

ARIA

Australian Record Industry Association

21 July 2004

Senator the Hon Peter Cook
Chairman
Senate Select Committee into the Free Trade Agreement
Between Australia and the United States
Parliament House
Canberra ACT 2600

Dear Senator Cook

I write further to my appearance on 8 June 2004, together with other Australian copyright industry stakeholders, before your Committee.

At the conclusion of this hearing, you specifically raised the possibility of recommending an amendment to the Copyright Act to allow a US-style broad-based "fair use" exemption for the private copying of material protected by copyright. You sought our feedback on this concept. The Australian record industry views such a proposal, insofar as it would relate to sound recordings, with a great degree of concern. The purpose of this submission is to explain these concerns and the significant practical impact of such a proposal on all stakeholders in the Australian music industry (ie. record companies, Australian performing artists, artist representatives, retailers etc).

INTRODUCTION AND SUMMARY

The proposal for the introduction of a US-style "fair use" exemption may, it appears, be based on the misconception that the doctrine in the US allows, amongst other things:

- Copying of television programs off air for time-shifting purposes; and
- Making copies of recordings (e.g. CDs) for private and domestic use.

As we explain in this submission, the US Copyright Act does not create these exemptions. In any event, ARIA (on behalf of its members) is strongly of the view that a broad-based private copying exemption (whether based on the US doctrine or otherwise) should not be introduced in respect of sound recordings. We consider that such a scheme would be contrary to the interests of sound recording producers (typically record companies) and recording artists whilst delivering no practical benefit to consumers.

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The reasons for our opinion can be summarised as follows:

- It would be an unjustified abrogation of the rights of copyright owners and in breach of the “three step test” under international copyright treaties to which Australia is a party;
- 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 significantly increase enforcement difficulties;
- The introduction of a broadly-stated “fair use” exemption would introduce unnecessary ambiguity and uncertainty (contrary to the position under the current legislation in relation to the specified areas of “fair dealing”), and would be highly likely to give rise to substantial litigation to clarify the state of the law;
- It would be highly likely to encourage and legitimise mass copying of recordings;
- It would hamper, and potentially frustrate entirely, the use of technological protection measures employed to protect digital content against infringing use;
- It would be inconsistent with the scope of rights granted to consumers under contract 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;
- Recordable media are often used to make further copies of pre-existing infringing copies of the recordings, particularly those sourced from the internet via file sharing networks. The proposed scheme would run a very strong risk of being relied upon by supporters of such services in an attempt to legitimise such activity.

These matters are discussed in more detail below.

One fact which we trust emerges strongly from this submission is that the “digital revolution” and the commercial exploitation of digital media and digital distribution methods is in its infancy. On any view of it, it would be inappropriate to give consideration to any form of general private copying exemption until, at the very least, the methods of commercial exploitation have become clearer and more settled, something that we consider to be simply impossible at this stage.

HISTORY

As you will no doubt be aware, 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. These significant changes (which are still in the evolutionary phase) make it inappropriate to continue to support a scheme which is based on increasingly outdated concepts.

The industry is now strongly of the view that the introduction of such a scheme would be adverse to the interests of both record companies and recording artists as well as songwriters (who are represented by APRA).

PRIVATE COPYING EXEMPTION UNDER US LAW

Two provisions in the US copyright legislation are frequently mentioned in the context of consumer home copying: The "fair use" provision (Sec. 107 of the US Copyright Act) and the Audio Home Recording Act (AHRA, Sec. 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 exemption and does not, in particular, 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 right holders to bring legal action against consumers and hardware manufacturers under certain conditions.

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 programmes, 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. Most 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, agitated 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 2004.

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 some form of tax or levy which is either paid by consumers at the point of sale or passed on to consumers. 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 (as has been maintained recently in the context of the Free Trade Agreement) 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.

The proponents of a private copying exemption argue that members of the general public are unwittingly infringing copyright by exposing themselves to actions for copyright infringement through the copying of, amongst other things, CDs.

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 a private copying scheme would be in breach of this test and therefore contrary to Australia’s obligations under those treaties.

In addition, we consider that the implementation of such an exemption would be **in breach of Australia’s international copyright treaty obligations as discussed in Annexure B.**

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 is clear evidence in support of the proposition that copyright owners consider it inappropriate to use remedies available to them under the Copyright Act to address the problem. Rather, the industry has pursued, and continues to pursue, a combination of educational and technological solutions to 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.

