

**FAIR USE AND OTHER COPYRIGHT EXCEPTIONS**

**SUBMISSION**

**by**

**AUSTRALIAN RECORD INDUSTRY ASSOCIATION**

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## 1. INTRODUCTION AND SUMMARY

This submission is made by the Australian Record Industry Association (ARIA) on behalf of the Australian sound recording industry.

ARIA is a trade association representing the interests of the Australian recorded music industry. It currently has over 100 members ranging from the local subsidiaries of the large multinational corporations through to smaller independent labels and artist owned labels.

The Attorney-General's discussion paper seeks views on a variety of issues (as outlined on page 36 of the paper). This submission focuses on the following 5 key issues from our perspective:

1. Whether the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in the United States Copyright law (question 3);
2. Whether the Copyright Act should be amended to include a specific exception for time shifting television and radio broadcasts;
3. Whether the Copyright Act should be amended to include a specific exception for format shifting, and if so, under what material and under what conditions? (question 5);
4. Whether the Copyright Act should be amended to include a specific exception for making back up copies of copyright material other than computer programs, and if so, for what materials and under what conditions? (question 6);
5. Whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances? (question 7).

On a general note, ARIA considers that any amendment to the reproduction right and its exemptions needs to support new business models and the successful roll out of digital formats and online services. The industry considers that the market requires music products that are tailored to consumer needs and expectations, including home copying. This can and needs to be achieved through product design and technology, not through legislative amendment which distorts the market response to consumer demands.

Our submission addresses the questions presented by the Discussion Paper for the five points mentioned above in detail, provides background information on the previous discussion of a levy scheme in 1989, assesses the situation in the US, the EU, and other countries mentioned in the Discussion Paper based on the experience of the recording industry in those markets, and provides more information on the technologies and services developed by and for the recording industry.

In relation to the first of those questions, ARIA submits that the introduction of a broadly stated "fair use" exemption would introduce unnecessary ambiguity and uncertainty (contrary to the position of the current legislation in relation to the specified area "fair dealing") and would be highly likely to give rise to conflict until clear guidelines are established through case law. As such, ARIA strongly submits that the current scheme of clearly defined and articulated "fair dealing" exemptions is the only way to provide the necessary certainty for users and copyright owners alike.

As to the second question, ARIA agrees that the exemption must not accidentally cover "librarying". This is particularly important following the introduction of digital television and radio. The metadata which can be (and typically is) broadcast as part of a digital broadcast stream is used to identify the recordings. This identification is primarily used to allow the radio receiver to display the artist and title of the recording whilst that recording is being

played. However, the metadata can also be used by digital audio recorders to identify particular tracks which a listener wants to copy. This enables consumers to use recorders to automatically assemble comprehensive music libraries at home. As these copies can be made at a massive scale with little investment of time or effort, they substitute for purchases of legitimate copies of the recordings, very much to the detriment of the holders of rights in the content, and also contrary to the interests of the broadcaster. For the same reason, we believe it would be unjustified and ill advised to extend a time shifting exemption to effect the rights of holders of rights in content. Right holders need these rights in order to implement appropriate solutions.

In relation to the third question, the US doctrine of “fair use” is often incorrectly cited as a statutory basis for a private copying exemption (i.e. format shifting for private and domestic purposes). Contrary to its public perception, it does not apply to activities at large, but depends on the particular circumstances of its application and is not as generous as it is often portrayed. Limiting its usefulness and increasing the concerns, the US doctrine of fair use cannot be understood without the corresponding case law that has slowly developed in the US.

The general character of the guidelines and the way it is tied in with the specific US case law makes it particularly unsuitable to function as a precedent for Australia. Foremost, there is no need for general fair use guidance in Australia, where we already have a tradition of specific and clearly identified exemptions. Furthermore it would go in the wrong directions and create considerable risks. Resulting conflicts and uncertainty would be detrimental to the interests of sound recording producers (typically record companies) and recording artists as well as consumers.

In relation to the fourth question, ARIA submits that there is little or no evidence to support the proposition that the primary purpose for which private copies of sound recordings are made is to produce back up copies in the event of damage or loss. This is to be contrasted with the position in relation to software programs where the operating copy is required to be loaded on to a computer hard drive for purposes extending beyond the ‘enjoyment of the computer program’. ARIA opposes the introduction of a right to make “backup” copies of sound recordings.

As to the fifth question, ARIA opposes the introduction, in conjunction with a private copying exemption, of a blank media levy as compensation for such copying. Such a proposal is an inadequate and ineffective means of addressing the harm caused by private copying. Many reasons for the unsuitability of levy systems are mentioned in the report and ARIA supports these reasons. Based on the experience of the recording industry in other countries:

- In order to avoid an anti-competitive effect, a levy would need to be applied across all recordable media and recording devices (including computer hard drives and other hardware), not just portable media such as blank CD-Rs. This is likely to raise significant practical hurdles to the implementation of such a scheme;
- Unlike cassette tapes (which were, in a practical sense, the only storage media for music up until the mid 1990s), digital storage media are used to store many different types of copyright material (not just music, but also films, software, publications and the like). Levies in their collection and distribution would therefore always be rough justice and never compensate for the actual use.
- It would be unfair to consumers who will in more and more cases have been granted rights under contract, e.g. in relation to digital downloads where the right to make a certain number of copies typically forms part of the agreement between the consumer and the online retailer; and

- As already mentioned in relation to question 3 above, recordable media are often used to make further copies of pre-existing infringing copies of the recordings. The recording industry is strongly opposed to the proposition that levies are an appropriate response to piracy.

In addition, we would also simply make the observation that (as was the case when the blank tape levy was introduced in 1989) such a scheme is likely to be very strongly opposed by the manufacturers of recordable media. As the government is undoubtedly aware, those manufacturers successfully challenged the constitutional validity of the 1989 scheme.

All the issues introduced and summarized will be discussed in more detail below.

Finally, we trust that what emerges strongly from this submission is the fact that the “digital revolution” and the methods of legitimate exploitation of digital media and digital distribution methods are in their commercial infancy. We would submit that, in those circumstances, it would be inappropriate to give consideration to fundamental amendments to the Copyright Act until, at the very least, the legitimate methods of commercial exploitation of digital copies of recordings have become clearer and more settled.

## 2. BACKGROUND - BLANK TAPE LEVY SCHEME (1989)

An amendment was made to the Copyright Act during 1989 to introduce a blank media levy scheme (or, as it was more commonly known then, a blank tape levy scheme given the prevailing technology of the time) which was accompanied by a private copying exemption in relation to sound recordings. That scheme was ultimately declared by the High Court in 1991 to be ultra vires the Constitution. As such, the amending legislation introducing the scheme was declared invalid. The application to the High Court was brought by the Blank Tape Manufacturers Association, an association which appeared to have been formed for the purpose of challenging the validity of the legislation (but which may still exist in one form or another).

The Australian record industry was, at that time and in the years leading up to the introduction of the legislation, a strong supporter of the scheme. Indeed, ARIA appeared in the High Court proceedings as an amicus curae in support of the Commonwealth's defence of the application.

Notwithstanding the industry's support of the scheme at that time, the nature and pace of technological change in the interim period has caused the record industry to reconsider its position on the private copying exemption (and, by extension, blank media levies) and the industry now opposes the introduction of such an exemption.

The blank tape levy scheme, as formulated in 1989, provided a private copying exemption in respect of sound recordings and musical works in return for the imposition of a levy on the sale of "blank" recordable media. At that time, the predominant form of blank media used for the purposes of copying music was the compact cassette. Indeed, at a practical level, it was about the only form of blank recordable media of any significance for the music industry. They were, at the time, used almost entirely to copy music, although the industry accepted that there was some limited use of compact cassettes for non-infringing purposes.

Further, the copying technology of that time had a number of features which acted as a practical limitation on its likely use for "non-private" purposes. First, even with the best recording equipment available at the time, there was an inevitable degradation in sound quality between the source copy (such as an LP or subsequently a CD) and the copy made on to the cassette. Further sound degradation occurred with each subsequent copy made. Secondly, and perhaps more importantly, each copy that was made, was made in real time. In other words, it took 40 minutes to make a copy of a 40 minute album. These two key features combined to limit the likely number of copies that would be made – not only was a substantial investment of time required in order to make copies, but the sound quality of each subsequent copy made from the first cassette copy would be noticeably worse than the one that preceded it.

That situation is to be contrasted with the **quantum shift in technology which has occurred in the last 5-10 years with the rapid adoption of digital copying technologies**. Not only does technology now allow perfect digital copies to be made (thereby avoiding any degradation in sound quality), but such perfect copies can now be made in a matter of minutes (if not quicker). This means that large scale private copying is now possible and is, in fact, occurring. This significant shift in copying behaviour has dramatically altered consumer purchasing of authorised copies of recordings to the demonstrable detriment of record companies and recording artists.

During the same period, the industry has seen (and is actively supporting) a significant broadening (and in some cases changing) of the ways in which music is both acquired and distributed. Some of the more obvious examples of this change in recent years include the introduction of online services, both for downloading, (i.e. copying) and streaming (i.e.

listening to) music. The last few years has also seen the emergence of a wide variety of portable music players, many of which link into the emerging online music services.

In short, the technological developments of recent years, together with those that are anticipated in the coming years, mean that the circumstances surrounding the introduction of the Blank Tape Levy Scheme 1989 bear little or no relevance to the circumstances and the commercial environment in which the current inquiry is being undertaken. To the contrary, the changes reinforce the proposition that the introduction of a levy scheme could no longer be justified.

