

**COMMERCE ACT 1986: BUSINESS ACQUISITION****SECTION 66: NOTICE SEEKING CLEARANCE**

16 March 2012

The Registrar  
Mergers and Authorisations  
Commerce Commission  
PO Box 2351  
WELLINGTON

Pursuant to section 66(1) of the Commerce Act 1986, notice is hereby given seeking clearance of a proposed business acquisition.

**EXECUTIVE SUMMARY**

- A Universal Music Holdings Limited or any interconnected body corporate thereof (*Universal* or *the Applicant*) seeks clearance to acquire some or all of the shares or assets of EMI Group Worldwide Holdings Limited's (*EMI*) recorded music businesses (*the Acquisition*). This is an international merger, but both parties have operations in New Zealand.
- B The recorded music market consists of a single product market that encompasses both physical and digital recordings (e.g. CDs and downloaded music). This product market operates at four functional levels: artist development and creation of a recording (known as "artist and repertoire" or "A&R"); physical manufacture and distribution (relevant to physical sales only); wholesale supply of the record in physical and/or digital format; and retail supply. This application focuses on the A&R and wholesale supply markets. Universal is not active in physical manufacture and distribution; and neither party has material presence in the relevant retail market.
- C Only if pirated music were excluded from the analysis – which we say it should not be – would the aggregation in the wholesale supply market within New Zealand resulting from the Acquisition fall outside the Commission's safe harbours.
- D In any event, the merged entity will continue to face sufficient constraint such that there will be no substantial lessening of competition in that market. In particular, the merged entity will face constraint from:
- (a) existing major competitors. Both Sony Music and Warner Music have a strong competitive presence in all repertoire and all major music markets. Each operates a number of iconic labels and has world-class recording artists (such as Usher, Kesha, Pink, Bruno Mars and Cee Lo Green) on their books. Further, both Sony Music and Warner Music have a particularly strong complement of New Zealand artists such as Bic Runga and Kimbra;
  - (b) independent record labels. The "indies" operate as an especially powerful and growing force in New Zealand, as there are no barriers for independent labels to distribute their products through the major digital distribution channels. Indeed, latest market share information indicates that, after allowing for physical third party distribution deals (in terms of which revenues are collected

by the majors on behalf of distributed independent labels), the indies now account for over [ ]% of the New Zealand wholesale market. Indies are a formidable force in the A&R market, and the success of Adele demonstrates that indie labels can propel their artists to levels of global success that rival any major. Indies have a particularly strong position in the New Zealand market, in part due to a tradition of New Zealand artists starting their careers with New Zealand On Air funding, and also because many New Zealand artists consider independent labels a better cultural fit;

- (c) DIY artists. With advancement in technology it has become increasingly possible for artists to create, distribute and promote their own records, avoiding the record labels (major or indie) altogether. Examples of artists who have utilised DIY methods include Avalanche City and Six60, as well as international artists such as Radiohead and Simply Red;
- (d) supply to physical retailers. Retail distribution of physical recordings in New Zealand now is dominated by a few (and decreasing number of) large retailers. In fact, the number of retail outlets has reduced from over 400 to approximately 150 over the last 10 years, with The Warehouse comprising 89 of those outlets and JB HiFi comprising 13 stores. In all those Warehouse outlets CDs must compete with other discretionary consumer products for shelf space and optimal placement within the store. Products which cannot be priced attractively receive less favourable treatment. Meanwhile aggressive retail competition has developed between JB HiFi stores and Warehouse outlets. These factors have combined to place significant pressure on both Universal and EMI to reduce wholesale prices to physical retailers; and will continue to do so post-merger;
- (e) supply in digital format. The rapid and permanent shift from physical to digital formats, and high levels of interchangeability between those formats, has entrenched the position of iTunes viz-a-viz Universal and other wholesale suppliers. iTunes has quickly emerged as the essential gateway to digital sales in New Zealand, and currently accounts for [ ]% of Universal's digital sales here. Given that dominance, iTunes is able to exert significant downwards pressure at wholesale level;
- (f) changing trade patterns which bring wholesale prices down generally. Legislative change to New Zealand's copyright laws in 1998 expressly permitted parallel importing in New Zealand, making global pricing a significantly relevant consideration here. Similarly, the more recent advent of international online retailers such as Amazon, which facilitate the ready importation of CDs, have constrained local prices. Further, the high levels of interchangeability between physical and digital formats, requiring that negotiations at wholesale level must be conducted with regard to the price level for music in both formats, are trending prices down;
- (g) piracy. Despite the graduated response programme very recently implemented in New Zealand by the Copyright (Infringing File Sharing) Amendment Act 2011 ("*Copyright Amendment*"), unlicensed downloading and streaming of music – piracy – remains a major factor in New Zealand and globally. The proliferation of unauthorised download and streaming platforms – and substantial use of those platforms by many consumers – is a key feature of the recorded music

market, which must be an integral and vital part of the framework of analysis of any competition assessment of the industry.

- E Those constraints are also relevant to the market for A&R services. Numerous indies operate alongside the majors and self supply is a real option for artists. In addition, threat of switching by artists is a real and effective constraint. None of this will change as a result of the Acquisition.
- F More generally, changes in technology have transformed the recorded music industry over the past decade. On the one hand, innovation is enhancing consumer choice as new models for accessing recorded music are rolled out. For example, the emergence of music streaming services (such as The Sony Entertainment Network, rara.com and Rdio, which are already launched in New Zealand) has enabled consumers to pay for access to streamed digital music rather than digital downloads. The world's predominant streaming brand, Spotify, is expected to launch here shortly. On the other hand, that same technical innovation has led to an extraordinarily difficult business environment, with internet users able to access unlicensed material with ease. Within New Zealand, recorded music revenues have more than halved since 2001. As one Member<sup>1</sup> said during the Parliamentary debate on the bill which became the Copyright Amendment:

*"[The copying of vinyl on to cassettes] was a hand grenade thrown at copyright law, whereas the Internet provides a nuclear explosion."*

- G The industry is still in a very dynamic state at all market levels, as participants strive to meet the challenges of the new environment. As legitimate digital services – like iTunes and Spotify – have been introduced, the industry has experienced competition for the market and the market share figures of incumbent major record labels are neither stable, nor reflective of market power. The simple fact is that wholesale prices for recorded music in New Zealand have consistently trended downwards for the past six years.
- H Globally, the Acquisition will combine the two least similar traditional major recording companies, given Universal's focus on new signings and releases and the significantly greater importance of back catalogue for EMI. This combination will enable Universal to diversify its catalogue. Universal's commitment to innovation and cultural diversity will also reinvigorate EMI's catalogue. Crucially, there is scope for significant synergies, and these savings will allow Universal to lower its post-merger costs. This will enable Universal to increase its spending on developing and promoting artists, offering keen prices, maximising output and driving innovation. In short, to take the commercial actions necessary to compete with piracy.

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<sup>1</sup> Michael Woodhouse, Hansard: Volume 662, page 10422. Copyright (Infringing File Sharing) Amendment Bill, First Reading, 22 April 2010 available at: [http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/9/3/49HansD\\_20100422\\_00000870-Copyright-Infringing-File-Sharing-Amendment.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/9/3/49HansD_20100422_00000870-Copyright-Infringing-File-Sharing-Amendment.htm), accessed on 25 February 2012

**PART 1: TRANSACTION DETAILS****The Business Acquisition**

- 1 Universal intends to acquire some or all of the shares or assets of EMI's recorded music business.
- 2 The details of the transaction are set out in the Agreement for the Sale and Purchase of EMI Recorded Music between EMI Group Global Limited, Citigroup Inc, Universal Music Holdings Limited and Vivendi S.A. dated 11 November 2011, attached at **Appendix A** (the SPA).
- 3 Under the terms of the SPA, as supplemented by a number of further agreements, Citigroup (EMI's parent company) will separate, by way of a corporate reorganisation, the assets and liabilities of EMI group's music publishing business from the assets and liabilities of EMI group's recorded music business into "MP" group companies and "RM" group companies. Universal will then acquire the entire issued share capital of the RM group companies. The music publishing business will be sold separately to a group of companies led by Sony/Mubadala, and is not part of the present acquisition. Universal will not acquire any direct or indirect interest in any of EMI group's MP business or any of the MP group companies other than certain very limited music publishing assets in relation to Christian music that are relevant predominantly in the USA.<sup>2</sup>
- 4 To elaborate, EMI and Universal have agreed that the RM business to be transferred shall include the Christian music publishing assets of EMI's Christian Music Group which comprises EMI Christian Music Group, Inc., Tooth & Nail LLC, Hear it First LLC, Thank You Music Ltd and GHM LLC, all of which are US registered and based companies and whose music publishing rights are predominantly licensed for US music consumption.
- 5 For more information on the distinction between recorded music and music publishing, see Part 2.
- 6 This is an international merger. A list of countries where notification is being made to that jurisdiction's competition agency is attached at **Appendix B**.
- 7 The New Zealand companies that will be subject to this merger are Universal Music New Zealand Limited, Universal Music Holdings Limited, EMI Music New Zealand and Music Distribution Group Ltd (MDG).<sup>3</sup>

**The person giving notice**

- 8 This notice is given by:

Universal Music New Zealand Limited  
Site 3 Stables Building  
30 St Benedicts Street  
Newton  
Auckland

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<sup>2</sup> Some music publishing rights were also acquired in an incidental manner in connection with the acquisition of Source Etc. by EMI Music France in 2008.

<sup>3</sup> MDG is a 50/50 joint venture between EMI Music New Zealand and Warner Music New Zealand.

