should not form part of the UK-Australia FTA.

The creation of any copyright exception should be driven by clear public policy goals, and the Three-Step Test should be applied when considering any exception which derogates from creators' rights.

The legal concept of copyright underpins the music industry and creates revenues for the entire value chain. A robust framework founded on good policy creates commercial confidence and attracts investment that supports artists and assists them to bring their creative output to market for the enjoyment of their fans.

The safe harbour protections which limit liability represent a poor compromise struck when the internet was emerging. They do not represent the digital distribution reality and the vast array of commercial platforms which occupy the current online landscape. Many of those commercial platforms continue to exploit the creative content on their services without paying the creators whose works they are exploiting and harvest user data for advertising purposes.

The misapplication of overly broad safe harbours has led to distortions which have undermined the commercial marketplace internationally.

Public policy is starting to shift in recognition of this market failure. For example, in the European Union online services which provide access to copyright protected content uploaded by their users without the involvement of rights holders, have flourished and become the main source of access to content online. This impacts rights holders' possibilities to determine whether and under what conditions the content is used.

There is also ample evidence from the US review of s512 of the *Digital Millennium Copyright Act* that the current obligations which service providers have under their safe harbour regime are inadequate for the current online environment.

The misapplication of safe harbour protections gives unfair market advantage to commercial platforms. The power imbalance between rights owners and the commercial digital platforms distorts the marketplace and results in significant disadvantage to creators around the world.

This unintended outcome should not be permitted to continue and safe harbour exceptions should not form part of the Australia UK FTA IP chapter.

However, if the Government does intend to include language on safe harbours in the IP chapter, we urge the Government to consider the following issues.

Uncertainty around the proper application of safe harbours has emboldened services that make available user-uploaded content to take an “act first, negotiate later” approach, building large music services without a licence, fundamentally distorting the negotiation process. If they do enter licence negotiations (as opposed to carrying on business in the hope they will not be sued), the choice for rights holders is to:

1. accept the terms on offer and get some return for the use of their music;
2. rely on ineffective notice and takedown procedures provided in safe harbour legislation to try to prevent their content being distributed without a licence; or
3. sue the service under an uncertain legal framework and delay any chance of getting income from their music.

The fact that some digital content services claim the liability-limitation privilege of safe harbours undermines free and fair negotiations between digital services and rights owners. License negotiations are conducted in the “shadow of the law”, in a rigged market place, and result in artificially low rates, causing a value gap between the value extracted from music by online services claiming to fall under safe harbours (such as some user uploaded content services), and the revenues returned by these services to record companies and artists.

The commercial platforms derive commercial benefit, whether directly or indirectly, from the creative content which appears on their services and little or nothing of those revenues are returned to the creators whose work is exploited on the commercial services.

Australia has taken a significant step to limit this unfair exploitation by limiting the scope of its safe harbour provisions in the *Copyright Act 1968*<sup>5</sup>. Australia correctly applied the principle that safe harbours were intended to apply only to service providers which are mere passive conduits: not active commercial platforms which can curate or monetise the creative content.

Any negotiation of the language in the IP chapter on this issue should not water down the principled position adopted by Australia.

Australia and the UK are in a unique position to take this world leading position of rights protection online and create a digital environment which reflects the real online environment now and for the future.

Such a position would fit within the Department’s stated aims for the IP Chapter:

*“Australia will seek to include Intellectual Property (IP) provisions that promote the adequate, effective and balanced protection and enforcement of IP rights and that balances the legitimate interests of rights holders, users and the public interest.”*<sup>6</sup>

## Advertising on Illegal Sites

---

<sup>5</sup> *Copyright Act 1968* (Cth) Part 5 Div 2AA.

<sup>6</sup> Department of Foreign Affairs and Trade, ‘Australia-United Kingdom Free Trade Agreement: Summary of Negotiating Aims and Approach’ (15 June 2020), p 4, available at <https://www.dfat.gov.au/sites/default/files/australia-uk-fta-negotiating-aims-and-approach.pdf>.

In 2014, MRA made a submission to the *Copyright Online Infringement Discussion Paper*. Copies of pages 4-6 of the MRA submission appear as **Appendix A**. In the submission MRA referenced the Digital Citizens Alliance study *Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business* and produced data which showed illegal sites were suing the Australian recording artists' works to attract consumers to their sites which were supported by advertising revenues.