### 3. TECHNOLOGICAL DEVELOPMENTS – FUTURE VISIONS

In ARIA's view, it is vitally important that the issues being considered within the scope of this inquiry are addressed in the context of both current and future technology (both in relation to means of distribution and the media / hardware on which recordings are playable). Without that context, a change in the law may have significant, if unintended, consequences for copyright owners and users alike.

It is the goal of record companies, both internationally and in Australia, to support the introduction of new options and business models offering different services and options to consumers at different price points. Whereas in the past, the only option available to consumers has been to buy (at full retail price) and keep a physical product, services are already becoming available that offer digital access by internet download, purchase of individual songs, subscription services (akin to rental, but generally for unlimited content at a fixed rate), previews (prior to release, but timed out) and others. The options that come with these services can include 'buy' (includes a permanent licence), stream (usually a 'try before buy' option), option to transfer to portable devices and option to burn CD-R backups and compilations. The market is settling around two main business models at present: first 'pay-per-download' which is a 'buy' option including sharing on three computers, unlimited portable devices and providing a CD-R backup; and secondly subscription, which allows unlimited rental access to a catalogue of over 1 million songs, while a fixed monthly fee is paid. More recently, these services permit 'export' of the subscription catalogue to portable devices that offer support for the necessary DRM feature. Further models involve mobile services (ring tones, ringback tunes, full track downloads and streaming).

Offering these features at different price points is only possible through DRM-enabled rules that provide the agreed use at the agreed price.

On top of this, content providers continue to offer content via physical discs including CD and more recently Hybrid SACD, DVD-A, music video on DVD-V as well as DualDisc. CD has been problematic as lacking a DRM it has been the source of much infringing content 'ripped' and traded on P2P networks. But due to consumer popularity of the format, it remains necessary to support it in the market, and this has led to some releases incorporating a protection technology along with the CD content.

Annexure A to this submission is a summary of current and future trends in technology as they pertain to the production, distribution and use of sound recordings.

As will be apparent from the content of annexure A, ARIA anticipates that, in the short term, technological developments:

- Will enable consumers to make a reasonable number of copies of recordings under licence from the copyright owner;
- Will provide copyright owners with the means to limit uncontrolled copying of recordings;
- Will encourage the continued investment in new distribution technologies and methods to the benefit of consumers and copyright owners alike; and
- Will provide to consumers the flexibility that they are seeking whilst ensuring that, at the same time, Australia continues to be able to meet its obligations under various copyright treaties and the Australia/US Free Trade Agreement.

As will be apparent from Annexure A, the ability to offer consumers a variety of digital distribution options is dependant upon the development and effective operation of digital rights management (DRM) technology as well as the continued protection by law of DRM

and other technological protection measures. If such technologies are not properly protected by law, then one of the likely outcomes is that consumers will be worse off as the broad range of distribution options will not be available to them. By way of example, if a private copying exemption was to allow the circumvention of technological protection measures in order to enable the so called "right" to be exercised, then there would be no commercial incentive to introduce a business model under which a consumer pays a lower price for recordings on the basis of a contractual agreement (with associated DRM protections) that no further copies of that recording be made.

In other words, it is in the consumer's interests (as well as that of the copyright owners) for effective technological protection measures to be developed and implemented. If any legislative amendment was to compromise the ability of copyright owners to utilise and protect such measures, then that would be to the ultimate detriment of both consumers and copyright owners alike.

#### 4. FAIR USE DOCTRINE

The “fair use” doctrine under the US Copyright Act is, in that legislation, stated in the form of guidelines allowing courts to assess on a case by case basis whether an activity infringes copyright or not. It does not exempt whole sets of activities (e.g. it does not generally exempt private copying or time shifting), but requires the consideration of activities on a case by case basis, including the effects and implications of the activity. For this and other reasons, case law and experience in the US show that the “fair use” doctrine is not as generous as it is often portrayed. The lack of legal certainty and the likelihood for conflict that also follow is to be contrasted with the position under the Australian legislation as contained in the fair dealing provisions. The Australian provisions clearly state the boundaries of what constitutes “fair dealing”. The certainty afforded by the Australian provisions has achieved the aim of providing clear guidance to users and avoiding or minimising litigation. Certainly, there have been very few cases in Australia concerning the scope and operation of the “fair dealing” provisions.

However, the same is not true of the position under US law. Because the “fair use” doctrine is a set of general guidelines it has been left to the courts to articulate the limits and boundaries of that doctrine. This creates two negative effects:

- Consumers and other users of copyright material are given **no clear guidance by the legislation** as to whether or not any proposed use would constitute fair use and, hence, attract the protections of the legislation;
- Even where case law has addressed a particular situation, the guidelines may lead to a different result for a similar activity at a later time or under different circumstances.
- Any dispute as to the ability of a user to rely on the doctrine in a given case is **more likely to result in litigation** to obtain a court determination as to those limits and boundaries.

The certainty afforded by the Australian provisions is generally viewed as one of the strengths of the Australian Copyright Act.

The discussion paper seeks views on whether or not the current fair dealing provisions ought to be consolidated (albeit in the context of introducing a broadly stated “fair use” exemption with the current fair dealing categories providing examples of what would constitute fair use).

As stated above, ARIA is strongly of the view that the introduction of a broadly stated concept of “fair use” would be inappropriate. There is no practical problem being experienced by consumers which necessitates the introduction of such an exemption. Conversely, the introduction of such an exemption would create new licensing and enforcement difficulties. In those circumstances, we consider that there would be little or no practical benefit in consolidating the current fair dealing provisions, nor any need to do so.

## 5. FORMAT SHIFTING/PRIVATE COPYING EXEMPTION

One of the key focuses of the discussion paper is a consideration of, in effect, a right for consumers to make copies of (relevantly) recordings for their personal use. Supporters of such an exemption often cite what they understand to be the position under US law (particularly in relation to the application of the “fair use” doctrine to recordings).

As such, before addressing our key concerns in relation to the introduction of a general private copying exemption, we outline our understanding of the situation under US law, particularly in relation to the “fair use” doctrine.

### **Position Under US Law**

Two provisions in US copyright legislation are frequently mentioned in the context of consumer home copying: the “fair use” provision of the US Copyright Act (section 107 of that Act) and the Audio Home Recording Act (AHRA, section 1001 – 1010).

While the fair use provision may cover some selected acts of copying by consumers, in particular for educational purposes, it does not create a general private copying exemption. In particular, it does not create a broad right to make copies of CDs for private and domestic use. The AHRA on the other hand covers all copying of audio content by consumers using home copying equipment for non-commercial purposes. Importantly, it does not create an exemption, but merely limits the ability of rights holders to bring legal action against consumers and hardware manufacturers under certain conditions.

#### **1. Fair Use and home copying before the adoption of the AHRA [1992]**

In *Sony Corp of America v. Universal City Studios, Inc. [1984]* the Supreme Court upheld the right of Sony to sell a Betamax recorder to home users for taping whole television programs, containing audio and visual components.

This created the misconception that home copying in general was exempted by the fair use principle. This understanding is not supported by the language of the legislation for several reasons:

- The fair use exemption by definition cannot be applied to a broad range of activities in general but has to be applied on a case by case basis with the outcome depending on a number of factors; in particular the purpose of the activity, the character, and the effect on the interest of the right holder. Many cases of home copying of music will not satisfy the requirements of the fair use test.
- The fair use test requires a special purpose for the copying, in particular an educational purpose. While some home copying from television might serve an educational purpose, this is not generally the case, and certainly applies hardly ever to the copying of music.
- The fair use test states very clearly that the activity in question must not have a detrimental effect on the legitimate market. Home copying, in particular in the digital environment, has a very negative effect on the legitimate market.

Copyright owners, in reaction to the *Sony v. Universal Studios* case, have called for legislative clarification of the issue. This became particularly necessary in light of new emerging hardware for the digital audio copying leading to new dimension in consumer copying. For example, DAT recorders were sold for the primary purpose of allowing consumers to build a library of music for repeated listening. This lobbying resulted in the introduction of the Audio Home Recording Act in 1992 which represented a compromise position reached between copyright owners and hardware manufacturers.

Given the substantial changes in digital technology which have occurred in the last twelve years, the legislative “solution” created by the AHRA cannot be regarded as a useful guide or precedent for Australia in 2005.

## 2. The Audio Home Recording Act (AHRA)

The Audio Home Recording Act of 1992 has three key elements:

- No action can be brought against manufacturers for developing, manufacturing, and selling audio recording equipment. The same legal indemnity applies to consumers using such equipment for private non-commercial home copying. Note that this is not an exemption from the reproduction right, but merely precludes right holders from bringing actions against consumers and against manufacturers of specified equipment under certain conditions.
- To further limit the negative impact, the AHRA prescribes the application and integrity of a certain copy control system that was perceived as being useful for the situation in question and the technology relevant in 1992, i.e., a system that allows content to be copied from the source, but prevents serial digital copying, i.e. the digital copying from digital copies.
- It aims to compensate the affected parties for revenue they might lose due to the use of digital home recording equipment and media. It does this by imposing a form of tax or levy which is either paid by consumers at the point of sale or passed on to consumers as part of the overall purchase price. Those funds are then distributed to copyright owners and others. Such “compensation schemes” cannot be looked at as a viable solution today.

Importantly, it should be noted that the introduction of the AHRA would not have been necessary if such uses constituted “fair use” under the US Copyright Act.

## Key Concerns

Turning now to the specific concerns of the record industry in relation to a broad based private copying exemption:

### 1 Unjustified Abrogation of Rights

The fundamental propositions on which this proposal appears to be based are:

- that private copying is occurring in any event;
- that there is little that can be done to control or prevent that copying given current technology;
- that, because technology allows private copying to occur (and has done so for some time), such copying has assumed the status of a “right”; and
- that, irrespective of the rights of copyright owners and creators, the only effective “solution” is to legitimise the activity through, in effect, a compulsory licence.