New Zealand

Telephone: +64 9 375 7575  
Email: adam.holt@umusic.com  
Attention: Adam Holt

- 9 All correspondence and notices in respect of this application should be directed in the first instance to:

Chapman Tripp  
10 Customhouse Quay  
PO Box 993  
Wellington

Telephone: +64 4 498 4908/+64 4 498 6364  
Email: grant.david@chapmantripp.com / helen.townley@chapmantripp.com  
Attention: Grant David / Helen Townley

**Other merger party**

- 10 The other merger party is EMI, its New Zealand subsidiary being:

EMI Music New Zealand Limited  
Level 4, Suite 4  
150 Karangahape Road  
Auckland 1140  
New Zealand

Telephone: +64 9 356 1587  
Email: matt.headland@emimusic.com  
Attention: Matt Headland

- 11 All correspondence and notices in respect of this application should be directed in the first instance to:

Russell McVeagh  
Vero Centre,  
48 Shortland Street  
PO Box 8  
Auckland

Telephone: +64 9 367 8133/+64 9 367 8862  
Email: sarah.keene@russellmcveagh.com / chris.bowden@russellmcveagh.com  
Attention: Sarah Keene/Chris Bowden

**Details of the Participants**

***Universal***

- 12 Universal Music Group is a music recording company with operations in recorded music and music publishing as well as some associated activities such as merchandising. Universal's major record labels include Island, Def Jam, Mercury, Polydor, Universal, Motown, Interscope, Geffen, A&M, Decca, Deutsche Grammophon and Verve.

- 13 Universal's New Zealand based operations involve performing services for local artists, and also promoting and distributing international artists within New Zealand.
- 14 Details about the business activities of Universal are set out in paragraphs 33 to 43 below.
- 15 Further information on Universal's business activities is available at [www.universalmusic.com](http://www.universalmusic.com) and [www.universalmusic.co.nz](http://www.universalmusic.co.nz).

*Subsidiaries and parent companies*

- 16 The Universal Music Group is made up of many companies throughout the world. Universal's parent company is Vivendi S.A. A structure chart for Universal, so far as is relevant to this transaction, is provided at **Appendix C**.

**EMI**

- 17 EMI is a music recording company perhaps best known for its representation of UK artists. EMI operates a recorded music business, a music publishing business and has a small presence in merchandising. The major record label imprints under which EMI music is marketed are: Capitol Records, Capitol Nashville, Parlophone, Virgin, Blue Note Records, EMI Classics and a variety of other labels within the Christian Music Group.
- 18 Details about the business activities of EMI are set out in paragraphs 33 to 43 below.
- 19 Further information on EMI's business activities is available at [www.emimusic.com](http://www.emimusic.com).

*Subsidiaries and parent companies*

- 20 The EMI Group is made up of many companies throughout the world. EMI's parent company is Citigroup Inc. Structure charts for Citigroup and EMI, so far as is relevant to this transaction, are provided at **Appendix D**.

**Formal and informal links between participants**

- 21 Universal Music NZ is part of a marketing partnership with EMI Music NZ and Sony Music NZ operating the *Now That's What I Call Music* compilation album brand. The brand is owned by EMI and the album is sold and marketed on behalf of the marketing partnership by EMI. Three volumes are released each year and annual sales have fluctuated between 120,000 and 140,000 albums over the last 5 years.
- 22 From time to time, Universal and EMI also enter into informal ad hoc marketing partnerships for specific compilation albums, for example the *Ten Guitars* album, a brand owned and marketed by Universal on behalf of the marketing partnership.
- 23 Both Universal Music NZ and EMI Music NZ are represented on the boards of the Recording Industry Association of New Zealand (RIANZ) and PPNZ Music Licensing. Adam Holt, the chairman of Universal Music NZ, is the current elected president of RIANZ and the current elected chairman of PPNZ. Matt Headland, the country manager of EMI Music NZ, sits on the board of both organisations.

**Directorships**

- 24 None of the relevant parties holds any directorships in another party that are of significance to the current application.

***The reasons for the proposal and the intentions in respect of the acquired or merged business***

25 Globally, the strategic, economic and commercial rationales for the Acquisition have been summarised in the Form CO that has been provided to the European Commission<sup>4</sup>, as follows:

*"The Transaction, which will combine the two least similar traditional majors, will allow Universal to diversify its catalogue, given Universal's focus on new signings and releases and the significantly greater importance of and dependence on back catalogue for EMI RM. [*

*] In contrast, in 2010 Universal derived only around 39% of its revenues from its back catalogue sales....*

*EMI RM's greater focus on exploiting its back catalogue at the expense of investing in new artists and the creation of new sound recordings is also demonstrated by EMI RM's reduction of its roster of artists by around [ ] between 2007-2010 and the significant decrease in spending on the discovery, signing and creative and promotional development of artists ("A&R") over recent years. [*

*]. With its reduced focus on a limited number of new signings and in the overall reduction of its A&R spend, including advances paid to new artists in recent years, EMI RM is therefore today closer in its competitive proposition and strategy to the leading Indies in Europe than to any of the other three traditional majors.*

*Following the implementation of the Transaction, Universal intends to develop the existing artistic talent within the EMI RM portfolio and help the business to rediscover its heritage of finding and nurturing new talent. [*

*], Universal has a strong record of developing creative tailored solutions to promote individual artists and recorded works across the EEA and elsewhere through multiple channels, to maximise their exposure, and to increase consumer choice and output. Universal's commitment to innovation and cultural diversity at both the A&R and the retail channel level are further discussed in Sections 6 and 8 of this Form CO. Applying this innovative approach to EMI RM will enable a wider range and larger volume of music to be delivered effectively to consumers in Europe and around the world.*

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<sup>4</sup> Form CO relating to the notification of a concentration pursuant to regulation (EC) No 139/2004, Acquisition of EMI Group's recorded music business by Universal Music Holdings Ltd, COMP/M.6458, submitted to the European Commission on 17 February 2012.

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*Overall, this means that many parts of EMI RM can be integrated into Universal's business with limited incremental overheads, thereby bringing considerable scale to centralised and back-office functions, allowing the combined entity to exploit a combined more diverse Universal / EMI RM catalogue business without duplicative operations. These savings will therefore allow the post-Transaction Universal to lower its costs, which in turn will benefit its customers and, ultimately, consumers by enabling the post-Transaction Universal to increase its spending on developing and promoting a wide range of artists across the EEA and elsewhere, offering keen prices, maximising output and driving innovation through licensing innovative platforms and services."*

- 26 In New Zealand, as elsewhere, Universal intends to develop the existing artistic talent within the EMI catalogue (which includes local artists Anika Moa and Annabel Fay). Universal has a strong record of developing creative tailored solutions to promote individual artists and recorded works to maximise their exposure, as well as increase consumer choice. Applying this same approach with the EMI portfolio will bring a wider range and larger volume of music to New Zealand consumers.
- 27 Combining Universal's and EMI's catalogue will enable Universal to dedicate more resources to New Zealand artists. Already Universal are the only major label with a dedicated A&R Director, but with an increased roster of New Zealand artists and a greater capacity for investment in A&R, Universal will be able to increase their commitment to New Zealand artists following the merger.
- 28 More generally, piracy remains a major threat for the recorded music industry, in New Zealand as elsewhere. The government and industry have been working together to combat piracy<sup>5</sup>, and while the graduated response programme introduced by the Copyright Amendment represents a recent legislative response, the magnitude of that threat cannot be overstated. The then Minister of Justice (and Commerce), Hon. Simon Power, said in introducing the bill that became the Copyright Amendment<sup>6</sup>:

*"The Copyright Act facilitates the earning of revenue from creative works, in turn encouraging the investment of that revenue into the production of more creative content. Copyright owners are granted exclusive rights to exploit their creative works for a limited period of time. Ensuring strong legal frameworks for intellectual property rights contributes to achieving this Government's goals of fostering economic growth and encouraging our creative industries to provide new and innovative products to New Zealand consumers and abroad. However, copyright owners currently lack an effective enforcement measure against illegal file-sharing.*

<sup>5</sup> Universal understands that the Department of Internal affairs works with the National Enforcement Unit which is attached to MED, and the police to investigate copyright infringement. RIANZ also has dedicated anti-piracy staff, but RIANZ does not officially collaborate with DIA.

<sup>6</sup> Hon Simon Power, Hansard: Volume 662, page 10422. Copyright (Infringing File Sharing) Amendment Bill, First Reading, 22 April 2010, available at: [http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/9/3/49HansD\\_20100422\\_00000870-Copyright-Infringing-File-Sharing-Amendment.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/9/3/49HansD_20100422_00000870-Copyright-Infringing-File-Sharing-Amendment.htm), accessed on 25 February 2012.