The Digital Citizens Alliance updated the study in May 2015 in *Good Money still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business*<sup>7</sup>. The updated report made some key findings about the prevalence of creative content, including music, on illegal sites.

It found that<sup>8</sup>:

- Despite increased awareness within the advertising community of the issue, there were still instances of signature brands advertising on illegal sites which stole creative content and which were primarily supported by advertising revenues.
- The type of site which fell into its search criteria for the study had shifted and the primary sites which were making the money from advertising were now streaming sites which inserted video advertisements into the stolen creative content.
- The online streaming sites were less expensive to set up and so had lower barriers to entry.
- The sites had increased instances of downloadable malware and malicious software like bots which placed consumer safety at risk.

*"The content theft industry's low barriers to entry and the ability of operations to switch domains quickly make it easy for new sites to fill the void left by those that do get shut down."*

Recently, White Bullet United Kingdom reported<sup>9</sup>:

---

<sup>7</sup> Digital Citizens Alliance, *Good Money Still Going Bad: Digital Thieves and the Hijacking of the Online Ad Business* (May 2015).

<sup>8</sup> *Good Money Still Going Bad*, p 2.

<sup>9</sup> White Bullet, 'Brands Are Paying their Advertising Partners to put their Brand Reputations at Risk' (May 2020), available at <https://www.white-bullet.com/brands-are-paying-their-advertising-partners-to-put-their-brand-reputation-at-risk>.

*“More people are taking to living life on the web and that means the internet pirates are benefiting. White Bullet Q1 2020 data shows a 50% traffic increase to the top pirate websites since the last quarter in the US and the UK alone.*

*Much of this is due to consumers looking for more available free content. More pageviews equates to more advertising displayed to these new website visitors, and more eyeballs means more money to the pirates and the ad companies placing those ads.*

***There have been more than 6 billion ad impressions on pirate websites since lockdown in Q1 alone.”***

The exploitation of Australian artists’ work on illegal sites continues and the ad revenues which these illegal streaming sites continue to make undermine licensed streaming services<sup>10</sup> which do pay artists and record labels for their work.

Home | TOS | About Us | FAQ

Shop Related Products

Oh, be nice. Share with others.

Facebook Twitter Print Email + 113K

FACEBOOK

Extract

Dr. Seuss' The Lorax

Tube Player for YouTube

Tube App (For YouTube)

\$3.99 (552)

\$11.99 (4883)

\$0.00 (8967)

\$0.00 (2036)

Ads by Amazon

### MP3 From YouTube Flash Video

VidToMP3.com is the most convenient online application for converting YouTube flash video to MP3 audio. This service is fast, free, and requires no signup. All you need is a YouTube URL, and our software will separate the audio portion from the video, and give you a link to download the audio (MP3 version) file.

#### How To: Extract MP3 From a YouTube Video

Enter the URL from any YouTube page, and this application will quickly retrieve the Flash video file and extract the audio as a downloadable MP3. By using our service you agree to abide by our [terms](#).

Paste the YouTube URL here GO

☐ I confirm that my use of this site is in accordance with the [terms](#) of service and all applicable laws.

Like 15K Share

#### Youtube to MP3

FEATURES:

- Youtube to MP3
- MP3 from YouTube Video
- FLV to MP3
- Extract MP3 from flash video

Image: Screenshot of [www.vidtomp3](http://www.vidtomp3) homepage with banner advertising

If Australian consumer behaviour mirrors that reported by White Bullet, this will seriously damage the incomes of local and international artists and further weaken an industry which is reeling from the effects of the COVID 19 pandemic.

<sup>10</sup> See [www.digitalcontentguide.com.au](http://www.digitalcontentguide.com.au); [www.pro-music.org](http://www.pro-music.org).



Prior to the COVID 19 pandemic, the music industry was seriously impacted by the unauthorised use of music on digital platforms and the use of music on illegal stream-ripping sites, Torrent sites, MP3 aggregators and cyberlockers.

As the impact of COVID 19 pandemic plays out and the music industry shifts to live streamed events it will be essential for creators to ensure they capture the revenues which come from the streams. Under the current law, this is not easy to do or certain to succeed.