As a matter of principle, the record industry does not accept that an abrogation of the rights of copyright owners and creators can be justified on these grounds. Attached as Annexure B is an analysis of the proposal for a private copying exemption in the context of what has become known as the “three step test” as articulated in various copyright treaties. This analysis draws on a number of the matters canvassed above and concludes that (in view of the development of technology, business models, and the music market generally) a private copying scheme would be in breach of this test and therefore contrary to Australia’s obligations under those treaties.

### 2 No Practical Problem

The Copyright Act does not contain a per se prohibition on the making of copies of recordings (amongst other copyright based material). Rather, it provides that it is an infringement of copyright to make a copy (except in limited circumstances, e.g. fair dealing) without the consent of the copyright owner. As such, it is a matter for the copyright owner in each instance to determine whether or not to grant consent. In a practical sense, in circumstances of private copying (where almost by definition no express consent is obtained), the issue for consideration in the mind of a copyright owner is whether or not it intends to take any action in respect of the unauthorised copying.

In a practical sense, home copying of recordings by consumers has been a reality for 40 years or more since the widespread introduction of home recording facilities in the 60s – initially reel to reel tape decks, followed by the compact cassette and, in more recent times, by a plethora of digital storage and recording media. Despite a relatively long history of home copying, and also despite a number of technological attempts during the 70s and 80s to build anti-copying technology into LPs, we are not aware of a **single instance (either in Australia or elsewhere in the world) of a sound recording copyright owner seeking to prosecute an individual for copying for private and domestic use.** Whilst that does not mean that the copyright owners condone that private copying, it clearly demonstrates that copyright owners have not sought to utilise remedies available to them under the Copyright Act to address the problem. Rather, the industry has pursued, and continues to pursue, a combination of contractual and technological solutions to enable and control private copying.

As such, the proponents of the private copying exemption are, in the main, seeking to address a point of principle rather than a point of practical concern for a consumer.

As this submission makes clear, there are many adverse consequences for copyright owners that arise from the introduction of a private copying exemption. It will have many far reaching and unintended adverse consequences for copyright owners. The absence of any practical problem for consumers simply does not warrant the exposure of copyright owners to those consequences.

It is relevant in this context to note one of the key findings from the ARIA research study of 2003<sup>1</sup> (a summary of the key findings is attached as Annexure C). It will be noted, on page 6 of the summary, that 82% of those who had received a “burnt” CD (i.e. a privately made copy) reported that they either never or very rarely went on to buy an original or legitimate copy of the recording. One of the key conclusions to be drawn from that finding is that, in the minds of consumers, a “burnt” CD is an effective substitute for a legitimate copy of the recording (unlike the position with cassette tapes a decade or more ago). As such, the extent of the substitution effect, whilst very unlikely to be one for one, is nonetheless likely to be substantial.

### 3 Enforcement Difficulties

Another adverse consequence from the introduction of a private copying exemption for CDs would be the increased difficulty in enforcing copyright infringement. At present, one of the key indicators that a copy of a recording is an infringing copy is the fact that it appears on either an unknown label or, more relevantly, is in the form of a burnt CD. Burnt CDs are clearly not commercially released by copyright owners and, as a matter of logic, a burnt CD is almost certainly infringing. That proposition would no longer hold true if a private copying exemption was introduced. Whilst there would continue to be circumstances where the method of sale or distribution clearly indicated that it was not a private copy (for example, the sale of burnt CDs at a market stall), not all situations would be equally clear-cut. A copy legitimately made under a private copying exemption would not cease to be legitimate if it was subsequently distributed to, or given to, third parties.

In short, we are concerned that the introduction of a **private copying exemption would exacerbate enforcement difficulties without any commensurate benefit to either consumers or copyright owners.**

### 4 Encouragement of Mass Copying

In the circumstances, the record industry is concerned that the introduction of a private copying scheme would have very adverse financial consequences for both record companies and recording artists alike. At the time that a decision is made by a record company to invest in the recording, manufacture, marketing and distribution of a new album, an informed assessment is made as to the likely sales of that album. If those sales are not achieved, then the investment made by the record company will not be recouped and there will be a loss. If home copying is permitted (and, in fact, encouraged) by the introduction of a “fair use” exemption, then the industry would be concerned that the **financial viability of many of its investments in new recordings and in new technology and business models would be adversely affected** by the substitution of burnt CDs for legitimate copies.

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<sup>1</sup> “Understanding CD Burning and Internet File Sharing and its Impact on the Australian Music Industry” Quantum Market Research (for ARIA) July 2003

## 5 Technological Measures

As mentioned above, the record industry has, for some time, made it clear that it considers the appropriate response to the private copying phenomenon includes the introduction of technological measures to enable and control the making of licensed copies.

A number of record companies in Australia have already commenced the inclusion of copy control technology on their new releases. Such technology has been a standard feature of DVDs since their inception and has also been included, in one form or another, in many software programs.

In the online environment, digital rights management technology is being employed to manage the number of copies of a recording that a consumer may make from a copy downloaded through one of the legitimate services. By way of example, the Apple iTunes service in the United States allows a consumer who downloads a licensed copy from that service to further copy the recording on to three separate devices (including a blank CD). The Telstra Bigpond music service in Australia grants similar copying rights. That contractual right is managed through the use of technology.

## 6 Infringing Source Copies

Proposals for a private copying exemption are typically predicated on the explicit or implicit assumption that the **source copy (from which the private copy is made) is a legitimate or authorised copy**. Of course, given current technology and, in particular, the enormous number of unauthorised copies of recordings which are currently sourced from the internet, that assumption is simply untrue in many cases.

Given the substantial concerns expressed by the record industry in relation to the adverse impact of file sharing services (such as the original Napster and, currently, KaZaa), the industry would be strongly opposed to any measure which legitimised the copying of infringing copies of recordings. In addition, we would be strongly opposed to any measure which could be relied upon by file sharing networks, even in the context of public debate, as legitimising their activities. The industry has a substantial public education challenge in front of it in relation to file sharing networks and the harm that they cause copyright owners and the creators of music. The advocates and supporters of such services would undoubtedly seek to maintain that the introduction of a private copying exemption would have the effect of ensuring that individual users of such a network would no longer be infringing copyright. In fact, this use is the least 'private' and most detrimental unauthorised use of music causing immense harm to rightholders.

Of course, the legislation could be expressed in terms that only allowed private copies to be made from authorised copies of recordings. By way of example, such a distinction exists in the German legislation (one of the countries struggling with a legacy levy scheme). However, their experience is that a provision that distinguishes between infringing and non-infringing sources finds very little acceptance and gives rise to concerns among consumers and rightholders alike.

On the basis of the prevailing copying from infringing sources, the record industry is strongly of the view that the introduction of a private copying exemption would be extremely prejudicial to the interests of sound recording copyright owners and recording artists.

## 6. BACK-UP COPIES

The discussion paper proposes consideration of an exemption which would allow a user to make a back up copy of, relevantly, a sound recording to cover circumstances where the original copy was either lost or damaged. An analogy is drawn with the existing exemption which relates to back up copies of computer programs.

As an initial observation, we do not consider that the analogy between sound recordings and computer programs is a valid one, notwithstanding the fact that they are both protected under the Copyright Act.

Given the way in which computer programs must be necessarily deployed and used, they are peculiarly at risk of loss or damage from:

- Hardware problems; and
- Corruption (e.g. from computer viruses).

Any corruption of the program will affect the functioning of the computer system, availability of data and work products, etc., as computer programs are used for purposes going beyond the mere 'enjoyment of the program'. In such circumstances, there is perceived to be a compelling need to retain a back up copy guard against these risks (particularly given the cost of many software programs). None of this reasoning applies to recorded music.

For the above reasons, ARIA sees no justification for the introduction of a general right to make general "backup" copies of recordings.

## 7. TIME SHIFTING

The industry's primary concern in relation to time shifting relates to the capacity of emerging technology to allow radio listeners to search for, and make digital copies of, recordings off the air.

One of the key features of digital radio broadcasting (currently being trialled in Australia) is the ability of the radio receivers to display (on a screen which forms part of the receiver) the artist and title of the recording currently being played (amongst other information). That feature is made possible by the inclusion within the digital broadcast stream of metadata which allows the receiver to identify the particular recording being broadcast. At the same time, we are witnessing the emergence of personal digital recorders that allow users to program the recorder to search for, and copy, specific copyright material.

The primary application for such recorders has, to date, been in relation to television (the personal video recorder). However, with the advent of digital radio, a right to "time shift" would allow consumers the unfettered right to make perfect digital copies of recordings off air in substitution for copies that they would otherwise legitimately acquire.

In addition, unlike the position in relation to television, we are not aware of any compelling evidence which suggests that there is a strong consumer "need" or demand to be able to time shift radio broadcasts (except, perhaps, in very limited circumstances such as interviews or specially scheduled programming). In the absence of any compelling reason for the introduction of such a right, we would submit that there is no justification for considering such an amendment in relation to radio broadcasts.

If legislation was introduced we would for the same reasons as stated above welcome a clarification to the effect that s. 111 does not exempt the 'librarying' of broadcast content.

## 8. STATUTORY LICENCE/BLANK MEDIA LEVY

The discussion paper also calls for submissions in relation to the possibility of introducing a statutory licence scheme (more commonly referred to as a blank media levy scheme). Before setting out our concerns in relation to such a scheme, we thought it appropriate to address the international position in relation to such schemes given that they already exist in a number of territories.

### International Position

Levy schemes (with the associated private copying exemption) are in place in a number of countries around the world (including some European territories and Canada). These examples are often cited by supporters of the levy scheme to argue for its introduction in Australia.