*File-sharing technologies link together Internet users who have access to copyright works, and they facilitate the quick and easy transfer of a copy of a work such as music, films, and software to many other users. A 2009 study commissioned by the Recording Industry Association of New Zealand identified an average of 5,000 potential infringements a day, using a limited list of sound recordings. The Copyright Act provides that the communication of a work and the copying of a work without the authorisation of the copyright owner is a breach of copyright. Many file sharers communicate or copy a work without seeking permission from or paying the copyright owner. This sort of activity can, therefore, constitute a breach of copyright under the Act.*

*As I am sure that everybody in the House this afternoon is aware, New Zealand's creative industries are a significant part of our economy. The advice I have is that in the 2008 financial year the New Zealand screen industry recorded gross revenue of \$2.7 billion. However, the creative industries have experienced significant declines in revenue, as file sharing has become more prevalent. This Government wants to ensure that our creative industries can derive maximum economic benefit from the investment they put into the production of new copyright works. Current enforcement measures in the Copyright Act are ineffective at remedying the problem, as the cost of legal proceedings outweighs the amount a copyright owner may be awarded by a court for file-sharing infringements. Court proceedings are further complicated by the requirement for copyright owners to obtain an order requiring the file sharer's Internet service provider—or ISP—to release the file sharer's contact details to the copyright owner before being able to take court action."*

- 29 That bill received overwhelming support in Parliament from most political quarters. The first Labour spokesperson said<sup>7</sup>:

*"Copyright in 2010 has become a brand or code. The prevalence of illegal downloading, both in New Zealand and globally, is a very real and important issue. The balancing act between protecting the rights of the creators of content and allowing and encouraging access to information and material is a delicate and increasingly tricky issue that is currently exercising the minds of parliaments across the world. Who owns intellectual property, who should have access to it, how they should have that access, and what should be the penalties for infringing the rules governing that access are all very live issues that are being hotly debated."*

- 30 The Copyright Amendment only came into effect on 1 September 2011; and then only partially so. The more stringent, and potentially more effective, enforcement mechanisms it provides for – namely, orders suspending the internet account of an infringer and requiring an internet provider to disclose account holder details – will not be brought into force until expressly done so by Order in Council. Additionally, the regulations associated with the legislation require rights holders to pay the internet providers a fee of \$25 for each notice sent to suspected infringers – an economically untenable fee for rights holders that has severely limited the effectiveness of the legislation. These regulations are due for review in 2012. It is therefore, far too soon to speculate on the effectiveness of anti-piracy legislation that is only partially in effect.

<sup>7</sup> Clare Curran, Hansard: Volume 662, page 10422. Copyright (Infringing File Sharing) Amendment Bill, First Reading, 22 April 2010 available at: [http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/9/3/49HansD\\_20100422\\_00000870-Copyright-Infringing-File-Sharing-Amendment.htm](http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/9/3/49HansD_20100422_00000870-Copyright-Infringing-File-Sharing-Amendment.htm), accessed on 25 February 2012.

- 31 The recorded music industry in New Zealand – like elsewhere – cannot rely solely, or even substantially, on the legislative response to piracy. It also requires substantial strategic and commercial responses – by developing and promoting a wide range of new artists, offering an expanded catalogue of existing artists, offering keen prices and driving innovation to provide new delivery platforms and services. The Acquisition will enable Universal (and EMI) to better make those essential responses, to the ultimate benefit of New Zealand consumers and the New Zealand recorded music industry generally.
  
- 32 Indeed, from a policy perspective the Acquisition fully accords with the Government’s expressed intention that the New Zealand creative industries be able to derive maximum economic benefit from the investment they put in.

## PART 2: THE INDUSTRY

### Industry sectors and involvement of the parties in New Zealand

#### **Recorded music**

- 33 The recorded music sector is the part of the music industry that makes a record and provides it to consumers. This typically involves a number of steps:
- 33.1 *A&R*: artist and repertoire is the term used to describe discovery, signing and creative development of artists. Depending on the requirements of the particular artist, the menu of A&R services a record label provides will vary. For example, some artists will sign a full recording contract that typically would involve creating the record and promoting the track. Other artists prefer to produce a track or album without label involvement, and will license the track or album to a record company to promote on the artist's own behalf;
  - 33.2 *Manufacture and distribution*: for physical recordings, CDs or DVDs are manufactured and shipped;
  - 33.3 *Wholesale supply*: once a record is made, the record company will seek distribution deals with wholesale customers. In the physical space, dedicated music stores are gradually exiting the market with physical sales now dominated by a few larger retailers such as The Warehouse in New Zealand, and Amazon globally. In the digital space, the range of wholesale customers and digital business models continues to grow and diversify. While Telecom and Vodafone were early entrants in the digital spaces, it was quickly dominated by iTunes (as is described fully in paragraphs 150 - 153 below). Wholesale customers include digital download stores and digital streaming sites. There has been great innovation in the digital space, with new customers, small and large entering the market almost continuously. A significant recent development is the arrival of streaming services, with three services already launched in New Zealand. The world's preeminent music streaming service Spotify is expected to launch here very shortly. That diversity in supply-modes also means there is greater diversity in pricing structures at the wholesale supply level. For example, for streaming sites consumers do not actually purchase the song and this is naturally reflected in the wholesale supply price of a track.
  - 33.4 *Retail supply*: records are then sold to consumers, typically by the wholesale customer, and in New Zealand very rarely from the recording company directly.

- 34 Universal's recorded music business primarily consists of A&R and wholesale supply. Universal Music NZ uses third parties for manufacturing and sold its distribution operation in 2009. Since then it has used distribution services provided by a third party. Universal Music NZ does not generally supply records directly to the retail market.<sup>8</sup>
- 35 EMI also provides A&R and wholesale supply. EMI Music NZ also uses third party manufacturing but distributes its own physical recordings through a joint venture with Warner Music NZ called MDG. EMI participates in some limited supply directly to the retail market, mainly through the website [www.theinsong.co.nz](http://www.theinsong.co.nz).
- 36 In addition, both parties act as a distributor for third party records. This typically involves overseeing the manufacture by a third party of the record and arranging for wholesale supply. This service would generally be utilised by an artist who has created his or her own record and not signed to a record company, or by an independent label that focuses on A&R and has chosen to outsource pressing and distribution. Universal and EMI essentially act as sales agents for the artist or label and receive a margin for providing this service. Price setting decisions are generally made, or ultimately approved, by the third party.<sup>9</sup> This type of "third party physical distribution" service is separately identified in the market share analysis in Part 5 of this application.
- 37 There are also independent aggregators, and specialist independent distributors that provide distribution services to third parties. Digital distribution through the major channels like iTunes does require the use of an aggregator but physical distribution can either be outsourced or self managed. New Zealand's small geography and concentrated retail sector makes self distribution a viable option.
- 38 The ratio of full recording, licensing and P&D contracts Universal has on its books at any one time varies, but at the current time the ratio for Universal Music New Zealand on domestic artists is approximately [ ]%, [ ]% and [ ]% respectively.

### ***Music publishing***

- 39 Music publishing is the business of acquiring, protecting, administering and exploiting the rights in musical compositions. Those rights include mechanical rights, performance rights, synchronisation rights and print rights. Essentially these are the intellectual property rights in the composition (written song) rather than the recording made of that song.
- 40 In New Zealand, music publishing royalties are generally collected on behalf of music publishing rights holders by the industry body AMCOS/APRA.

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<sup>8</sup> Universal Music NZ does occasionally make records available directly to consumers in association with special events. For example, individuals who attended the James Taylor and Carole King concert were given the opportunity to purchase the album directly from Universal Music NZ, in conjunction with Ticketek. Universal Music NZ also has a website: [umusic.co.nz](http://umusic.co.nz) where consumers can listen to tracks and "click to buy", but in most cases that click links through to the iTunes store.

<sup>9</sup> Third party distribution typically just involves undertaking the "sales" component of wholesale supply on behalf of third parties who prefer to outsource this function. In some cases Universal will tailor a distribution deal to the needs of the client and occasionally they may request Universal to provide some marketing on their behalf. If additional services are provided, such as marketing, Universal would typically pass on those costs directly to the third party.

41 Universal operates a music publishing business. EMI also operates a music publishing business. However, prior to the Acquisition the music publishing business of EMI will be separated and sold to Sony/Mubadala. Neither Universal Music NZ nor EMI Music NZ manages music publishing rights in New Zealand. Music publishing responsibilities for the territory are managed by Universal Music Publishing Australia Pty Ltd and EMI Music Publishing Australia Pty Ltd respectively.

**Associated services**

42 There are a range of associated services that are sometimes provided by record companies due to the close nature of these services to a record label's core services. For example, merchandising, concert and event management and artist management.

43 In New Zealand, Universal and EMI both participate in some merchandising (printing of t-shirts etc). Licenses for merchandising are typically short-term and non-exclusive. Neither party participates in other "associated services" in New Zealand.

**Industries affected by the Acquisition**

44 For New Zealand, the Acquisition will result in horizontal aggregation in the recorded music market. Music publishing does not form part of the Acquisition. In our view, the recorded music market is the only industry that will be affected by the Acquisition, but for the reasons given in this Notice, we do not believe the Acquisition will have the effect or likely effect of substantially lessening competition in any market relevant to this industry.

**Industry trends**

45 The recorded music market is now in its 10<sup>th</sup> consecutive year of contraction both globally and in New Zealand. For example, over the period 2001 to 2010, total global music revenues have declined by 43%; in New Zealand RIANZ reports that the wholesale value of the New Zealand recorded music market has dropped over 49% from NZ\$121 million in 2001 to NZ\$62 million in 2010.