It is essential that the digital platforms and the Ad Tech community are required to act as responsible corporate citizens to ensure the creative industries are not further undermined by the unlicensed use of their works by unauthorised third parties or by the illegal copying and storage of their works onto advertising supported illegals sites.

### Advertising Standards and Self-Regulation

Since 2013, MRA has lobbied the online advertising community to adopt uniform standards to stop advertising on illegal music sites and other online sites which offer counterfeit products, while there are some interest in the beginning from the Audited Media Association of Australia (**AMAA**) there was resistance from the online advertising community overall including brand owners, advertising agencies, ad platforms and the digital platforms.

Some progress has been made internationally as set out in the Ernst and Young, September 2017 report *Measuring Digital Advertising Revenue to Infringing Sites* which stated<sup>11</sup>:

*“Many digital advertising industry participants are taking various quality control steps to fight the corruption, including:*

- Contract wording from the buy side (e.g., advertisers and agencies).*
- Use of “do not advertise” lists at multiple levels to block ads being served to these sites.*
- Use of data analytics firms to identity ads being served at these sites and then inform the brands.*
- Legal action by content owners.”*

Despite these actions, the study found: “that in 2018, digital advertising revenue linked to infringed media was an estimated \$111 million, including \$36 million from premium advertisers and \$75 million from non-premium advertisers, such as gaming, dating and virtual private network security services.”

While this amount was a relatively small percentage of the US digital advertising revenue, Ernst and Young did conclude that: “While the \$111m ad revenue estimate represents less than 1% of the total US digital advertising market, that figure must be evaluated in the context of the overall harm that infringing content inflicts upon content producers”<sup>12</sup>.

---

<sup>11</sup> Ernst & Young, *Measuring Digital Advertising Revenue to Infringing Sites*, p 2, available at <https://www.tagtoday.net/piracy/measuringdigitaladrevenuetoinfringingsites>

<sup>12</sup> *Measuring Digital Advertising Revenue to Infringing Sites*, p 4.

In its most recent *Trust Report*, AMMA<sup>13</sup> stated:

*“Digital ad fraud and non- human traffic concern continues, for marketers and agencies alike.*

*.....*

*There are conflicting reports of the level of Australian digital ad fraud but it’s recognised as a global problem and predicted by the World Federation of Advertisers to grow to be in excess of USD \$50 billion globally by 2025.”*

The level of ad fraud was ranked #2 as a concern by the industry responders to the AMAA survey.

AMAA concluded: “the collection of consumer data, the level of ad fraud and the opacity of the digital trading ecosystem remain top issues the industry needs to address.”<sup>14</sup>

Internationally attempts have been made to harmonise the self-regulation of the advertising industry’s placement of ads online. After consultation with ad agencies, publishers, the content protection sector and consumer organisations, the European Commission released a Memorandum of Understanding on online advertising and intellectual property rights which sought to dissuade the placement of advertisements on websites which illegally provided copyrighted content. While larger ad services firms did sign onto the voluntary agreement, EUIPO’s *2019 Statutes Report on IPR Infringement* found that advertisements were still prevalent on infringing websites, and that 46% of advertisements were from mainstream brands (in contrast to ads for gambling and porn sites)<sup>15</sup>. Studies also found little evidence that the Memorandum impacted the behaviour of small or medium firms<sup>16</sup>.

Despite many studies and the Ad Tech industry’s recognition of the problem, self-regulation has achieved little and the damage to content owners continues to grow because there is systemic resistance to real and effective change.

It should be noted that all statistics which have been quoted in this section are pre COVID 19 figures. White Bullet’s report shows that consumer behaviour is shifting, and illegally sites are exploiting that shift.

Efforts should be made through international bodies and other instruments to require the Ad Tech community to act to prevent the ongoing support of illegal sites which place the

---

<sup>13</sup> AMAA, Trust Report 2019, available at <https://auditedmedia.org.au>.

<sup>14</sup> AMAA Trust Report 2019, p 26.

<sup>15</sup> EUIPO, 2019 Status Report on IPR Infringement, p 13, available at [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/docs/2019\\_Status\\_Report\\_on\\_IPR\\_infringement/2019\\_Status\\_Report\\_on\\_IPR\\_infringement\\_en.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/docs/2019_Status_Report_on_IPR_infringement/2019_Status_Report_on_IPR_infringement_en.pdf).