Not surprisingly, when put in those terms, the proponents of such an exemption understandably query the harm that would be done by legislating for a private copying exemption if, as the facts demonstrate, copyright owners will never seek to enforce their current rights.

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, in our view, 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.

The proponents of a private copying exemption often speak in terms as though there is, or should be, a legal right to make a private copy and that legislation which counters that proposition is a bad and unjust law. It needs to be remembered in the context of this discussion that this so-called “right” is merely a manifestation of technological advances. By way of contrast, it is not suggested (or at least not seriously) that consumers should have the right to make photocopies of entire novels so that they can take a copy away on holidays or give a copy to a friend. Nor is it suggested that people should have the right to make copies of DVDs for the same purposes – at least not at present. It is certainly conceivable that, as technology advances, that there will be a similar “right” asserted in relation to the making of copies of DVDs. Regrettably, this so-called right is put forward almost on the basis that it is axiomatic, that it is beyond question. However, such a mindset only comes about because of a combination of technological advance and a failure to recognise the value of intellectual property. In relation to the latter point, it is commonly assumed that when buying a CD, for example, you are acquiring the “right” to do with it as you please. The correct situation (as even the wording on CDs makes clear) is that the consumer is acquiring ownership of the physical medium (e.g. CD) in which a copy of the sound recording is embodied. The consumer is not acquiring any rights

in relation to the copyright whatsoever – he or she merely receives a limited licence to play the recording in a domestic environment.

It is relevant in this context to note one of the key findings from the ARIA research study of 2003¹ (a summary of the key findings is attached as Annexure A). 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.

The position in relation to the private copying of sound recordings is to be distinguished, for example, with the off-air copying of television programs for the purposes of time shifting (i.e. recording at one time and watching at another). Whilst we do not, of course, speak on behalf of the television stations or the various other rights holders who may have interests in the content of the broadcast, it seems to us that there is little or no prejudice to copyright interests in the time-shifting of television programs. Indeed, section 111 of the Copyright Act already provides a limited right to make copies of broadcasts for time-shifting purposes. The clear distinction, however, is that such copying does not result in a prejudice to the copyright owner (and, hence, is unlikely to be in breach of the three step test under the international copyright treaties). **This is to be contrasted with the position in relation to CDs, for example, where copying clearly leads to substitution and lost sales to the prejudice of copyright owners.**

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 Uncertainty of Scope

The “fair use” doctrine under the US Copyright Act is, in that legislation, stated in broad terms. This 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

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

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 very broadly stated, 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; and
- 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. In our view, it would be a retrograde step to replace that certainty with a vague and uncertain concept of “fair use” as is the case in the US legislation.

5 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.

6 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.

The key point is that the copyright owners are, on the basis of the legislation as it currently stands, employing technology to both:

- prevent or inhibit the unauthorised copying of sound recordings; and
- to control the authorised copying of sound recordings.

It follows that any device or software program designed to circumvent such technology would be a “circumvention device” within the meaning of the Copyright Act. The record industry would be very concerned by the introduction of a scheme which could be **relied upon to, in effect, support or encourage the use of circumvention devices (so as to enable private copying)**. It would be difficult to reconcile such a scheme with a strong commitment to anti-circumvention measures (including those expressly included in the US/Australia Free Trade Agreement).

7 Contractual Relationships

The introduction of a private copying exemption 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. This licence is controlled by the use of digital rights management technology which enables a limited amount of private copying to occur, but at the same time manages against broad scale copying to the detriment of copyright owners and recording artists. This is a far more effective solution than trying to achieve that outcome legislatively. In such circumstances, private copying is allowed with the express consent of the owner of copyright. Of course, if a private copying exemption was introduced, it would complicate (and, arguably, frustrate) the contractual arrangements between the retailers and consumers in relation to the extent of copying allowed under the terms of the licence agreement.

8 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.

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. 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.

In addition, we do not understand the Committee to be considering the recommendation of legislation equivalent to the AHRA with its consequent effect of introducing a blank media levy or some other form of tax or levy on hardware or recording media. However, if it is, then we would seek to make further submissions on that issue.

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

Yours sincerely

Stephen Peach
CEO

ANNEXURE A**ARIA RESEARCH : KEY FINDINGS**

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”.²

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

² 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, 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.