However, it should be noted that all of these schemes were introduced some considerable time ago prior to the introduction of the blank tape levy amendments to the Australian Copyright Act in 1989 and certainly well before the advent of digital technology. As such, when they were formulated and introduced, they only had in contemplation the use of compact cassettes to make analogue copies.

Significantly, each of those territories which has a “legacy” levy scheme in place is experiencing significant practical difficulties in effectively responding to the advent of digital technology and, specifically, to the ever increasing variety of blank media that can be used to copy music (as well as, increasingly, other copyright material – something which was not in contemplation at the time of the introduction of such schemes).

Significantly, to the best of our knowledge, no such blank media levy schemes have been introduced following the advent of digital technology.

ARIA submits that the government should place no weight whatsoever on the pre-existing “legacy” schemes when considering its response to the APRA/Screenrights proposal for the introduction of such a scheme in Australia.

As outlined in the introduction, there are a number of additional bases for the current position of the record industry internationally in relation to the appropriateness of blank media levies. We will discuss each of those in more detail in the following commentary. However, it is important to note that the industry acknowledges and confirms the extent and effect of private copying on copyright owners and recording artists. However, we regard any proposal for the introduction of a blank media levy as being a flawed, cumbersome and very unsatisfactory “solution” which, in all likelihood, could exacerbate the very problem that it is seeking to address.

The record industry is committed to addressing this problem through a combination of the following measures:

- the use of technology to to enable and control the making of licensed copies;
- the continued support of legitimate business models which enable consumers to make copies of recordings under licence (ensuring that revenues are received by those whose recordings are actually copied).
- education programs to highlight the fact that unauthorised copying is an infringement of copyright and that such copying is not a “victimless” activity (given that it denies revenue to the creators of music); and

The industry is very concerned that a blank media levy would have a very significant adverse impact on the ability of the industry to effectively deal with the problem of unauthorised copying.

## Key Concerns

Turning now to the specific concerns of the record industry in relation to a private copying/blank media levy scheme:

### 1 Inadequate Financial Return

The amount of any levy received in respect of the private copying of sound recordings is highly unlikely to constitute fair compensation for the almost unfettered and prejudicial use of such recordings.

As a subsidiary point, it should be understood that the introduction of a levy is likely to increase the prices of the various media on which it is placed (i.e. the levy is highly unlikely to be absorbed by either the manufacturers or retailers of such media).

It is almost inevitable that the amount of any levy will be referable to, and will be calculated as a percentage of or a proportion of, the price paid (either wholesale or retail) for the blank media. By way of example, retail prices for blank CDs are currently averaging approximately \$1.00 per disc. It would seem unlikely that any copyright levy would exceed a relatively small percentage of this price.

In this context, a look at levy schemes that are still maintained in some countries shows that levies cannot be considered as a way of compensating for the copies made. For example, Belgium applies a fixed rate of half a Euro cent per hour of playing time. The German scheme applies a royalty of 6% of the wholesale price. Significantly, no levy schemes are in place in either the United Kingdom or Ireland.

However, for the purposes of this analysis, even if it is assumed that a levy of 50% of the retail price was introduced (which is significantly higher than any other territory which currently has a scheme), that would still only produce a levy of approximately 50 cents per blank CD based on an initial retail price of \$1 per CD (which would, in all likelihood, raise the retail price as a consequence). Bearing in mind that the levy would need to be properly shared between a range of copyright interest groups (the respective owners of copyright in sound recordings, musical works, computer programs, literary works, artistic works and cinematograph films), it would be optimistic to suggest that sound recording copyright interests would receive more than 15-20 cents per blank disc at best (on the assumption of a 50% levy). Clearly, if the levy amount was in line with the experience in relevant European countries, then the amount payable in respect of the sound recording copyright would be significantly less.

This contrasts poorly with the returns to both copyright owners and recording artists from the sale of legitimate copies of CDs. Whilst there is no standard artist contract or a standard artist royalty, all recording artists under current industry agreements expect to earn royalties of at least \$2.00 - \$3.00 and sometimes significantly more on the sale of each full price CD. That amount is quite apart from any revenue or profit received by the copyright owner (often the record company). It is, of course, difficult to quantify a typical profit figure for record companies (particularly on a per CD basis) as profit will only occur once the revenue from sales is sufficient to cover all costs associated with the release (e.g. recording, manufacturing, distributing, promotional videos, marketing, etc). If it is successful, then the extent of the profit will depend upon the degree of success of the CD overall. Nonetheless, it is clear that there is a substantial disparity between the returns from any blank media levy and the revenues that are earned from the sale of legitimate CDs.

It is relevant in this context to note one of the key findings from the ARIA research study of 2003<sup>2</sup> (a summary of the key findings is attached as Annexure C). It will be noted, on page 6 of the summary, that 82% of those who had received a burnt CD reported that they either never or very rarely went on to buy a copy of the original recording. One of the key conclusions to be drawn from that finding is that, in the minds of consumers, a “burnt” CD is an effective substitute for a legitimate copy of the recording (unlike the position with cassette tapes a decade or more ago). As such, the extent of the substitution effect, whilst very unlikely to be one for one, is nonetheless likely to be substantial.

In the circumstances, the record industry is concerned that the introduction of a private copying scheme would have very adverse financial consequences for both record companies and recording artists alike. At the time that a decision is made by a record company to invest in the recording, manufacture, marketing and distribution of a new album, an informed assessment is made as to the likely sales of that album. If those sales are not achieved, then the investment made by the record company will not be recouped and there will be a loss. If home copying is permitted (and, in fact, encouraged) by the introduction of a blank tape levy, then the industry would be concerned that the financial viability of many of its investments in new recordings and in new technology and business models would be adversely affected by the substitution of burnt CDs for legitimate copies.

## 2 Diverse Media and Formats

Although blank recordable CDs are often identified as the primary recordable medium in discussions of the blank media levy, there are many other forms of recordable media. Apart from a variety of portable media (such as recordable CDs and DVDs, memory sticks and external storage devices such as zip drives), there is also a range of non-portable recordable media such as, most obviously, hard drives in personal computers. In addition, there is a growing range of portable media players (such as the Apple iPod) that are used to store and play thousands of recordings.

In order for the levy not to have an anti-competitive effect (and to avoid creating either a competitive disadvantage or a competitive advantage for particular forms of recordable media), a levy would have to be placed on all possible recordable media, both fixed and portable. The selective levying of specific types of recordable media would also be contrary to the government’s stated objective of making the Copyright Act technology neutral. That said, it would seem to the industry to be impossible, at a practical level, to devise a levy scheme that could be applied across all current (and future) recordable media in a fair and equitable manner. Indeed, our understanding is that those territories which have a “legacy” levy scheme struggle with these issues as the introduction of ever changing digital technology challenges the basis upon which the scheme was initially introduced. Their tribunals and courts are burdened with repeated disputes whenever a new carrier or piece of hardware is introduced.

## 3 Multiple Uses

It is, of course, stating the obvious to say that recordable media is used to copy a wide range of copyright material (including sound recordings, musical works, computer programs, literary works and cinematograph films). Equally clearly, such

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<sup>2</sup> “Understanding CD Burning and Internet File Sharing and its Impact on the Australian Music Industry” Quantum Market Research (for ARIA) July 2003

media is just as often used for “non-infringing” purposes such as backing up computer data and creating personal photo libraries.

Any workable levy scheme would have to contemplate that all current recordable media has substantial non-infringing uses and would also have to fairly apportion any such levy amongst a wide variety of copyright holders.

In relation to the rights of consumers in relation to non-infringing uses, it has been suggested that a solution would be to enable a consumer to obtain a refund on application to the relevant collecting society supported by a statutory declaration. With respect, this is a very cumbersome measure which will have the practical effect (given the time and cost involved) of ensuring that many do not seek the refund to which they are legitimately entitled.

As to the wide variety of relevant copyright holders, it is not clear how a meaningful allocation would be made between the various copyright interest groups. Any scheme that is used (such as some form of survey evidence) would at best be a gross approximation, but could conceivably bear no relationship whatsoever to the nature of use of the various blank recording media by consumers.

#### 4 Technological Measures

As mentioned above, the record industry has, for some time, made it clear that it considers the appropriate response to the private copying phenomenon includes the introduction of technological measures to prevent or inhibit the making of unauthorised copies and/or to control the making of licensed copies.

A number of record companies in Australia have already commenced the inclusion of copy control technology on their new releases. Such technology has been a standard feature of DVDs since their inception and has also been included, in one form or another, in many software programs.

It is still too early to assess the long term efficacy of such technology. However, anecdotal evidence suggests that it has had a measurable impact on copying behaviour. In addition, and consistent with the proposition that copyright owners should continue to have the right to grant consent for the copying of the recordings, new versions of copy control technology now being developed are intended to allow a limited number of copies to be made from the original source copy.

In the online environment, digital rights management technology is being employed to manage the number of copies of a recording that a consumer may make from a copy downloaded through one of the legitimate services. By way of example, the Apple iTunes service in the United States allows a consumer who downloads a licensed copy from that service to further copy the recording on to three separate devices (including a blank CD). The Telstra Bigpond music service in Australia grants similar copying rights. That contractual right is managed through the use of technology.

#### 5 Contractual Relationships

The introduction of a blank media levy scheme would be at odds with the contractual relationships between consumers and those companies selling licensed downloads (such as, for example, Telstra’s Bigpond music service). Such services have become known generally as Digital Service Providers or DSPs.

Typically, consumers who purchase licensed downloads from DSPs are authorised to make a limited number of copies of the recording on to other devices and other media such as blank recordable CDs. That proposition is certainly true of the Telstra service, for example. In short, the purchase price paid by the consumer includes a licence to make a certain number of copies. On that basis, there could be no justification for the consumer having to pay a levy on blank recordable media to exercise a right already granted to them under contract from the DSP.