46 The key driver of this decline is the collapse in physical sales. Although digital music is fast becoming the major form of music consumption (a trend that is expected to continue as mobile and broadband penetration and data speeds increase), the decline in physical sales has not been offset by an equivalent rise in digital sales in the New Zealand market. This can be attributed to a number of factors:

46.1 Piracy. While the threat from pirated music and legislative response to that threat have already been described, a highly conservative quantification (at paragraph 108 below) attributes a 60% market share to pirated music across combined physical and digital formats;

46.2 Amendments to New Zealand legislation that expressly allow parallel importing;

46.3 The unbundling of albums, mainly due to the introduction of the iTunes store, which allows consumers to select individual tracks to buy rather than purchasing an entire album;

46.4 The emergence of many low cost and accessible digital recording, distribution and promotion channels such as Soundcloud, Bandcamp, Tune Core and

Amplifier have made it viable for artists to produce a record themselves and distribute it easily. Alternative music channels such as YouTube and Facebook allow artists to control their own direct relationships with their fans and consumers. These “DIY” methods allow artists to bypass record companies throughout the supply chain;

- 46.5 Alternative music channels such as YouTube and other streaming sites also act as a means for consumers to legitimately obtain music, sometimes for free from a consumer perspective. YouTube allows consumers to legitimately access music at no cost to themselves. Other music-specific streaming sites (such as Spotify, Rdio and rara.com) allow consumers to access a vast supply of music and are generally either advertising funded or subscription based;
- 46.6 Tablets and smartphones are replacing pure mobile music devices. On these converged platforms, non-music content, especially apps, increasingly competes with music content for consumer’s time, discretionary spend and hardware memory space. These devices are also driving demand for music videos.
- 47 Another trend is that dedicated physical music stores are closing as major national and international customers (such as The Warehouse and Amazon) dominate the retail market. The number of retail outlets has reduced from over 400 to approximately 150 over the last 10 years. The Warehouse comprises 89 of those outlets, with JB HiFi comprising 13 stores. The specialist music retailer Marbecks has now reduced from 30 stores to 12 stores.
- 48 In the digital space, a number of major players have successfully entered the market on a large scale, especially iTunes, which currently dominates this segment. However, the digital segment is growing and diversifying rapidly, particularly as new distribution models evolve.
- 49 The market contraction is represented in the diagrams below:<sup>10</sup>

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<sup>10</sup> Universal Music NZ does not have access to EMI 2011 market share.

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50 These industry trends will be further discussed in the context of constraints, in Part 5 of this application.

**Recent mergers**

51 There have been no relevant mergers in the recorded music market in the last three years.



### PART 3: MARKET DEFINITION

#### Horizontal Aggregation

52 The market principally affected by the Acquisition is the recorded music market.

#### Market definition

##### Product Market

53 In our view, the recorded music market is a single product market.

54 This market comprises both physical and digital recordings. A digital recording and a physical recording are indistinguishable when played, and therefore highly substitutable on the demand-side. Modern technology also means that a recording can be easily converted from digital to physical or vice versa by the consumer simply hitting the “import disc” or “burn disc” button on their computer. Many stereo systems that may have been used primarily in the past to play CDs can play music from an iPod or other MP3 device. In addition, most stockists of physical music also sell iTunes gift cards. On the supply side, most record companies supply both physical and digital recordings, and for any record companies that do not, it would be easy for them to begin to offer both formats: manufacture costs are low for both physical and digital recordings and Universal knows of no intellectual property restrictions that may prevent a company exploiting a track in both formats.

55 We do not think the product market should delineate between individual albums, top ranking albums or music genres. This is consistent with Australasian precedent on the recorded music market:

55.1 In *Tru Tone Ltd v Festival Records Retail Marketing Ltd* the Court of Appeal confirmed the High Court finding that there was not a distinct market for each album, and instead identified the “album market” as the relevant market. The Court was of the view that the short average time an album stays popular before being replaced by another showed they are clear substitutes, and “a single album definition of market ignores commercial realities”.<sup>11</sup>

55.2 In *Universal Music Australia Ltd v Australian Competition & Consumer Commission*<sup>12</sup> the Federal Court of Australia was also not prepared to identify each separate title as a distinct product market. The Court acknowledged that there was some lack of substitutability in that a consumer looking for a particular track may not be satisfied with an alternative, but that this was not enough to mean that each album constituted its own market over which the licensor would have a monopoly. Instead, the Court identified a “wholesale market for recorded music”.

56 Importantly, the product market is not confined to legally sourced music, as pirated music constrains legally sourced music. Piracy has always been a feature of the recorded music market. However, the advent of the internet and growth of digital distribution channels for recorded music over the past decade has led to an explosion of piracy. And, to revert to the previous Parliamentary reference, not a hand grenade but a nuclear explosion.

<sup>11</sup> *Tru Tone Ltd v Festival Records Retail Marketing Ltd* [1988] 2 NZLR 352, page 360

<sup>12</sup> *Universal Music Australia Ltd v Australian Competition & Consumer Commission* [2003] FCAFC 193

- 57 The term “supply” is given an expansive definition in section 2(1) of the Commerce Act. In relation to goods, supply includes supply by way of gift, sale, exchange, lease or hire; and in relation to services, supply includes provide, grant or confer. Those forms of supply are clearly not intended to be closed categories. For example, it is well recognised by the Commission that supply of a particular service (e.g. reinsurance<sup>13</sup>) can include self supply of that service. Similarly, the Commission has recognised that self supply of particular goods (e.g. harvesting) can occur.
- 58 Importantly, there is no requirement that such self supply be confined to legal sources. Indeed, in its decision giving clearance to Te Ohu Kai Moana to acquire Salmond Smith Biolab Limited<sup>14</sup>, the Commission expressly noted in relation to the market for procurement of paua that, in addition to the commercial harvesting of paua of 1253 tonnes (greenweight), there were three non-commercial sources of paua, being recreational fishers (324 tonnes), Maori exercising customary harvesting rights (233 tonnes) and illegal fishing (401 tonnes). Those non-commercial sources combined to provide a substantial alternative to paua being harvested under quota.
- 59 Obviously, the internet and diverse platforms it provides for digital delivery of recorded music allow far more scope than self harvest – legal or illegal – of paua. The magnitude of the competitive threat posed by online copyright infringement is well described in the joint submission presented by RIANZ and Independent Music New Zealand (*IMNZ*) on the bill which became the Copyright Amendment, which is attached at **Appendix E**. In particular, paragraphs 5 to 24 of the submission, describing the need for the bill outline that threat to the industry as a whole. Indeed, that submission was made by the trade bodies that represent all major and independent recording companies in New Zealand as well as over 1100 New Zealand artists.
- 60 The submission shows clearly that for many New Zealand consumers, pirated music is a ready substitute, or at least complement, for music that is sourced either physically, or lawfully from the increasing variety of digital delivery mechanisms. The fact that unlawfully sourced music may be difficult to quantify, does not mean that it should be excluded from the market. A highly conservative quantification (at paragraph 108 below) estimates a 60% market share for pirated music across physical and digital formats.

### **Functional Market**

- 61 The functional markets of the recorded music market comprise the steps of the music recording supply chain:
- 61.1 *A&R*: artist and repertoire is the term used to describe discovery, signing and creative and promotional development of artists;
- 61.2 *Manufacture and distribution*: for physical recordings, CDs or DVDs are manufactured and shipped;
- 61.3 *Wholesale supply*: once a record is made, the record company will seek distribution deals with wholesale customers such as The Warehouse and digital

<sup>13</sup> Decision 439, PMI Mortgage Insurance/CGU Lenders Mortgage Insurance

<sup>14</sup> Decision dated 7 September 1995

customers such as iTunes. The record company will also seek to have the record picked up by radio stations and music television channels.

61.4 *Retail supply*: records are then sold to consumers, typically by the wholesale customer. In very rare circumstances are records supplied by the recording company direct to the ultimate customer.

62 In this application we focus only on aggregation of A&R services, and wholesale supply:

62.1 We do not think the acquisition by Universal of EMI's interest in the distribution business, MDG, should raise any competition concerns. Universal currently outsources manufacturing and distribution activities and there are numerous companies that can provide pressing and freight services for CDs. Also, the need for this function will diminish as physical sales further decline and digital sales increase. We do not propose to analyse the competitive effects of manufacture and distribution further in this application, but are happy to provide further information should the Commission wish.

62.2 Similarly, we do not propose to address retail supply further in this application. Universal's involvement in retail supply is de minimis, and therefore any acquisition of EMI's retail operations effectively constitutes a bare transfer. In any event, EMI's retail operations are very small (see paragraph 35 above).

### ***Geographic Market***

63 Universal Music New Zealand is based in Auckland but provides A&R and wholesale supply services on a national basis. Wholesale customers are mainly large national operators such as The Warehouse or international businesses such as iTunes, and these operators generally set retail prices consistently throughout New Zealand. Therefore, for the purposes of this application we think the appropriate geographic market is a national one.

### ***Vertical Integration***

64 As both merger parties currently operate at broadly the same functional levels, there will be no significant increased vertical integration as a result of the merger.<sup>15</sup>

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<sup>15</sup> As stated above, we do not think the acquisition of an interest in EMI's distribution business, or their small retail operation is of significance.

**PART 4: COUNTERFACTUAL**

65 EMI's parent company has conducted a thorough and wide-ranging auction process for EMI, to maximise value to its shareholders, including a wide range of bidders.  
[

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66 [

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67 [

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## PART 5: COMPETITION ANALYSIS

### A. MARKET FOR A&R SERVICES

- 68 At the beginning of the value chain for record companies is the discovery and development of artists and the subsequent recording of their music, with a view to exploiting the copyright in the resulting sound recordings, the activity described in the Notice as "A&R". Success or failure in A&R is key to success in the other markets for recorded music.
- 69 A&R typically involves:
- 69.1 Discovering artists. This may be achieved by attending gigs, following up recommendations or responding to artists who have approached the label. Success at this stage typically turns on individuals within the label with an eye for an artist who could become a success, and with good links to the grass roots industry;
  - 69.2 Development of demos. At the early stages of a relationship between the label and artist, demos may be produced to give an indication of the potential product, and a trial experience of working together. When a label is interested in an artist, the label will often fund the demo but the artist will not be obliged to enter a recording contract;
  - 69.3 Negotiation of contracts. A recording contract will have features that vary from artist to artist, but will include matters like royalties, marketing commitments, provision for creative control etc;
  - 69.4 Production of the master recording; and
  - 69.5 Marketing and promotion of the artist. This will involve getting the artist airtime on TV and radio, advertising, promotional interviews, use of social media etc.
- 70 The particular A&R services provided to the individual artist will vary depending on that artist's needs. Some artists will enter into a full recording contract and have the label provide all the services described above. Others may create the recording themselves, but license it to a record company for promotion and distribution. Other artists will manage their own promotion and merely contract for distribution of their record by an established company.
- 71 The "markets" for these activities are very volatile and market shares are not indicative of market power.