<sup>16</sup> Batikas., Michail, Claussen., Jorg and Peukert, Christian, Follow the Money: Online Piracy and Self-Regulation in the Advertising Industry, 2018, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3140358](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3140358).

creative industries and consumers at risk. There is an urgent need to place the Ad Tech community under obligations to change their practices and to make the changes consistent across the ecosystem.

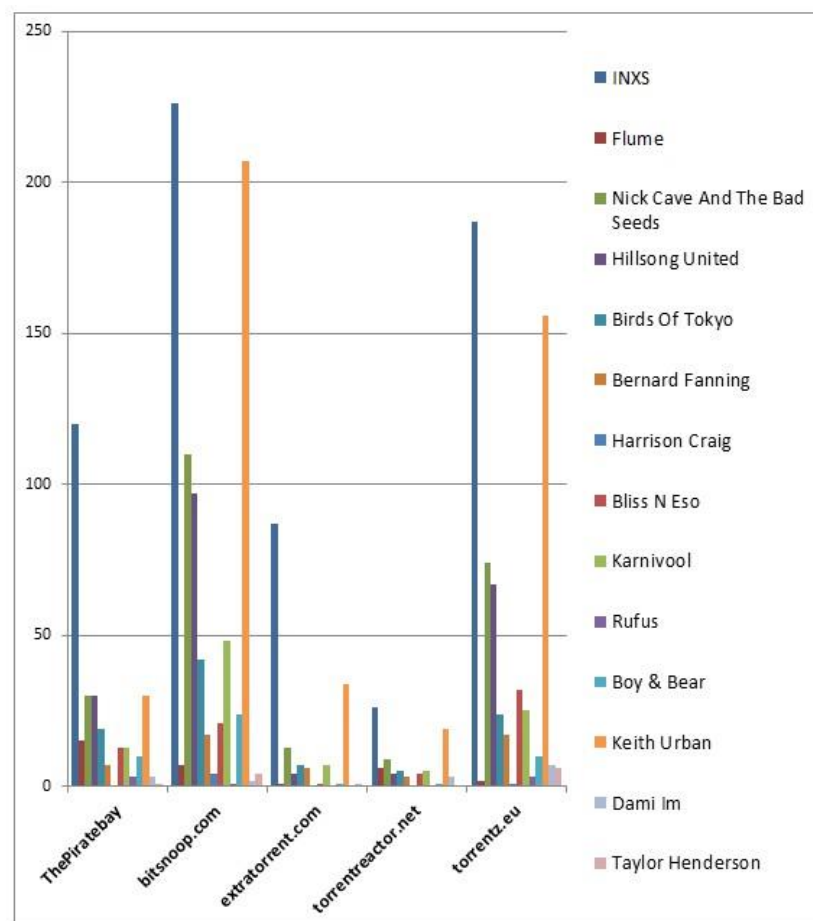
Should DFAT have any questions, please contact Vanessa Hutley at [vhutley@musicrights.com.au](mailto:vhutley@musicrights.com.au).

**APPENDIX A – Music Rights Australia submission to the *Copyright Infringement Discussion Paper* (2014) pages 4-6**

*a. Ease of access to unlawful material*

Despite the range of choices outlined above, according to the IFPI Digital Music Report 2014, approximately 26 per cent of Internet users worldwide regularly access unlicensed services.<sup>1</sup>

Licensed music is available where, when and how consumers wish to experience it, yet sites like The Pirate Bay and Kickass Torrents continue to operate and offer music for which they are not licensed. Those sites generate money for their operators from the advertising which appears on them. A recent study titled Good Money Gone Bad: Digital Thieves and the Hijacking of the Online Ad Business,<sup>2</sup> by the Digital Citizens Alliance, found that the top 30 sites in the US which stream illegal content, or make it available for download, made on average USD4.4 million each year and in total the top 30 illegal sites made USD227 million. In March, MRA reviewed the top five sites identified in that study and, using the ARIA Australia No. One Albums for 2012–2013 as a guide, took a snapshot of those sites on one day and found the following artists' albums on each of the sites (the y axis represents the number of torrents available on the site with at least one seeder).



<sup>1</sup> IFPI, *Digital Music Report 2014*, p 40.

<sup>2</sup> Digital Citizens Alliance,  
<http://www.digitalcitizensalliance.org/cac/alliance/content.aspx?page=FollowTheProfit>.