Equally, if such a scheme was introduced, the situation could arise whereby a consumer enters into a contract to buy a copy of a recording from a DSP at a lower price on the basis that no copies are made and then relies upon the private copying right to effectively circumvent the contractual restriction agreed between that DSP and the consumer.

## 6 Infringing Source Copies

Proposals for a blank media levy are typically predicated on the explicit or implicit proposition that the source copy (from which the private copy is made) is a legitimate or authorised copy. Of course, given current technology and, in particular, the enormous number of unauthorised copies of recordings which are currently sourced from the internet, that proposition is simply untrue in many cases.

Given the substantial concerns expressed by the record industry in relation to the adverse impact of file sharing services (such as the original Napster and, currently, KaZaa), the industry would be strongly opposed to any measure which legitimised the copying of infringing copies of recordings. In addition, we would be strongly opposed to any measure which could be relied upon by file sharing networks, even in the context of public debate, as legitimising their activities. The industry has a substantial public education challenge in front of it in relation to file sharing networks and the harm that they cause copyright owners and the creators of music. The advocates and supporters of such services would undoubtedly seek to maintain that the introduction of a private copying exemption would have the effect of ensuring that individual users of such a network would no longer be infringing copyright. In fact, this use is the least 'private' and most detrimental unauthorised use of music causing immense harm to rightholders.

Of course, the legislation could be expressed in terms that only allowed private copies to be made from authorised copies of recordings. By way of example, such a distinction exists in the German legislation (one of the countries struggling with a legacy levy scheme). However, their experience is that a provision that distinguishes between infringing and non-infringing sources finds very little acceptance and gives rise to concerns among consumers and rightholders alike.

On the basis of the prevailing copying from infringing sources, the record industry is strongly of the view that the introduction of a private copying/blank media levy scheme would be extremely prejudicial to the interests of sound recording copyright owners and recording artists.

**CONCLUSION**

On any view of it, the matters raised in this submission mitigate against a consideration of a private copying exemption at this early stage in the commercial development of digital copying and digital distribution (with or without a blank media levy). The introduction of such an exemption at this time could have significant and presently unforeseeable adverse consequences for copyright owners and recording artists with little or no practical benefit to consumers.

The above is a comprehensive summation of the reasons why the Australian record industry strongly opposes the introduction of a private copying exemption in relation to sound recordings. We would, nonetheless, be happy to expand on or clarify any aspect of this submission or answer any other questions in relation to it.

In the meantime, we thank you for the opportunity to make this submission on what is an important issue for the record industry in Australia.

**Stephen Peach**  
**CEO**  
**Australian Record Industry Association**  
**1 July 2005**

## ANNEXURE A

### TECHNOLOGY – CURRENT AND FUTURE TRENDS

Technological developments, as they pertain to Digital Rights Management within the recorded music industry, are focusing on two key objectives:

- Limiting the uncontrolled, broad scale copying of recordings contained on physical media (such as CDs); and
- Facilitating greater diversity in the online and mobile distribution of recordings and more flexibility for consumers in how they acquire music.

Outside of these areas, the recorded music industry is working with technology partners to deliver new consumer formats (online formats and new disc formats that can provide exciting features such as surround sound, high resolution audio etc) and also to deliver greater efficiencies in the value chain (this covers identifiers, messaging and reporting with digital distributors as well as the digital management of rights). Internally, music companies are actively working to digitise their catalogues – a process which is generally now complete, regarding the active catalogue items.

#### Controlled Copying

The early versions of copy control technology, utilised on some new release CDs over the last 12 to 18 months in Australia, have sought to prevent digital copying of the recordings by the in computer drives. Generally, copying of such CDs via consumer audio CD-R recorders has remained possible by analogue or digital means. It has been the stated objective of the industry to ensure the development and refinement of CD protection technology to allow much greater flexibility of copying by consumers – e.g. to allow the transfer of digital files onto the computer and to portable devices, albeit with DRM to prevent uncontrolled transfer to P2P networks or unlimited burning to CD-R copies. That more sophisticated technology has now been developed<sup>3</sup> and will shortly be utilised on new release CDs by at least one of the major international record companies.

New versions of copy control technology:

- Will allow a user to make authorised copies of the recordings as compressed music files on the computer and onto a limited number of other devices; and
- Will allow the consumer to “burn” a copy of the recording on to a blank CD.

In other words, new versions of copy control technology (which will be deployed internationally and in Australia during the second half of 2005 and into 2006):

- Will further permit a reasonable level of private copying; but
- Will prevent uncontrolled, broad scale copying of recordings.

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<sup>3</sup> Provider information about such technology and usage features includes:

<http://www.macrovision.com/products/cds/cds300/index.shtml>

<http://www.xcp-aurora.com/xcp2.aspx>

<http://www.key2audio.com/solution.asp>

<http://www.sunncomm.com/Brochure/SunncommPage2.htm>

## Online/Mobile Distribution

The emergence of digital distribution channels via the internet and mobile phones (with the emergence of 3G networks) opens up a plethora of distribution models for music. Digital Rights Management is a necessary foundation upon which different service option and pricing models can be constructed. Various DRM solutions have become available from providers such as Microsoft, Apple Computer, Real Networks and others. Progress with mobile DRM has in some respects been slower, but OMA 1 DRM has widely been used for ring tones, and a version 2 technology is under development while other providers such as SDC Ag and Beep Science are developing alternatives. Examples of the kind of features that can be enabled are described at provider websites<sup>4</sup> and illustrative examples include:

- Permanent downloads of recordings with the accompanying right to make a limited number of copies of those recordings. This is the most popular distribution model to date and is the model currently employed by the emerging online music businesses in Australia;
- Tethered downloads. Under this model, permanent copies can be kept on a specified storage device (such as a PC or mobile device) but there is no right to make any copies of those recordings. Such tethered downloads would typically be offered at a cheaper price than permanent downloads because of the more limited flexibility;
- Timed-out downloads. Under this model the consumer would purchase a copy of a recording at a relatively cheap price (or perhaps even free). However, the consumer's ability to access that copy would be limited to a particular time (e.g. two weeks from initial download). After that time, the consumer would have to decide whether he or she wished to acquire a permanent download for which an additional fee would be payable;
- Promotional downloads. These would be similar to timed-out downloads, but could be downloaded for free for a limited time. Alternatively, the promotional download may be a truncated version of the full track or there may be some other restriction. The purpose of the download would be to provide the consumer with the opportunity to listen to the recording and decide whether or not he or she wished to purchase a permanent copy of the recording (either at that time or at some time in the future);
- Subscription download services. Under such models, the consumer pays a monthly subscription fee. In return, the consumer is able to download as many recordings as he or she likes and to copy them on to a number of devices. However, the ability of the consumer to continue to be able to access those copies is dependant upon the continued payment of the subscription fee. Such online businesses are already operating in the US and Europe;
- Streaming services. These services typically allow unlimited "listening" to recordings for a monthly fee together with the ability to purchase permanent copies of particular tracks; and
- Permanent downloads with restrictions. An alternative business model to the first example could have two price points – a lower price in circumstances where the consumer purchases only one copy of the recording with no right to make any subsequent copies and a higher price to acquire a copy of the recording along with the right to make a limited number of copies.

These are simply some of the distribution options either currently available or to be made available to consumers in the near future.

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<sup>4</sup> Microsoft Windows Media DRM <http://www.microsoft.com/windows/windowsmedia/drm/default.aspx>  
 Devices compatible with Windows Media DRM  
<http://www.microsoft.com/windows/windowsmedia/devices/default.aspx>  
 RealNetworks Helix DRM <http://www.realnetworks.com/products/drm/>  
 Apple Fairplay DRM <http://www.apple.com/support/itunes/authorization.html>

## ANNEXURE B

### THREE STEP TEST

ARIA submits that the proposed private copying exception, even if coupled with a remuneration scheme in the form of a levy on certain blank media, is clearly in breach of the three step test for exception and limitations to copyright, enshrined in Australia's international obligations.

The three criteria, as reflected in the Berne Convention, Article 9(1), TRIPS article 13 and the WIPO Copyright Treaty, article 10, are that the exception or limitation must extend only –

- to “certain special cases”
- that “do not conflict with a normal exploitation of the work” and
- that “do not unreasonably prejudice the legitimate interests of the author”.<sup>5</sup>

It is generally agreed that the three steps are cumulative, and that all must be satisfied if an exception or limitation is to pass the test.

The proposed private copying exception is an “exception or limitation” that would fall to be judged by the three step test. In particular, in the digital environment, the WIPO Copyright Treaty and the WIPO Phonograms and Performances Treaty mandate that member countries may appropriately extend existing exceptions and limitations into the digital environment, but only consistently with the three step test.

#### **Step 1 – Certain special cases**

According to the authorities, this means that the exception:

- must be clearly defined and narrow in its application;
- need not have a special policy purpose; and
- must be potentially available to only a narrow category of users.

ARIA does not concede that the proposed private copying exception is limited to “certain special cases” in this manner. As proposed, the exception would apply to all sound recordings and all users of those sound recordings. The comments of the WTO panel on this step of the test support ARIA's position.

However, for the purposes of this submission ARIA will accept that it may be possible to enact a private copying exception in sufficiently narrow terms so as to pass the first step of the test.