#### **Existing competitors**

- 72 All of the major record companies and independents are engaged in providing some mix of A&R services. There are also a number of other alternatives available to artists. To give an indication of the number of established record labels – RIANZ represents 60 record labels in New Zealand, and IMNZ represents 83 100% New Zealand owned record labels. Membership of RIANZ and IMNZ does intersect with some independent New Zealand labels being members of both organisations.

- 73 Record labels, both major and independent, are substitutable from an artist's perspective. For more detail on specific competitors, see paragraphs 115 to 124, below.
- 74 Artists have today a wide range of other highly effective and low cost opportunities to publicise their talent and musical performances to both record companies and also directly to consumers. For example, YouTube allows artists to upload their recordings and performances for free and social media sites such as Facebook, MySpace and Twitter have established themselves as powerful multipliers which can create and direct significant volumes of traffic to the musical works of new artists. This means that the next "hot act" often has a lot of visibility at an early stage among label executives and fans alike. Before signing with any record label, New Zealand folk music band Avalanche City made their debut album available as a free download on their website. Word of mouth ensured the album quickly reached near-platinum status from free downloads alone, despite a lack of major radio support. An executive for TV2 heard the single *Love, Love, Love* playing in a store and decided to use it for the 2011 station promos which created huge demand for the song and the group. It also created strong interest in the band amongst New Zealand record labels with the group subsequently signing a contract with Warner Music. This ability to establish a fan base without label support in turn increasingly leads to promising new artists being pursued by many record companies at the same time, i.e. a high levels of so-called "contested" artists.
- 75 Not only can artists bypass labels in promotion of their track/album, artists also have the option to create and distribute the actual recording themselves too - self supply is a real option. There are many high quality and inexpensive ways to record music, either by using personal equipment or by obtaining access to recording studios at competitive commercial rates. Once a master recording has been created, the music can be monetised through accessible low cost digital distribution channels, such as cdbaby, the Orchard, Tunecore and now, Google Music Artist Rooms.
- 76 Like Avalanche City, fellow New Zealand band Six60 also used this self supply route to start their career. Six60 developed a strong live and Facebook following, giving away their music through Facebook to build fan loyalty and encourage strong word of mouth and buzz for the band. In both cases Six60 and Avalanche City used direct to fan commerce and promotion at the start of their career before entering into distribution deals with majors (Universal and Warner respectively).
- 77 In addition, the NZ On Air music funding schemes allow artists to record music and create videos without the financial assistance of a record company.

**Potential Competition**  
***Conditions of entry***

- 78 The number of participants in the A&R market, and frequency of new entry from independents, is evidence that barriers to entry are low. The main requirement is a passion and talent for music. This is demonstrated by the fact that many independent labels originate from artists that first represent themselves, and then take on other artists. Digital growth and ability to outsource distribution means that the small size of a fledging label providing A&R services should not deter an artist

from signing, as technological developments have meant that scale is no longer a requirement for success. As stated in submissions to the European Commission:<sup>16</sup>

*"Some try to hide the success of Indies behind arguments like "Adele is a one-off" or that their potential is unable to be met by "complex barriers to trade". Any such arguments simply cannot credibly be sustained. Back in 2008, The Guardian identified Indie labels such as Domino, Rough Trade and XL, as "the drivers of the record industry", signing artists of the calibre of The Arctic Monkeys, Franz Ferdinand, The White Stripes, Dizzee Rascal – and selling them in their millions. According to The Guardian article:*

*"The Arctic Monkeys model says a lot about how much the rules of hype and business building have changed in the past decade. The internet communities and peer-to-peer file sharing that helped make Arctic Monkeys known have fostered a revolution, helping scenes to flourish without the need for big-money marketing campaigns or focus groups. As a result, record labels that are also fuelled by the passion for music rather than money are becoming more successful. "[Richard Russell, head of XL] says the speed and reach of the internet means that there are no secrets in the industry any more. All labels have access to the same information, and artists more power to choose with whom they want to work. Although he doesn't want to discuss contracts, this is presumably why Radiohead joined XL, as did Damon Albarn for the CD release of Monkey: The Opera. "Russell can't disguise how excited he is about XL's success. 'Saying that, I wish the majors all the best, I really do.' He follows this with a smile, and it looks genuine. 'But think about all the labels you've talked to. They are doing well because things are good now for artists as well as for audiences - for the people who are more prepared to take risks. It's a really great time.' He laughs. 'No, scrub that. It's the greatest time.'"*

*This strength of the indies is not new – it has been developing for several years and has been sustained while the traditional majors have struggled. The Indies have succeeded in building a platform from which they are able to continue to flourish. In sum, the recent success of Indie labels demonstrates that the predictions of a number of years ago – "selling millions of records is no longer the preserve of the majors" – have undeniably come to fruition."*

- 79 In addition, in *Universal Music Australia Ltd v Australian Competition & Consumer Commission* the Federal Court found that barriers to entry in the recorded music market were not high:

*"Hill J identified the 'essential and distinguishing feature' of the industry as the continued need for new product, which was as much a problem for the major companies as for new entrants. He held there was no significant general barrier to entry into the record industry, as demonstrated by the growth of independents. New entrants competed with incumbents for artists. They had no less chance of recognising a likely 'hit' than incumbents."<sup>17</sup>*

- 80 The New Zealand market exhibits similar characteristics to A&R markets in Australia and the EU. Therefore, we do consider that barriers to entry into the A&R market are low (see examples of entry by Avalanche City and Six60 above).

<sup>16</sup> Supplementary submission filed 9 March 2012.

<sup>17</sup> *Universal Music Australia Ltd v Australian Competition & Consumer Commission* [2003] FCAFC 193, paragraph 40

81 The A&R market and the wholesale supply market are linked; ease of access to digital distribution has made smaller labels a more viable option in the A&R space. Indies are thriving, and this reflects competition at both functional levels of the recorded music market that are relevant to this application.

**Countervailing power of artists**

82 Signing of artists is a highly competitive process and “contested” artists have and do exercise considerable market power in this competitive environment where many record companies compete for these artists and the threat of switching is real and effective.

83 This market power of “hot” new acts and established successful artists is a reflection of the fact that in today’s increasingly digital marketplace for music an artist has a wide choice of how to develop his recording career. She/he can choose to sign with a label with an established track record of developing and promoting artists. In this regard, there are today few differences in the competitive proposition of the traditional majors and established indie labels. As stated in submissions to the European Commission:<sup>18</sup>

*The fierce competition at the A&R level is not merely a result of the presence of a wide range of effective recorded music companies but also reflects the ability of artists and their managers to intensify competition for their rights by their ability to create a fan base before signing with a record company (e.g. through creating a social media driven buzz around themselves) and by their credible threat to continue their recording career without a label. At the same time... it is almost impossible for record companies to make any robust predictions (e.g. from P&L data) about which artists may or may not be successful, which means that the A&R process is something of a lottery, in which the winners (hopefully) pay for the losers.”*

84 The unpredictability of success means that contracts are typically short term, giving artists opportunity to churn. The desire to resign successful artists means that labels may renegotiate terms during the life of a contract to preserve an ongoing relationship. As part of the submission process in Europe, Warner has stated that “[i]t is not unusual for [Warner] to renegotiate contract terms with a successful artist during the term of an existing contract”.<sup>19</sup>

85 The ability to exercise bargaining power as a result of an artist’s ability to switch was observed by the European Commission’s findings in Sony/BMG II. As the European Commission concluded in its 2007 decision: <sup>20</sup>

*“the competition for securing the best artists remains intense among all record companies - majors and independents. Artists can, and do, move from majors to / from / and between other majors and independents” .*

86 The ease with which artists are able to switch has been proven by major artists such as Paul McCartney, Radiohead and Noel Gallagher, who have each switched labels a number of times in recent years.