It is generally accepted that any unreasonable prejudice under the first limb can be “cured” by the payment of money. Nonetheless, there would still be impacts on rights’ holders other legitimate interests (such as enforcement and consumer perceptions) that could not be compensated financially.

However, as stated above, this step is not even reached if the exception or limitation conflicts with a normal exploitation at the second step. ARIA submits that due to the clear conflict with normal exploitation, the third step of the test is effectively irrelevant.

Even if the third step were relevant, 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. This is not a case of market failure where a government-imposed response is appropriate. 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.”³

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.

³ [Citation]

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

Key Quantitative Research Findings

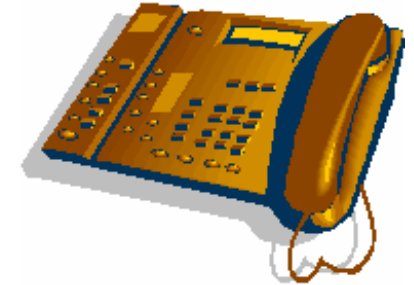
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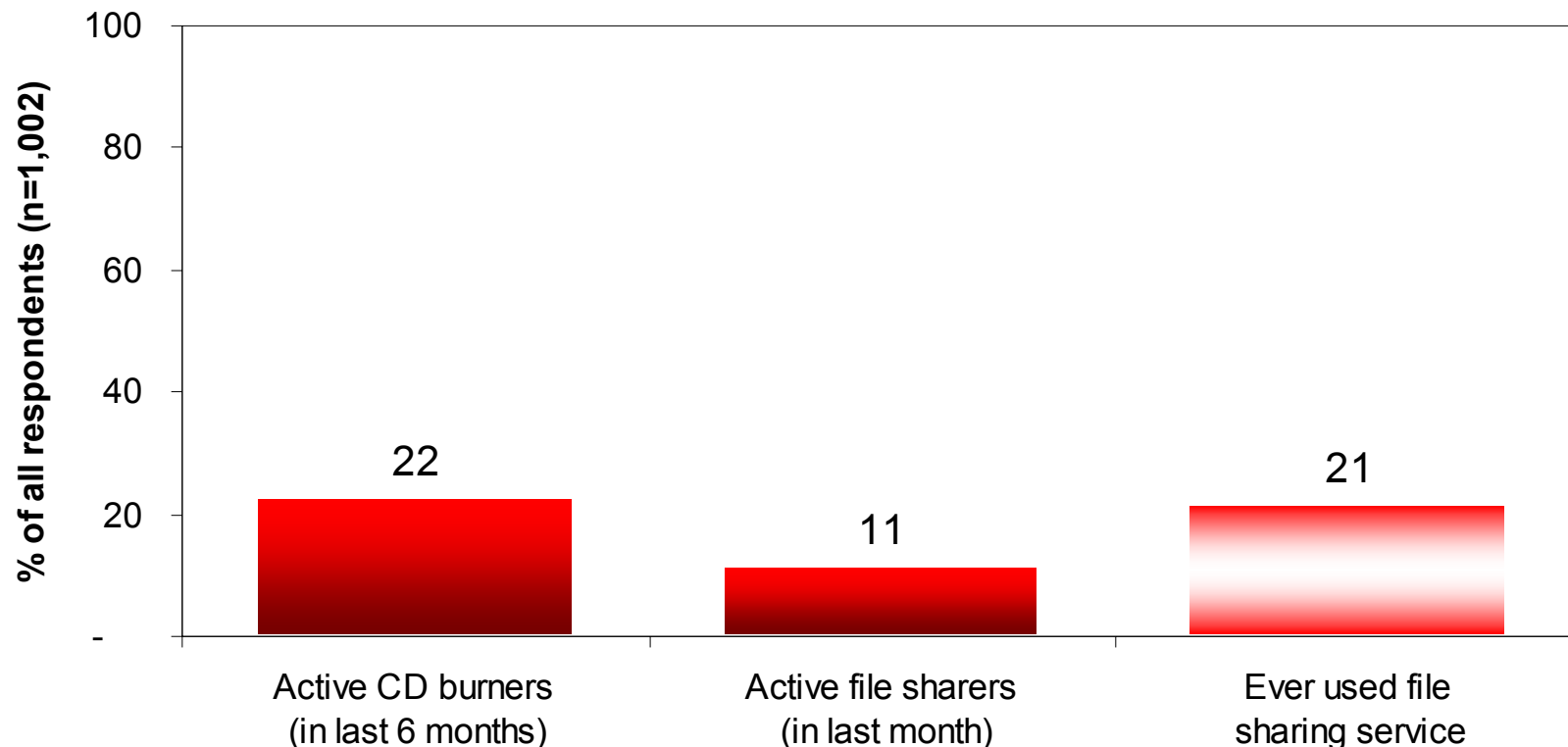
How was the research conducted?