#### **Step 2 – No conflict with normal exploitation**

According to the authorities, there is no “conflict with a normal exploitation” only if:

- the use does not enter into economic competition with ways in which the authors normally extract value from a work; or

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<sup>5</sup> For the interpretation of the three step test, ARIA has drawn on the work of Sam Ricketson, who is clearly recognised as the leading expert in the area. ARIA has also had reference to the full decision of the WTO Panel regarding the dispute between the United States and European Communities regarding section 110(5) to the US Copyright Act, and the work of Professor Jane Ginsburg.

- taking into account the technological and commercial conditions that exist now or in the near future, the use does not or could not acquire any considerable economic or practical importance.

Importantly, the authorities are agreed that if there is a conflict with a normal exploitation, it is not possible to “cure” that conflict by the payment of money. In considering economic competition and the “normal extraction” of value, the relevant market to consider is the Australian market. In addition, the authorities state that current licensing practices and market conditions are not the sole guide and account must be taken of future directions and the exploitation of new markets.

ARIA considers that a private copying exception for sound recordings is clearly in conflict with the ways in which copyright owners are already exploiting their rights in Australia. ARIA’s members are already licensing various types of private copies of sound recordings, most notably through the recently launched Telstra Bigpond music website.

Users of that website download recordings subject to the following rules:

*Your purchase of a Music File, authorises you, for your own personal use, to:*

- (a) *download the Music File once, to one stand-alone personal computer;*
- (b) *copy the Music File an unlimited number of times to up to two portable devices registered to you which operate with Microsoft Windows Media Player version 9;*
- (c) *burn the Music File up to 3 times onto CD-R or CD-RW; and*
- (d) *download up to two replacement Music Files at no additional charge if you have had problems installing the licence or if the original file on your stand-alone personal computer is lost or destroyed.*

The advent of sophisticated digital downloads of this nature, coupled with technological protection measures, and has only recently enabled ARIA’s members to begin to flexibly license the making of consumer copies. These business models will become more widespread over time.

The copies referred to above, for private use, are an integral part of the product being offered by ARIA’s members via the BigPond music website and other similar digital download services. The price of these copies is factored into the pricing of the digital download to consumers, as well as into the licensing arrangements that ARIA’s members have with the other various parties involved in the digital delivery of the sound recordings.

Imposing a private copying exception would be in direct conflict with the pricing and licensing structures that ARIA’s members already have in place in relation to licensed digital copying.

### **Step 3 – No unreasonable prejudice to legitimate interests of author**

The Panel stated that a right holder’s legitimate interests may be unreasonably prejudiced if:

- there is potentially an unreasonable loss of profit to the right holder, taking into account the potential effect if all users eligible to take advantage of the exception do so; or
- the right holder’s other legitimate interests are unreasonably limited.

ARIA submits that a private copying exemption would be in contravention of the third step as it would significantly and adversely impact the successful development of legitimate digital download businesses. The emerging market for digital downloads, in its infancy, should be permitted to determine the appropriate remuneration for copyright owners.

## Comparison with other jurisdictions

In Europe, legislators struggled with the three step test in relation to various private copying schemes that already existed in European countries prior to the enactment of the EU Copyright Directive. For example, in the legislative history to the EU Directive, the following statement was made:

*“There is a substantial difference of opinion on the exact treatment of “private copying”. The majority of rightholders, editors and parts of industry are against providing any kind of private copy exception (or any other limitation) in the digital environment, arguing that such reproductions would conflict with the normal exploitation of the work. Such an unlimited exclusive right would in their view also be enforceable, as new technology is shortly expected to allow the effective control of private copying.”<sup>6</sup>*

A compromise position was reached in the EU Copyright Directive, in an attempt to accommodate existing exceptions in certain European countries. The compromise reinforces the protection of technological protection measures, but effectively allows countries to reach their own decision regarding a digital private copying exception. Notably, there is no private copying exception in the United Kingdom or Ireland.

In the United States, contrary to popular belief, there is no general private copying exception for sound recordings. There is a general “fair use” defence, which applies to closely confined cases of private purpose copying, each subject to a number of conditions, including the condition that it not conflict with the copyright owner’s market for the work in question. The application of this defence is not automatic or certain.

**ANNEXURE C**  
**ARIA RESEARCH : KEY FINDINGS**

# **Understanding CD Burning and Internet File Sharing and its Impact on the Australian Music Industry**

*Key Quantitative Research Findings*

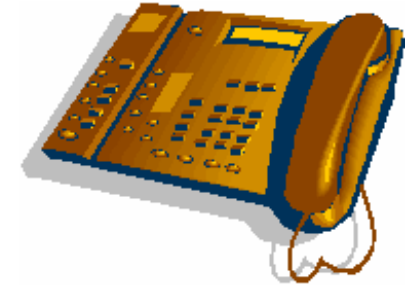
*Prepared for ARIA*

*July 2003*

*Project # 23006*

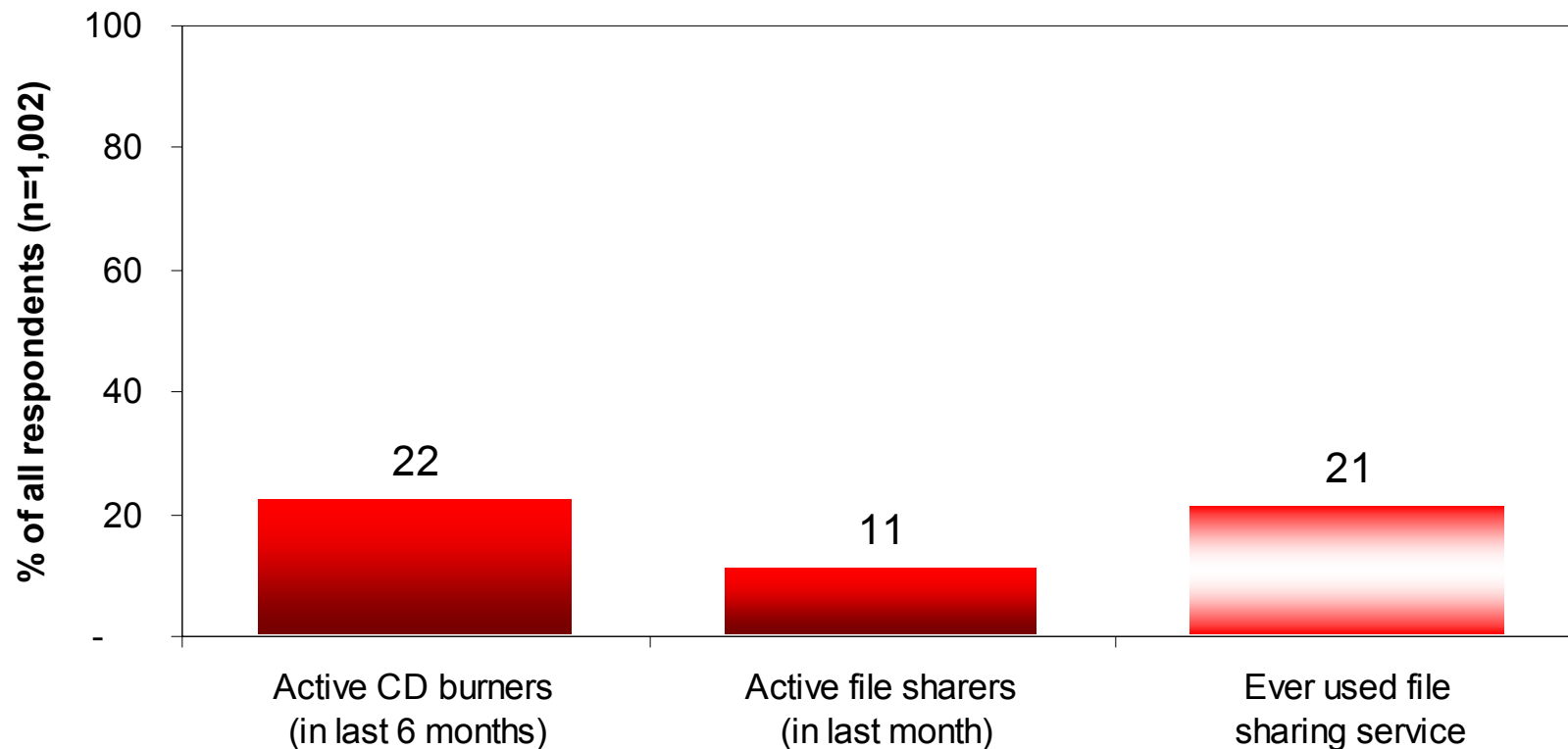
# How was the research conducted?

- Quantum was commissioned by ARIA to implement this quantitative research program. Since its inception in 1969, Quantum has evolved into one of Australia's eminent market research agencies and delivers experience, independence and rigour.
- In total, **1,001 telephone interviews** (unweighted) were conducted with people aged 10 years and above (*Note: Parental permission was received to interview those under 14 years*).
  - The sample was randomly drawn from electronic 'White Pages' and covers all States and Territories (including capital cities and non-metropolitan areas).
  - Proportionate quotas were established on age/gender and location to ensure that the sample was reflective of the Australian population.
- All fieldwork was conducted between 30<sup>th</sup> January to 10<sup>th</sup> February using Quantum's Computer Assisted Telephone Interviewing (CATI) facilities from Albert Park in Melbourne. Each interview took 15 minutes on average to complete.
- Sampling error is the extent to which survey responses can be generalised to the Australian population at large. On a weighted sample of 1,002 interviews, the degree of sampling error is between  $\pm 1.9$  and 3.1% at the 95% confidence interval.



# Incidence of CD burning and file sharing (1)

- Around **3.6 million** (22%) of Australians have illegitimately burnt a music CD in the last 6 months.
- Around **1.8 million** (11%) of Australians have illegitimately downloaded music files via file sharing services within the last month (21% or 3.5 million Australians have ever used these services).