<sup>18</sup> Supplementary submission filed Friday 9 March 2012

<sup>19</sup> Warner Form 10-K filing, as reported in Universal’s supplementary submission filed Friday 9 March

<sup>20</sup> European Commission decision, Case COMP/M.3333, *Sony/BMG II*, at para 426



**Market share does not reflect dynamics of the market**

- 87 Success or failure in the A&R market is to some extent reflected in sales figures, and so the wholesale market share figures provided in this application provide some proxy for A&R market share. However, immediate sales figures may be distorted by the current appeal of a few major artists and therefore may not reflect the true competitive dynamic at the A&R level. Competition in the A&R market is better evidenced by:
- 87.1 the number of participants;
  - 87.2 low barriers to entering the A&R market; and
  - 87.3 fierce competition *for* the artist.
- 88 The A&R market for recorded music is best characterised as an innovation market where there is constant competition among a variety of participants (including those artists who opt for self supply) for that market, rather than within it. An analogy can be drawn with the Commission's treatment of road resurfacing contracts in *Decision 595: Fulton Hogan/Beynon Contracting*.<sup>21</sup> In that decision, the Commission recognised that the relevant point where competition occurs is when the request for bids is made – at that point all potential bidders become significant competitors. To assess competition, the Commission analysed the requirements potential bidders would need (and barriers to achieving those), as well as countervailing buyer power. It concluded that competition was effective, despite the fact that once a tender was won, the successful bidder may hold a large proportion of contracts.
- 89 Applying this same approach to A&R, effective competition occurs at the point an artist is looking to sign. The range of options available to the artist are numerous, as described above. An artist who already has a strong fan base will be able to exercise significant countervailing power. Therefore, mere quantification of A&R market share does not adequately reflect the market dynamic.
- 90 This demonstrated ability and willingness of artists to negotiate with a range of potential labels, and to switch, means that market share has little relevance.
- 91 Universal submits that this high level of competition for signing artists has further intensified since 2007. A significant driver of these further enhanced levels of fierce competition in discovering and signing artists is not only the further diversification of distribution models on offer for artists (as outlined above) but also the strong resurgence of the indies since the 2007 Sony/BMG II Decision.<sup>22</sup> It is clear that in today's recorded music market the indie labels compete vigorously and successfully with the majors for both new and established talent.
- 92 If the Commission is looking for some practical illustration that competition is operating at the A&R level, this can be seen from an assessment of any number of New Zealand music sample sets. For example, of the New Zealand albums in the year end 2011 best of the year album chart, five were by artists signed by majors and ten by independents. Of the 75 finalists in the major categories at the Vodafone New Zealand Music awards 2011, 11 were signed by majors, and 64 were

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<sup>21</sup> Decision 595: *Fulton Hogan Limited and GJ Beynon Contracting Limited*, 19 December 2006

<sup>22</sup> European Commission decision, Case COMP/M.3333, *Sonu/BMG II* at para 426

independent. Of those 64 independent finalists, 24 of them were distributed by a major label.

- 93 Again, the strength of the indies in the New Zealand market for A&R is especially apparent.
- 94 None of this will change – globally or within New Zealand – as a result of the Acquisition.

**B. WHOLESALE MARKET****Existing competitors****Market share***Wholesale supply market share data*

95 Key market share figures for legitimate physical and digital sales are provided by RIANZ. Until recently RIANZ was unable to access digital sales figures for independent labels which greatly skewed digital market shares in favour of the four major record companies. This has now been rectified and RIANZ has provided an accurate digital estimate for indies as well as majors for the full year 2010 and year to October 2011. The updated data shows that digital sales from independent labels and artists are significant.

96 Importantly, these figures make no allowance for pirated music.

97 RIANZ New Zealand wholesale market share figures

<b>2010</b> Full year	Digital market share (% of total revenue)	Physical market share (% of total revenue)	Combined market share (% of total revenue)
<b>EMI</b>	[ ]	[ ]	[ ]
Sony	[ ]	[ ]	[ ]
<b>Universal</b>	[ ]	[ ]	[ ]
Warner	[ ]	[ ]	[ ]
Independents	[ ]	[ ]	[ ]
Total market value:	\$13,857,317	\$48,125,561	\$61,982,878

<b>2011</b> Jan to October	Digital market share (% of total revenue)	Physical market share (% of total revenue)	Combined market share (% of total revenue)
<b>EMI</b>	[ ]	[ ]	[ ]
Sony	[ ]	[ ]	[ ]
<b>Universal</b>	[ ]	[ ]	[ ]
Warner	[ ]	[ ]	[ ]
Independents	[ ]	[ ]	[ ]
Total market value:	\$14,784,534	\$26,010,738	\$40,795,270

98 The above market share figures include the share of physical products distributed by the four major record companies on behalf of independent third party labels and accordingly, significantly over-estimate the market shares of the majors. It is therefore necessary that market share data take into account the underlying ownership of the content and that revenues collected by the majors on behalf of distributed independent labels are reallocated to the independent sector. The independent label retains the responsibility to set the pricing for its own products under these deals with the majors. The deals are generally on short term contracts and are contestable at the end of each term.

99 At present RIANZ is unable to collect accurate details of distribution deals in respect of digital revenues. The adjusted figures below only reallocate third party distribution for physical products, and are therefore conservative.

100 New Zealand wholesale market share figures that take account of distribution carried out by majors on behalf of independent labels

2010 Full year	Total combined market share (Value and % of total revenue)	Value of physical third party distribution deals	Market share adjusted to reallocate third party distribution to independents
<b>EMI</b>	[ ] [ ]	[ ]	[ ] [ ]
Sony	[ ] [ ]	[ ]	[ ] [ ]
<b>Universal</b>	[ ] [ ]	[ ]	[ ] [ ]
Warner	[ ] [ ]	[ ]	[ ] [ ]
Independents	[ ] [ ]		[ ] [ ]
Total	\$61,982,878	[ ]	

2011 Jan to October	Total combined market share (Value % of total revenue)	Value of physical third party distribution deals	Market share adjusted to reallocate third party distribution to independents
<b>EMI</b>	[ ] [ ]	[ ]	[ ] [ ]
Sony	[ ] [ ]	[ ]	[ ] [ ]
<b>Universal</b>	[ ] [ ]	[ ]	[ ] [ ]
Warner	[ ] [ ]	[ ]	[ ] [ ]
Independents	[ ] [ ]		[ ] [ ]
Total	\$40,795,272	[ ]	

101 In addition, Universal is able to indicate (based on RIANZ figures) the wholesale market share figures so far as they relate to New Zealand artists only:

2011 Full year	Wholesale sale of New Zealand artists (% of total revenue)
<b>EMI</b>	[ ]
Sony	[ ]
<b>Universal</b>	[ ]
Warner	[ ]
Independents	[ ]

102 It should be noted however that this table takes no account of third party physical distribution carried out by majors on behalf of independent labels. Approximately half of distribution of New Zealand artists by majors would be on behalf of the indies. Thus, on a "controlled and own content basis", it is estimated that the combined market share for the merged entity for distribution of New Zealand artists would reduce from apparent [ ]% to less than [ ]%. And this is before piracy is accounted for in market share figures.

- 103 Further, these New Zealand artist figures only represent physical sales. As such, the major labels' shares are overstated and the independent sector is significantly underrepresented in this table.
- 104 Even allowing for their shortcomings, these figures do readily illustrate that both Universal and EMI currently have significantly stronger international catalogues than their respective New Zealand catalogues. EMI's strength generally is in its back catalogue, particularly UK artists. The other two majors, Sony and Warner, have a similar ratio of New Zealand to international repertoire in their respective catalogues.
- 105 The figures also show that independent labels are particularly strong with New Zealand artists.

### ***Market share including Piracy***

- 106 For obvious reasons, the extent of unlawfully sourced music is difficult to quantify with precision. It may vary considerably according to jurisdiction and from time to time. However, Universal believes the following table provides a highly conservative estimate of total market shares currently applicable in New Zealand for the supply of recorded music, including both legitimate and pirated copies.
- 107 Given that the bulk of piracy now occurs via digital formats, but affects legitimate services across both digital and physical formats, it would be misleading to attempt to provide share estimates including piracy on the basis of physical and digital formats separately. Accordingly, the table provides estimated shares across physical and digital formats combined. Further, given that the bulk of piracy, particularly that in digital formats, involves the unpaid consumption of music, it is more meaningful to provide shares on the basis of volumes of consumption, rather than values of sales.
- 108 As the European Commission noted in Case COMP/M.5529 Oracle/Sun Microsystems, regarding open source software, market shares are not a good proxy for the competitive positions in the market when some of the product is distributed freely.

### ***Total New Zealand market including Piracy***

<b>2010</b>	Estimated % of volume of music consumption (i.e. tracks downloaded or streamed)
EMI	[            ]
Sony	[            ]
Universal	[            ]
Warner	[            ]
Independents	[            ]
<b>Piracy</b>	<b>60.00%</b>

- 109 That conservative estimate of 60% for pirated music across physical and digital formats is based on the following assumptions:

- 109.1 the legitimate music market was valued at NZ\$120 million in 2001. Had there been no piracy or market disruptions, based on annual CPI Increases the market would have had an estimated value of NZ\$155 million in 2010;
- 109.2 on a value basis 60% piracy factors the market up to \$155 million (as opposed to the legitimate and actual market value in 2010 of NZ\$61 million); and
- 109.3 within the legitimate segment, shares by value would be equivalent to shares by volume. Although Universal does not know the prices of its competitors (other than those it distributes on the third party's behalf) it estimates that wholesale prices are fairly similar;
- 110 The IFPI has estimated that globally 37% and 95% of material in physical and digital formats are pirated respectively.<sup>23</sup> In New Zealand physical piracy has been traditionally much smaller than this (less than 5%). Applying these IFPI estimates (including accounting for a lower rate of physical piracy in New Zealand) to the split of physical and digital music sales in New Zealand, would suggest that 86% music consumed in New Zealand is pirated.<sup>24</sup> Therefore, we think the 60% estimate is conservative.