- 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 30th January to 10th 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 ± 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).



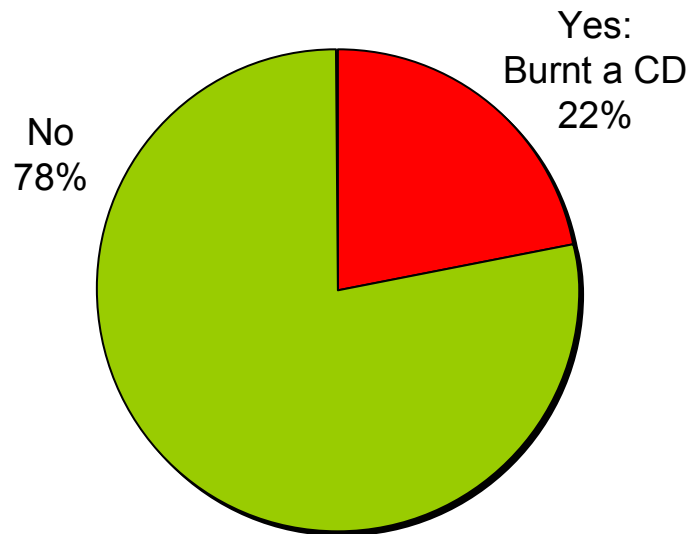
Incidence of CD burning and file sharing (2)

- 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'