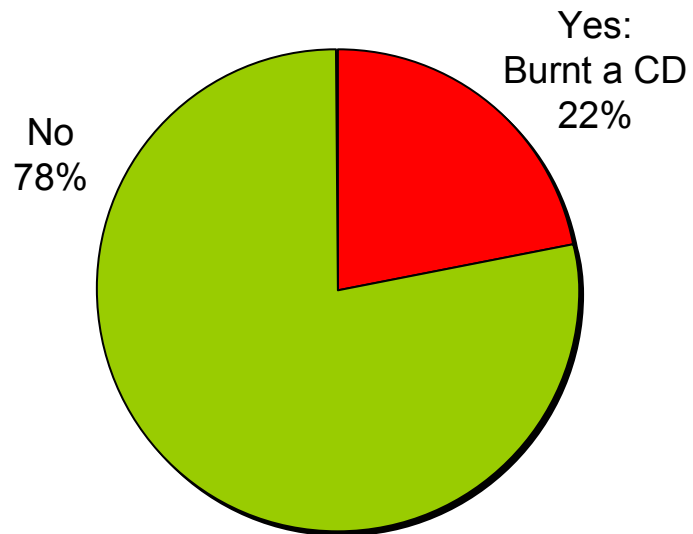
# Incidence of CD burning and file sharing (2)

- Overall, 7% of Australians acquire music through both CD burning **and** file sharing.
- The incidence of this illegitimate conduct is **significantly higher** in the age groups **under 25 years**:
  - CD burning: 22% over the last 6 months for the general population vs. **40% for under 25's**
  - File sharing: 11% over the last month for the general population vs. **26% for under 25/s**
- **Illegitimate channels account for 10.7%** of all music acquired by the general population:
  - 4.8% of this total volume from **CD burning**
  - 5.9% of this total volume via downloading from **file sharing services**
  - Illegitimate channels account for **31%** of music acquired by those '17 and under'; **21%** of music acquired by those aged '18-24'

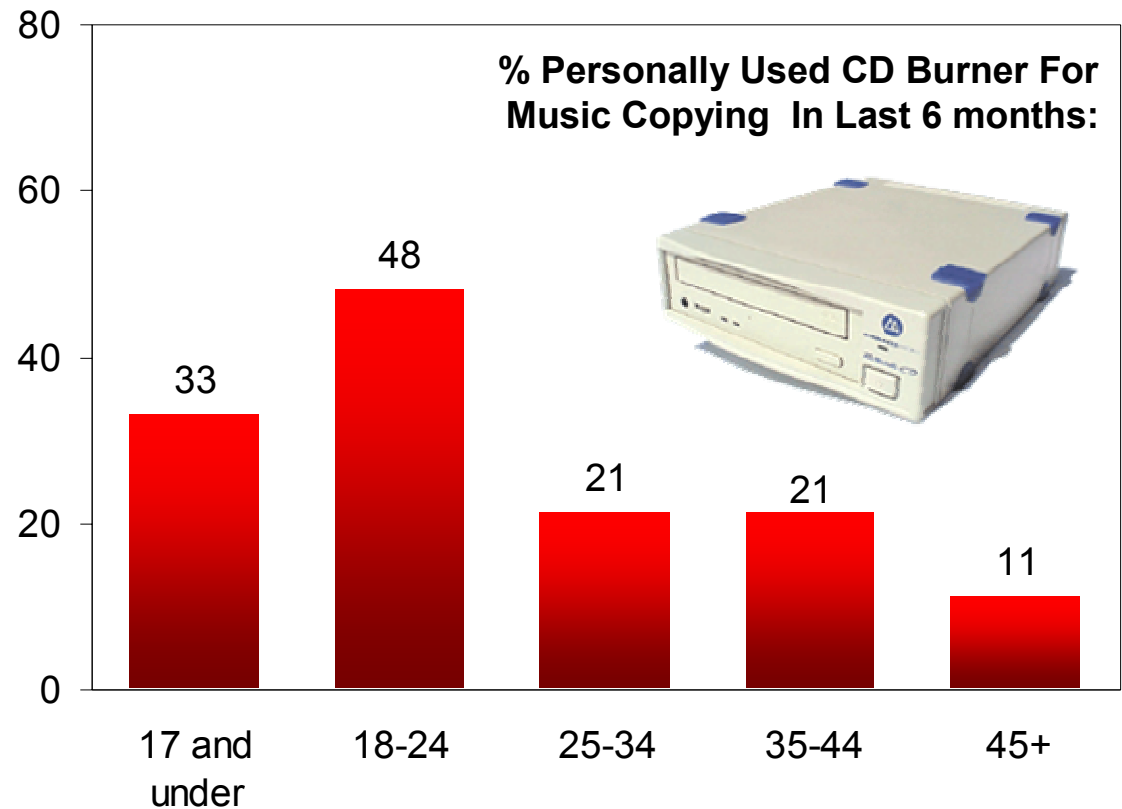


# CD copying: Incidence of use

Q. In the last 6 months, have you personally used a CD burner to record music to a recordable or blank CD?



% of all respondents (n=1,002)



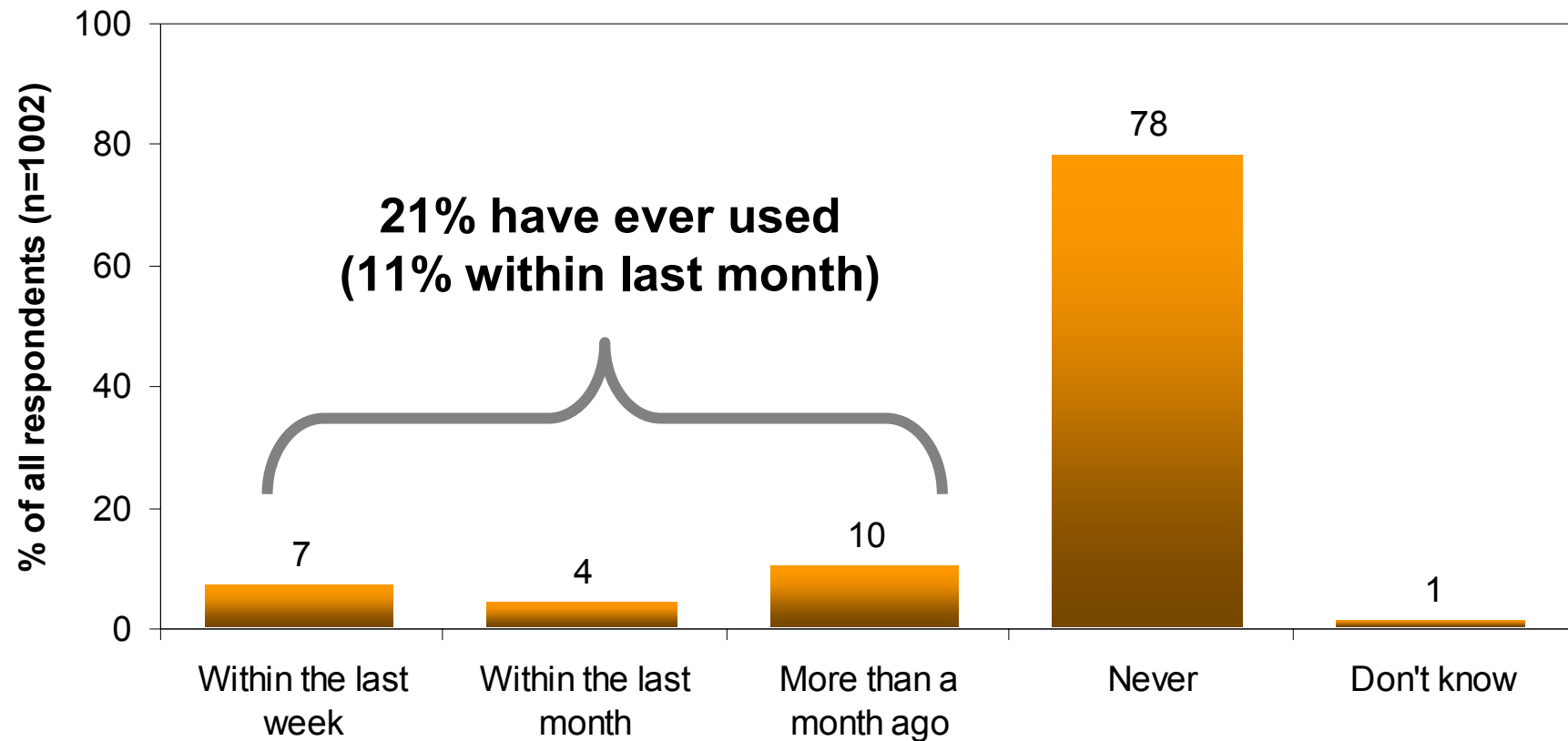
# Key characteristics of CD copying activity

- Active CD burners represent 22% of the general population
- Among the subgroup of active CD burners (n=217):
  - The **source material** is their own CDs (54%), borrowed CDs (34%), and the Internet (28%, including **file sharing services**)
- **40%** of the general population have at some stage **received a burnt CD**. Among this subgroup (n=404):
  - They have received an average of **3.9 illegitimately copied music CDs** within the last 12 months (in terms of the overall population this equates to 1.6 copies per capita)
  - The incidence is substantially greater among the 18-24 age group at **69%**
  - In terms of **sales impact**, 82% would 'rarely' or 'never' buy a burnt CD they had received



# File sharing: Incidence of use

Q. When was the last time you downloaded music files (e.g.. MP3s) for free via a file sharing service (like Napster or KaZaA etc)?