Every one of the No. One albums, and much of the particular artists' back catalogue, appeared on the five illegal sites. All of this music was readily available on a range of licensed online music services, including on free licensed services with advertising.

Despite a huge range of licensed online music services, easy access to illegal streaming and download services, including by use of P2P technologies, continues to impact the local and international music market.

#### *b. Consumer Awareness of legitimate services*

Recently, a group of rights holders and their associations worked together to develop and launch the Digital Content Guide.<sup>3</sup> The Digital Content Guide is a free service designed to help consumers find online music sites and confirm the sites which they are using are licensed. Search results often serve up illegal and unlicensed sites before they list licensed online music services, as they may not distinguish between the illegal advertising funded services and licensed services. The Digital Content Guide helps consumers check if the services which their search queries have served up are licensed online music services which support the legitimate market.<sup>4</sup>

MRA's stakeholders, ARIA and APRA AMCOS invest considerable resources in a range of initiatives, including seminars, industry and consumer events, and the development of online resources including websites and education programs, to inform their members and the general public about music licensing practices and creators' rights. MRA also operates a website which has practical fact sheets about music copyright and rights protection issues and has links to the ProMusic website and the Digital Content Guide.

Both ARIA and APRA AMCOS also fund the Music Matters campaign which is a music community based program designed to remind people about the value of music in their lives.<sup>5</sup>

A coalition of people and organisations working across the music sector, including the International Federation of Phonographic Industries (**IFPI**), has been producing the ProMusic service since May 2003.<sup>6</sup> ProMusic is a free service which lists every licensed online music service by category around the world. IFPI also produces a range of publications, including the annual Digital Music Report, which reviews industry trends and issues.<sup>7</sup> IFPI is also an active member in many of the initiatives discussed in the Other Approaches section of this submission.

---

<sup>3</sup> See [www.digitalcontentguide.com.au](http://www.digitalcontentguide.com.au); <http://www.musicrights.com.au/news/digitalcontentguide/>

<sup>4</sup> Since its launch in August the Digital Content Guide has had 10,000 visits which peaked just after the launch and this has now steadied to between 100-300 hits a day - Source Google Analytics

<sup>5</sup> See [www.whymusicmatters.com.au](http://www.whymusicmatters.com.au); [www.youtube.com/MusicMattersANZ](http://www.youtube.com/MusicMattersANZ); <https://www.facebook.com/WhyMusicMattersANZ>.

<sup>6</sup> See Pro Music, available at <http://www.pro-music.org/about.php>.

<sup>7</sup> IFPI, Digital Music Report 2014 <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>.

The current Digital Music Report outlines the vast range of services which international music fans now have:

One of the key hallmarks of digital music today is the high level of consumer awareness and engagement in digital services. Record companies are licensing a diverse range of services, successfully meeting different consumer preferences. This is illustrated in research undertaken by Ipsos Media CT across ten leading music markets for this report. Now in its second year the research shows 61 per cent of internet users aged 16-64 engaged in some legitimate digital music activity in the past six months. Among younger consumers (16-24) this figure is higher at 77 per cent.

The research also finds that consumer satisfaction with digital services remains high. Three quarters of licensed services' customers (76 per cent) described them as "excellent", "very good" or "fairly good" while even the majority of those using unlicensed services (56 per cent) recognise "there are good services available for legally accessing digital music".<sup>8</sup>

It goes without saying that record labels, music publishers, musicians' management and distributors invest heavily in marketing and promotional activities to ensure that music fans know how to find the music they produce, license and sell.

#### *c. The need for effective change*

As the music industry's experience makes clear, pervasive online copyright infringement is not caused by a lack of availability and affordability of lawful content or a lack of consumer awareness of legitimate services. Other factors, including the ease with which consumers can access unlawful material, are more significant contributors to this problem.

Further, effective rights protection is an essential component of a legal infrastructure that encourages businesses to invest in new content and innovative business models to meet consumers' legitimate expectations. This is equally true in the physical as well as the online environment.

The legal environment in which that investment takes place should also support the industry by having efficient and effective measures so that creators, and those who invest in them, have the tools to ensure their work is respected and protected online from those who seek to exploit it without rewarding them.

---

<sup>8</sup> IFPI, *Digital Music Report 2014*, p 11, available from <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>.