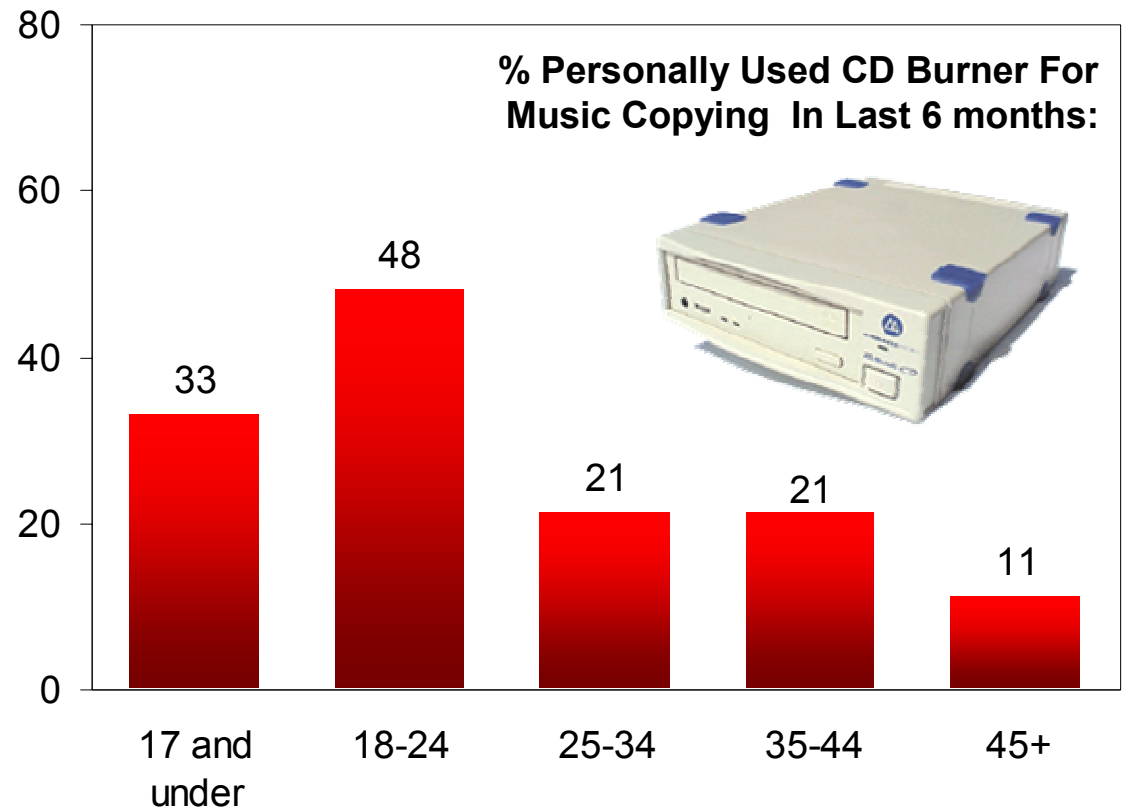


CD copying: Incidence of use

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)



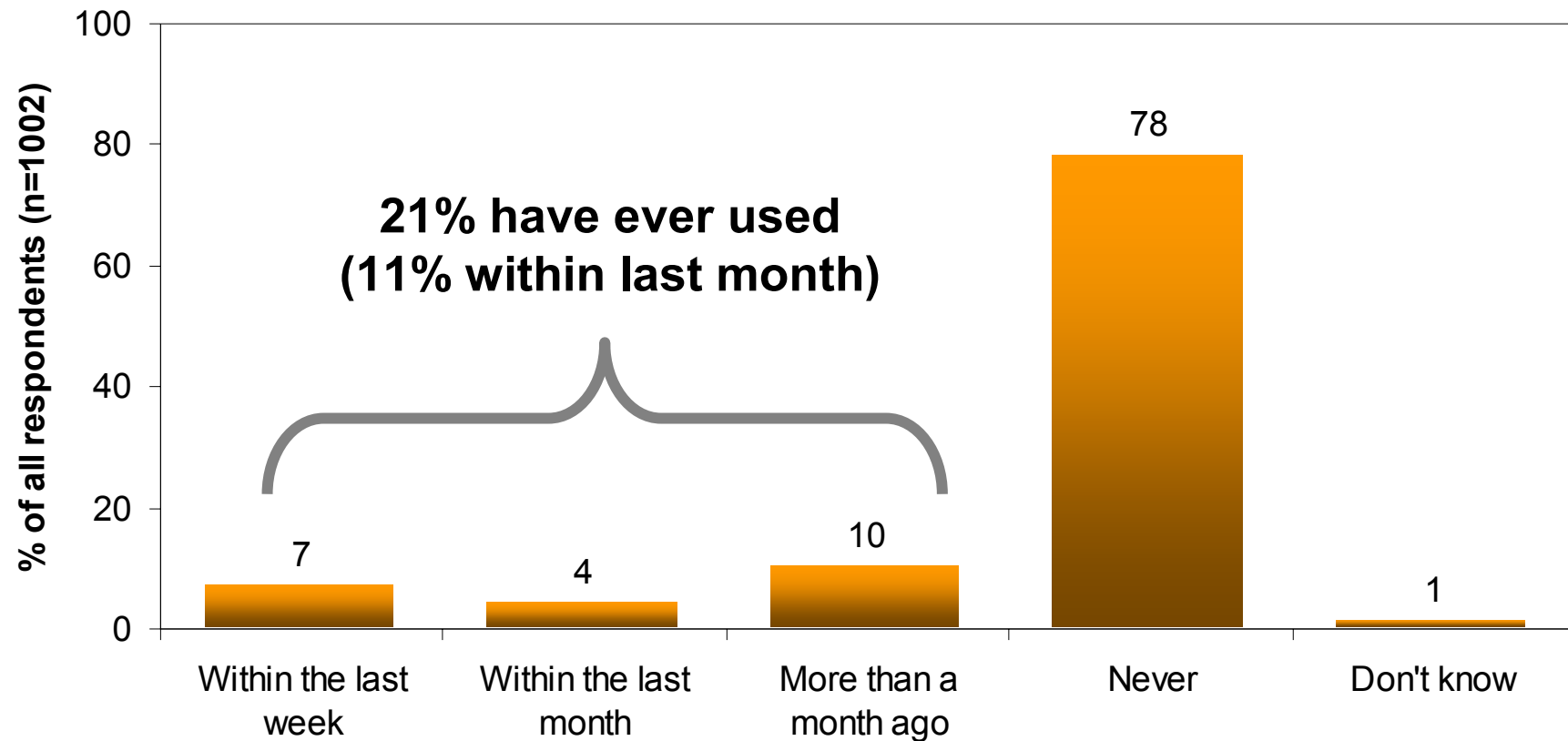
Key characteristics of CD copying activity