**Level of aggregation**

- 111 The above market share analysis shows that following the Acquisition, the merged entity will have approximately [ ]% market share of wholesale supply of recorded music that is sourced lawfully in New Zealand.<sup>25</sup> But, the merged entity's share of New Zealand artists would be significantly less, apparently around [ ]%; furthermore, on a controlled and own content basis this reduces to less than [ ]%.
- 112 Crucially, however, those percentages make no allowance for music that is sourced unlawfully.
- 113 Allowing for a highly conservative estimate of 60% for pirated music, the merged entity's combined market share reduces to [ ]% of all music, with its share of New Zealand artists correspondingly lower. All these figures are well inside the lower safe harbour (of 20%) specified in the Commission's Business Acquisition Guidelines.
- 114 Further, we note that these market share figures are by no means static: the market is experiencing significant change with the rise of new digital music platforms, market share figures are prone to flux with the rise and fall of popularity of artists, and as with any merger, there will likely be a natural level of attrition in favour of other existing market participants.

<sup>23</sup> IFPI, *The Recording Industry 2006 Piracy Report: Protecting Creativity in Music*, July 2006, Page 4, available at: <http://www.ifpi.org/content/library/piracyreport2006.pdf> and IFPI, *Digital Music Report 2009: New Business Models for a Changing Environment*, page 5.10

<sup>24</sup> This figure is reached by the following calculation: In New Zealand, RIANZ figures show approximately 2/3 of music sold is physical, and 1/3 of music sold is digital (see para 49 above. If the IFPI piracy estimates (with the reduced physical piracy rate of 5% in New Zealand) are applied to those sales figures, it suggests that for every 200 tracks legally consumed in physical format, 211 are actually consumed, and for every 100 tracks legally consumed in digital format 2,000 are actually consumed. Combined, if 300 tracks are legally consumed, IFPI piracy estimates would suggest that 2,211 tracks are really consumed in total. This provides a ratio of 1:7.37 or 87%.

<sup>25</sup> This figure combines the New Zealand wholesale market share figures that take account of distribution of behalf of third party record companies – see paragraph 100 above.

**Competitors**

- 115 Existing competitors act as constraints on Universal and EMI, and will continue to constrain the merged entity in both A&R and wholesale supply. In *Universal Music Australia Ltd v Australian Competition & Consumer Commission*, the Court held that “none of the major record companies (including PolyGram and Warner) had demonstrated an ability to raise prices and maintain them above the level of other suppliers (large or small) even for hits”.

*Warner Music*

- 116 Warner Music Group is a major multinational record company with operations in music publishing, recorded music and associated services. Warner’s financial position has recently been strengthened following its acquisition by Access Industries (which is controlled by the Russian-American investor Len Blavatnik). Warner is a well-established, well-resourced and sophisticated label that has been a constraint on Universal and EMI and will continue to constrain the merged entity. In 2011 Warner had considerable success with the Bruno Mars album *Doo-Wops And Hooligans* which was the second biggest selling album in New Zealand for 2011. Warner also represents popular New Zealand artists such as Kimbra, who was recently awarded Best Female Artist at the 2011 ARIAs, the multi-award winning rock act Shihad and provides services to a number of independent labels such as Move The Crowd (Young Sid, Smashproof) Illegal Musik (J Williams) and Let The People Speak (Midnight Youth, Dane Rumble). Warner Music was an unsuccessful bidder for the EMI recorded music business. However, Blavatnik has since stated publicly that Warner will benefit from its comparatively smaller size, which enables it to give artists more attention.<sup>26</sup>

*Sony Music*

- 117 Sony Music is also a major multinational record company. Sony has recently enjoyed particular commercial success due, at least in part, to its close links with reality TV formats, such as *The X Factor* and *Got Talent*. Sony owns and operates a number of well known labels such as Columbia Records and Epic Records. In New Zealand Sony have a strong New Zealand roster with artists like Bic Runga, Brooke Fraser and Annah Mac and distribution arrangements with independent labels such as Rajon who have with high selling artists like Dennis Marsh and Eddie Low.

*Independents*

- 118 Independent labels operate as a powerful and growing force in the New Zealand music market. The increased power of the indies in recent years is partly attributable to the fact there are no barriers for independent labels to distribute their products through the major digital distribution channels, and success of independent labels has also given them credibility with major physical retailers. Today the indies can match the traditional majors in offering artists effective and low cost distribution of their repertoire. The highest selling digital album to date and biggest record of the millennium in New Zealand is by independent artist, Adele, signed to independent label XL Recordings and distributed physically in New Zealand by RHYTHMETHOD. RHYTHMETHOD have also distributed two Fat Freddy’s Drop albums, the first being one of the biggest New Zealand albums of the new millennium.

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<sup>26</sup> Comments made by Len Blavatnik as reported in Bloomberg Businessweek, “Who are you calling an oligarch”, 17 November 2011

- 119 Independent labels represent a large percentage of the digital music inventory in New Zealand. Of the 20 million tracks available on iTunes in New Zealand<sup>27</sup>, only approximately [ ]% of those are supplied by Universal. In 2011 the ratio of digital sales to physical sales for independents was [ ]. This ratio is significantly higher than any major record company has achieved, demonstrating the ease by which independent labels can adapt to the increasingly important digital format, which has significantly lowered barriers to entry and allowed independents to increase sales.<sup>28</sup>
- 120 In some cases, independent labels also have a competitive brand advantage simply by virtue of the fact they are not majors and therefore appear non-conformist and non-conservative. In the music industry, majors face a real challenge against perceptions that large corporate entities may stifle artists' creativity. The New Zealand independent label RHYTHMETHOD provides a strong distribution platform for some of New Zealand's most independent artists including Fat Freddy's Drop, Shapeshifter and Ladi 6. RHYTHMETHOD generally does not offer A&R services – allowing the artists they work with to control their own creative output, something seen as highly attractive to some artists.
- 121 In New Zealand, independent labels have tended to operate solo, but internationally there has been a trend for some independent labels to work together on joint licensing arrangements. One such collective is Merlin, which has been referred to as "a virtual 5th major"<sup>29</sup> and is well recognised as a large player in the digital music space.
- 122 Independent artists and labels are also able to use a New Zealand based aggregator like DRM to deliver their digital content to digital stores locally and internationally. They are also able to use any number of international providers (such as TuneCore or The Orchard) to deliver internationally. Among the services offered by aggregators is the ability to encode recorded music files into the correct format demanded by mainstream online retailers and to ensure that digital releases are timed to coincide with physical releases in any market in the world.
- Self-release options*
- 123 With advancement in technology it has become increasingly possible for artists to create, distribute and promote their own albums, cutting out the record label altogether. Tracks can be created by using affordable software, for example, Apple GarageBand. Distribution channels include Google Music Artist Rooms, Amplifier, Soundcloud and TuneCore. Promotion can be undertaken at low (or no) cost by individuals via Facebook, MySpace, You Tube and Twitter. Among the better known examples of artists who built a fan base before signing with a record company are Lily Allen, the Arctic Monkeys and Kate Nash.
- 124 Even established artists have been utilising DIY methods. For example, Radiohead initially self-released its album *In Rainbow* directly to fans over the internet, asking them to pay only what the fan thought the track was worth. Simply Red has recently released a record directly to Tesco in the UK. In New Zealand, Avalanche City

<sup>27</sup> <http://www.apple.com/nz/itunes/itunes-match/>

<sup>28</sup> The IFPI Digital Music Report 2012 reports that digital sales have overtaken physical sales in China, South Korea and the United States, see page 6.

<sup>29</sup> Music Week, "Impala takes the next lead", 27 November 2010



launched their career by making their whole debut album available for free to the consumer for a limited period. The group subsequently had a hit song on radio and eventually signed a deal with Warner Music in New Zealand and abroad.

### **Potential Competition**

#### ***Conditions of expansion by existing competitors***

- 125 Success at the wholesale level is largely dependent on success at the A&R level. Discovery of “the next big thing” can dramatically increase the profile of a label and drive wholesale market share. RHYTHMETHOD was established in 2001 and has grown steadily in the past decade despite the shrinking market. Part of their success can be attributed to their representation of Fat Freddy’s Drop who had one of the highest selling New Zealand albums in the past 10 years. Their success with Adele in 2011 dramatically increased their share of the market. RHYTHMETHOD is involved primarily in physical distribution.<sup>30</sup> The small size of the New Zealand market means that one big record can result in a significant shift in annual market shares.
- 126 This means that there is scope for independent artists to expand, particularly as the market trends further towards digital music consumption and social media as a means of promotion.
- 127 With fairly open distribution channels, growth at the wholesale supply level is generally dependant on discovery or development of a successful artist. Identification of talent can be achieved without significant scale or resources.
- 128 When Sony Music and BMG merged in 2004, the merged entity’s increased size did not result in an equivalent increase in its market share. Whereas Sony Music NZ and BMG NZ’s market shares immediately pre-merger were [ ]% and [ ]% respectively, the market share of the combined entity post merger was, and remains at, around [ ]%. This is represented in the diagram below:

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<sup>30</sup> RHYTHMETHOD’s director has a share in New Zealand’s leading digital distributor and aggregator, DRM.

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**Conditions of entry**

129 The numerous options to outsource physical distribution, and the ease and low cost of digital distribution demonstrate that barriers to entry into the wholesale recorded music market are low. Independent labels can access this market themselves, thus providing an outlet for artists on their books. Alternatively, artist aggregators provide services to artists where artists can get access to market. For example, cdbaby provides a guide entitled "How to sell music on iTunes in as little as 48 hours". Cdbaby has a US\$35 sign-up fee and keeps a percentage of sales.<sup>31</sup> In addition to artist aggregators, there are a number of label aggregators that act on behalf of independent labels, negotiating license arrangements.

130 This demonstrates that little capital is required to enter the wholesale recorded music market. Success in this market will depend on the success of the artists, but as discussed above, incumbents have no inherent advantage in that regard.