- Overall, 11% of Australians used a file sharing service in the last month. The figure is much higher for those **'17 and under'** (28%) and **'18-24'** (24%)



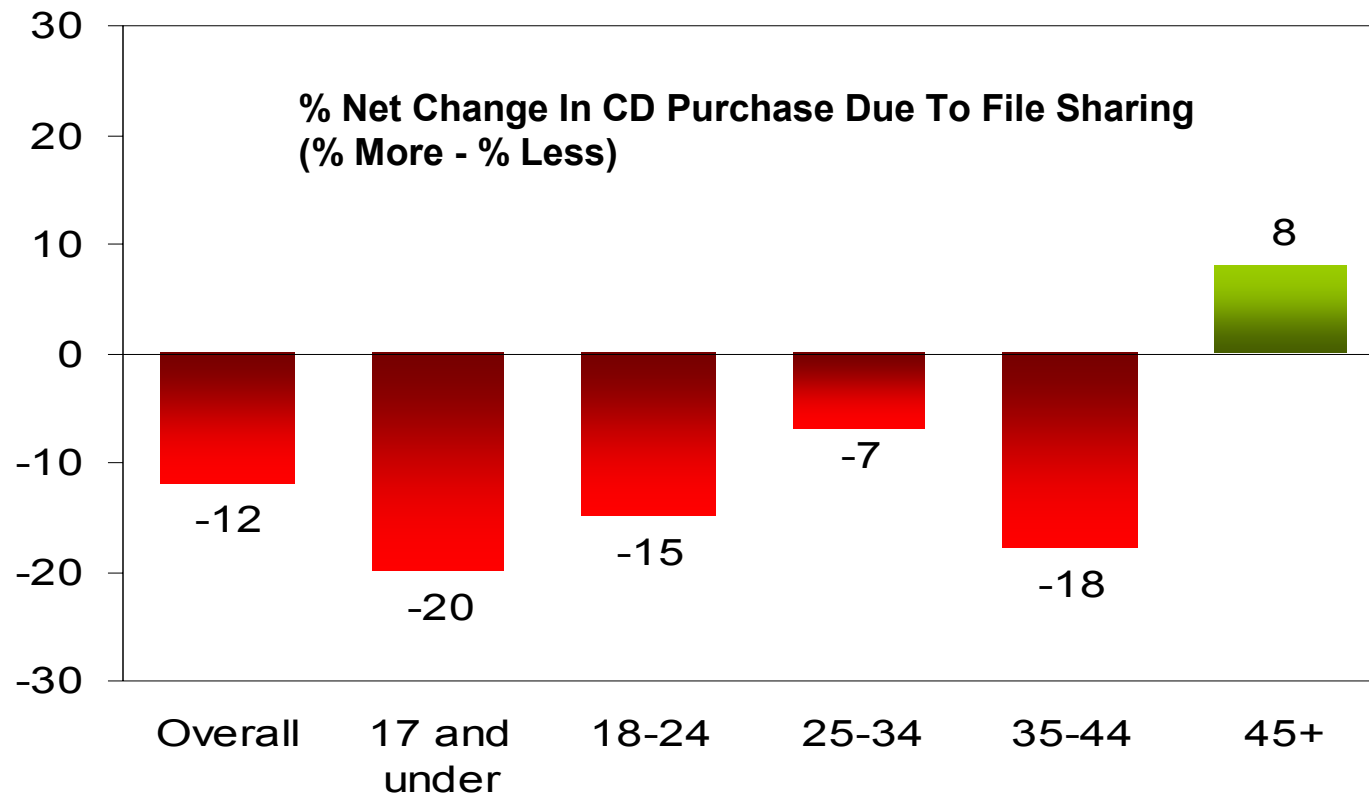
# Key characteristics of file sharing activity

- 21% of the general population have used file sharing services at least once (11% have used in last month)
- Among the subgroup of file sharing users (n=210):
  - The average **volume** downloaded in the last month was **19.6 files**.
    - The average downloaded was 32.4 files in the '18-24' age group
  - In terms of **sales impact**, 51% of file sharers tend not to go out and buy the music they have downloaded (i.e. rarely or never buy), while 37% only buy 'sometimes'
  - Dial-up (72%) more common than broadband (21%), although broadband users are over-represented among file sharing users (compared to the general population)
  - **Over 50%** of file sharers then **burn their music files** to CD or transfer to MP3 player

# File sharing: Impact on legitimate sales

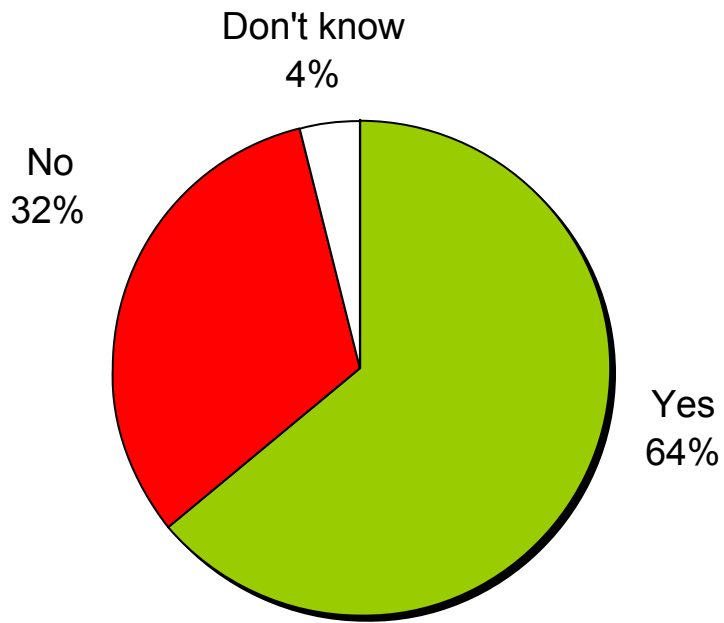
Q. Would you say the amount of music CDs you buy has increased or decreased as a direct result of you downloading music files via file sharing services, or has it or stayed the same?

- Among the subgroup of file sharing users, there has been a **net decrease of 12% in their CD purchasing** behaviour as a direct consequence of their use of file sharing services. This decrease in sales is greatest in the '17 and under' age group.

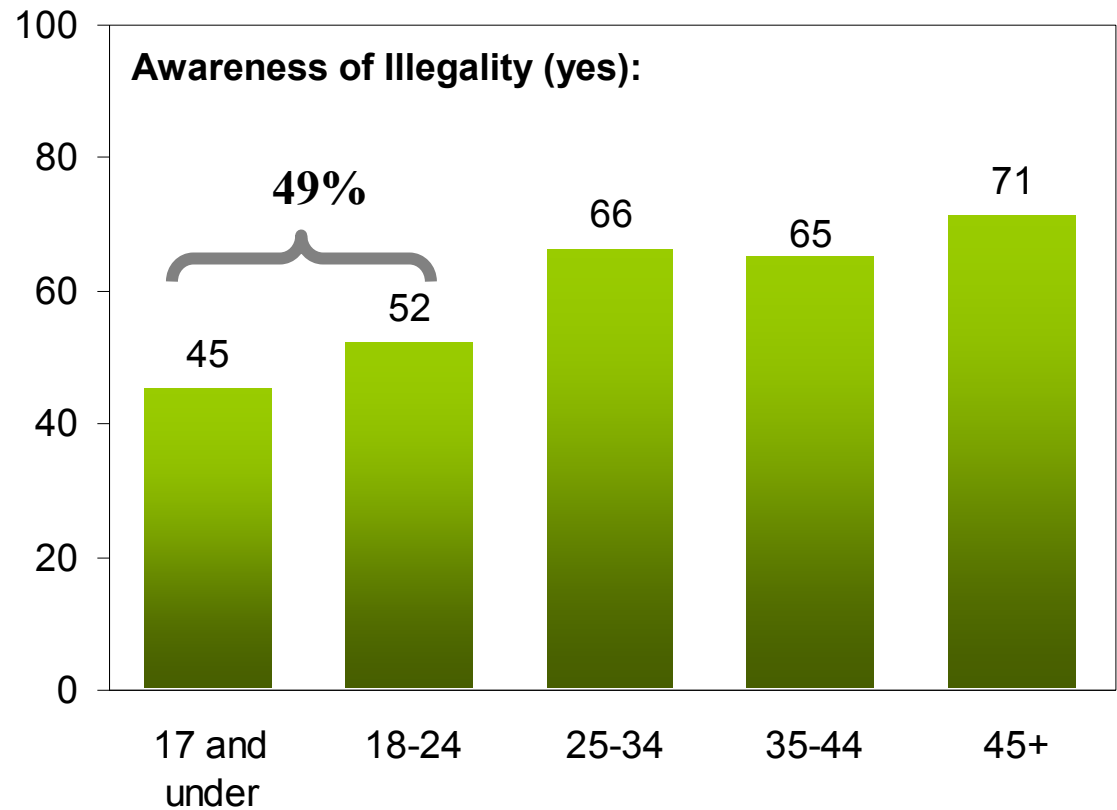


# Overall copying: Awareness of illegality

Q. Before today, were you aware that it is against the law to copy music files onto a recordable/blank CD or computer hard drive without permission of the copyright owner (this is true if you get music without permission from the Internet or as a result of CD burning)?



% of all respondents (n=1,002)



# Overriding consumer attitudes

- Attitudinally, many within the community consider file sharing and CD burning as 'wrong' or a 'problem' and are opposed to such behaviour (although many also engage in both):
  - 57% of the general population agree burning music without paying for it is like stealing
    - 35% agreement among under 25's.
  - 49% agree that downloading music from the internet without permission is like stealing a CD from a record store.
    - 33% agreement among under 25's.
  - 46% agree too many people are able to make copies of music and that technology should be changed to stop this.
    - 28% agreement among under 25's.