- 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%)**



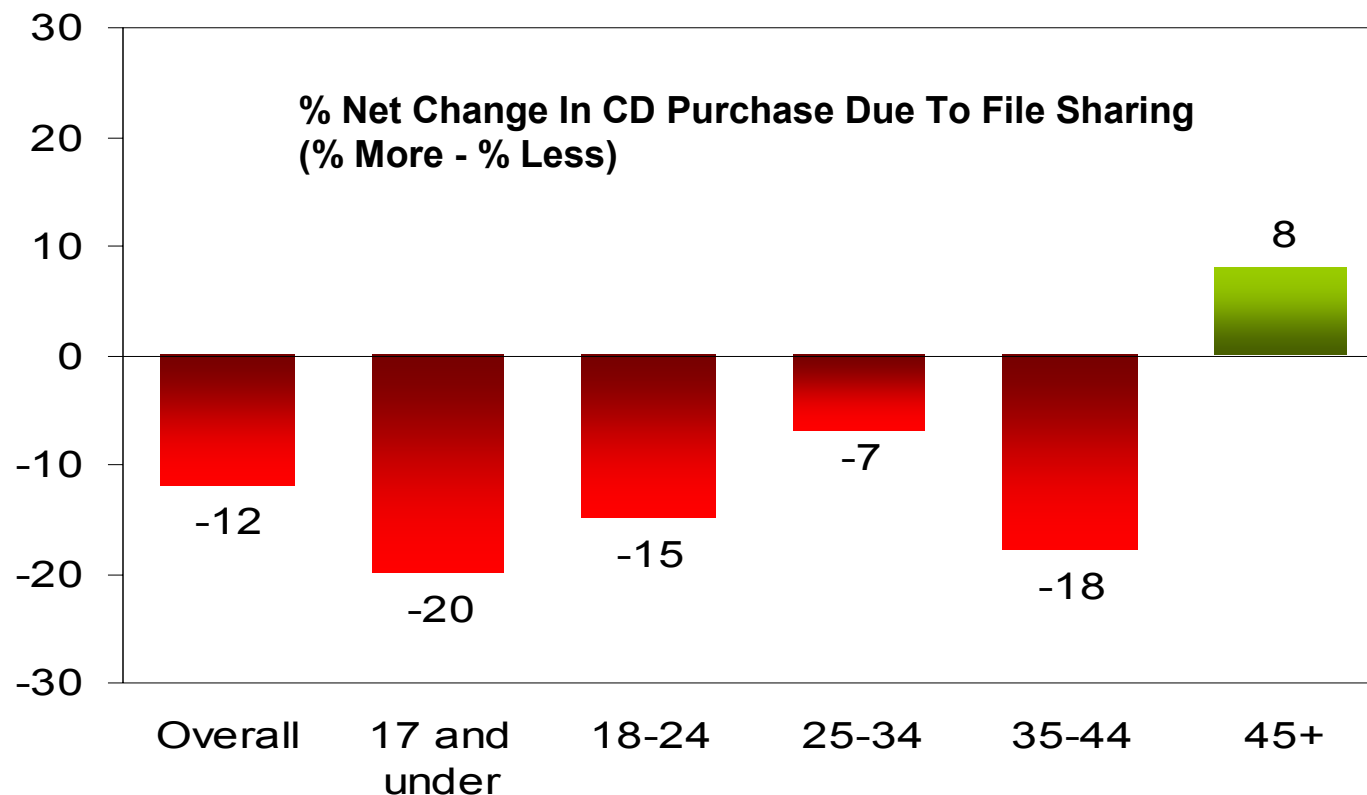
Key characteristics of file sharing activity

- 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

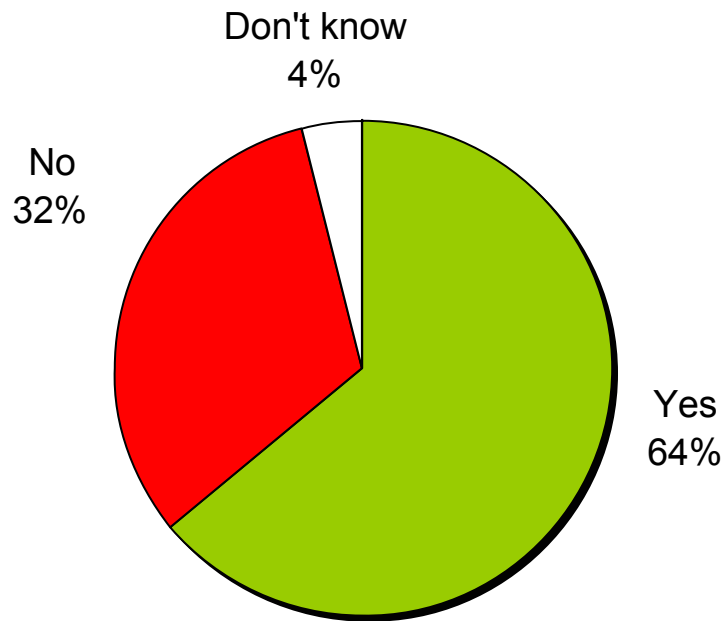
Q. Would you say the amount of music CDs you buy has increased or decreased as a direct result of you downloading music files via file sharing services, or has it or stayed the same?

- 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.

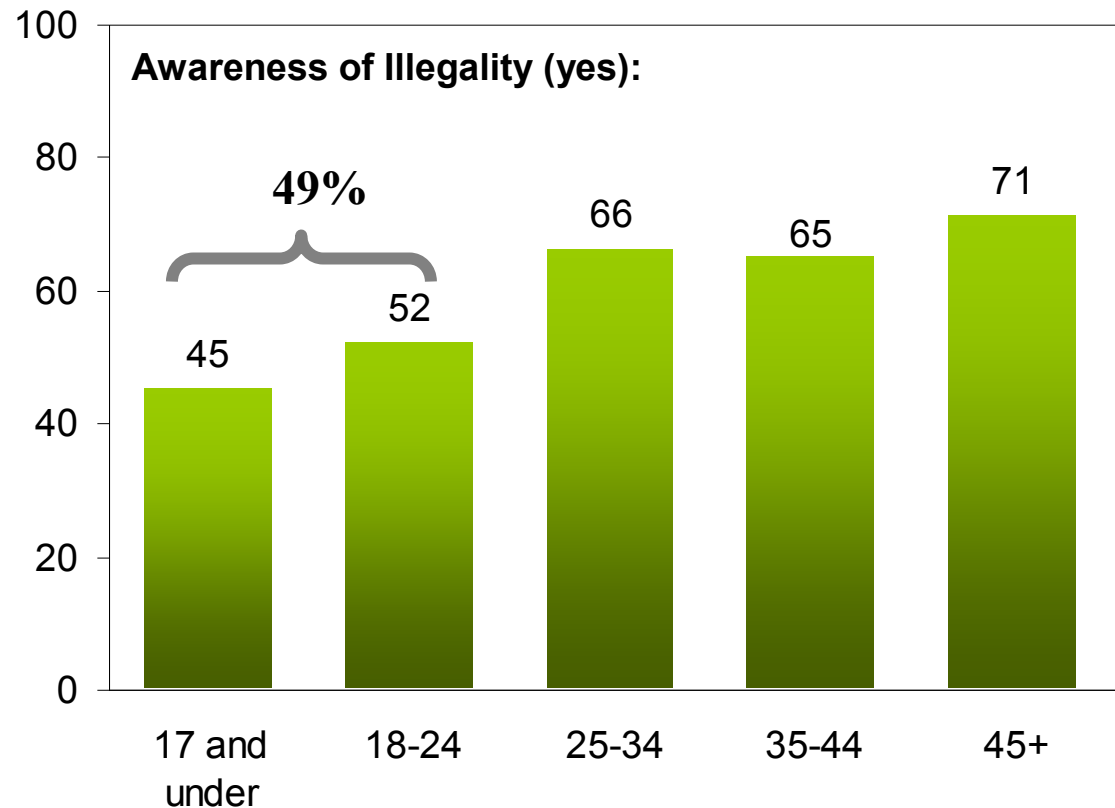


Overall copying: Awareness of illegality

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.