**The LET test**

131 It takes time to build a significant back catalogue comparable to those held by the majors other than by acquisition. However, the keen competition provided by Warner Music for EMI's catalogue demonstrates that growth in the recorded music industry need not be wholly organic.

132 In any event, a competitor need not be the size of a traditional major in order to act as a constraint, and as discussed above, a single hit artist can drive considerable growth. That is especially so in relation to New Zealand artists, as the relative strength of independent labels here shows.

133 A new entrant could certainly enter the market in under two years. There are no significant sunk costs and a new entrant could enter at all functional levels and

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<sup>31</sup> "Digital Distributors, choose the right one for you", <http://www.mosesavalon.com/digidist.html>, accessed 10 March

provide a full service or outsource certain aspects such as distribution, with a strategy to focus on a particular aspect (perhaps with a strategy to grow into other functional markets incrementally). Upon entering, expansion is achievable as discussed above, and as demonstrated by the continued success of indies.

134 A likely entrant, given its global presence, resources and alternative business model for artists, is Google.

135 Google launched a digital music service, Google Music, in the US on 17 November 2011. Universal understands that Google Music has licences with Universal, Sony Music and EMI as well as a large number of Indies but does not currently have a licence with Warner Music. Google Music, which is expected to be rolled out to Europe in the near future, offers a free music streaming service and cloud-based music storage capable of playing tracks through web browsers or to Android-based mobile devices. It has also introduced an innovative track preview model intended to drive consumption. [

] Google has also recently integrated its music service within its Android app marketplace, into a service called Google Play.

136 In this context, Universal notes that pirate sites are available on Google. [

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137 Further, social networking is having a dramatic effect on the recorded music market. As regards Google, artists have an incentive to register with Google+, Google's social network launched in July 2011, given that Google+ pages rank highly in a search on Google's search engine. Furthermore, artists such as Daria Musk have been able to make use of Google+'s free features (designated Band Pages and a video conferencing device called Google Hangout) to host a virtual concert on the service.

#### **Countervailing power of buyers**

138 The countervailing power of buyers in the music industry acts as a significant price constraint at the wholesale level. These buyers exert pressure within their own channels, but also across channels, as music pricing converges across international borders, and digital and physical formats. With piracy making the ultimate price floor available to consumers (free), physical and digital music retailers are required to offer competitive pricing to ensure they maintain (or minimise reduction) in their sales volumes. The reduction of physical sales outlets in New Zealand has had a significant impact on the industry. Shrinking physical sales have provided a strong incentive to Universal and other music wholesalers to offer competitive deals to ensure physical retail channels remain available to New Zealand consumers.

139 [

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140 The 1998 Copyright Act amendments provided for the parallel import of copyrighted goods including music and CDs without the consent of the New Zealand copyright owner or licensee provided the goods were not infringing copies in the country of origin. [

] This behaviour reflects the success of parallel import laws in that they have achieved what they were designed to do, but also highlights the constraint faced by record companies.

141 [

] In 2001 a new release CD in New Zealand retailed at The Warehouse for \$26.99, today the standard price is \$19.99 (despite an increase in GST) and Universal continues to face price pressure.

142 That reduction in retail price is reflected in the downward trend of net wholesale prices for physical music as represented in the diagram below:

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*The Warehouse*

143 The Warehouse is Universal NZ’s largest customer for physical music sales and has dominated the New Zealand market for some time. [

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144 For companies like The Warehouse, its business case is not built on the supply of physical music alone. Universal does not only compete with other music products within The Warehouse, but with every other product The Warehouse sells. As demand has declined they have begun to stock a more limited range, and given music less store prominence. This trend is expected to continue. [

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145 [

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*JB HiFi*

146 JB HiFi is Universal NZ’s second largest physical retailer and the largest physical retailer in Australia. [

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147 [

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*Specialist music retailers*

148 The decline in physical sales has seen a number of music store closures throughout the country. The Sounds music chain went bankrupt in 2007, numerous independent operators have closed and [

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*International online retailers*

149 Music is also easily available from a number of international sources, at international prices, particularly through websites such as Amazon, which sells CDs into New Zealand. [

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*iTunes*

150 [

] Although Telecom and Vodafone were early entrants in the digital music market, iTunes quickly emerged as the market leader and an essential gateway to digital sales. [

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151 By way of background, when iTunes launched the principal commercial objective for Apple was to increase sales of its hardware devices, then its iPods. Apple was able to persuade the record companies to make available their entire music content in unbundled form (i.e. as tracks) in digital format at very low prices. Universal and other record companies considered the iTunes proposal to be one of the then few effective commercial opportunities to incentivise an increasing number of consumers of unauthorised digital music to acquire digital music from authorised sources. The launch of iTunes succeeded in creating a growing authorised online music channel and driving the phenomenal success of Apple's range of hardware devices. Apple's range of products today include mobile communication and media devices, personal computers, portable digital music players, software, services, peripherals, networking solutions, and third-party digital content and application (only some of which is music related). However, the proportion of recorded music of Apple's total net sales is, therefore, very low; [

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152 [

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153 [

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*Streaming sites*

154 A significant development in music in the past couple of years has been the emergence of music streaming services where consumers pay for access to streamed digital music rather than digital downloads. Three services have already launched in New Zealand (The Sony Entertainment Network, rara.com and Rdio) and the world's predominant music streaming brand Spotify is expected to launch in New Zealand in March/April 2012. Spotify offer a free advertising supported tier and two premium paid subscription tiers. [

] In the fight against piracy, Universal seeks to ensure as many reputable and legitimate services are launched in New Zealand as possible. [

] However, streamed music does not constitute a separate market to downloaded music. Rather, they comprise alternative delivery formats which both allow the consumer to play a track.

155 While streaming services allow access to a very large online music library, it is also possible to retain a number of tracks offline during the period of a subscription. For example, the Spotify premium subscription allows users to have 3,333 tracks accessible on up to three media devices without requiring an active internet connection.<sup>32</sup> The internet is required for users to access downloaded and streamed music, and both formats can be listened to offline. As such, they are substitutable and part of the same market.

156 In any event, the question of whether the *retail* market for recorded music should be classified as granular digital markets is not relevant to this acquisition; this acquisition only affects the A&R and wholesale markets.

*Distribution of wholesale customers*

157 The diagram below shows the distribution of Universal's total sales to its wholesale customers in New Zealand:

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<sup>32</sup> These tracks must be "refreshed" each month which requires an internet connection. See <http://www.spotify.com/uk/about/features/offline-mode/>



158 The diagram below shows the distribution of Universal's *digital* sales only to wholesale customers:

[

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### **Other constraints**

#### ***Piracy***

- 159 As outlined above, pirated music accounts for a very significant proportion of the total recorded music market in New Zealand, at a conservative estimate of 60% across physical and digital formats combined. Thus, piracy acts as a very real and demonstrable constraint on pricing and output decisions by all recorded music companies. The fact that music is easily obtainable at no cost to consumers from the comfort of their living rooms means that record companies are constantly competing against the ultimate price floor. Illegally downloading music is very easy, even for people with limited technical skills; a simple Google search of any song or artist will bring up numerous illegitimate download options, particularly if the search also contains the word "free".
- 160 Although there have been recent changes to the law in the form of the Copyright Amendment designed to prevent illegal downloads, piracy remains a significant industry constraint.
- 161 Meanwhile, the industry itself is continuing to combat piracy through innovative new delivery modes that are intended to make legitimate music an attractive alternative to pirated music. The view of Frances Moore, chief executive of IFPI is that "consumer choice has been revolutionised, as new modes for accessing and consuming music are rolled out in new and existing markets".<sup>33</sup>

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<sup>33</sup> IFPI Digital Music Report, page 4

162 The short point is that changes in law – whether in New Zealand or elsewhere – to deal with piracy will only be successful if record companies continue to price low and aggressively and introduce new services and product formats. Indeed, this Acquisition is itself both driven by, and illustrative of, the need for the industry to respond effectively to piracy.

**Parallel importing**

163 Competition from overseas exporters acts as a constraint on New Zealand based record companies since parallel import laws were passed. Similar parallel import laws were passed in Australia, and when looking at the application of those laws in *Universal Music Australia Ltd v Australian Competition & Consumer Commission*, the Court found that if a record company refused to supply a retailer, that retailer could source the same product from overseas, so as not to be left in a competitively deficient position compared to its retail competitors.

**Coordinated market power**

164 There is minimal scope for collusion in the market for recorded music. Although record companies do co-operate through various joint ventures and industry bodies, referring to the factors identified in the Commission’s *Mergers & Acquisitions Guidelines*, the following factors mitigate against:

164.1 Barriers to entry are low and a single hit album can result in rapid growth;

164.2 There are many market participants, including two other major competitors. The majors have a history of fierce competition, and independents are acting as a significant constraint as they thrive in the digital space;

164.3 There is differentiation in the method of music delivery (physical or digital) and digital delivery modes are dynamic and rapidly changing;

164.4 Illegal downloads are a type of competitor, in that consumers can access the same music from illegal sources; but it is impossible for music companies to collude with piracy;

164.5 The creative nature of the industry means that particular services provided to artists in the A&R space are likely to vary depending on the personalities and requirements of artists, producers and record companies;

164.6 Neither party is a maverick competitor; and

164.7 There is no history of anti-competitive behaviour in recorded music.<sup>34</sup>

**Efficiencies**

165 A principal rationale for the merger is the significant scope for synergies through the adoption of common platforms across the parties’ respective operations, adopting the most efficient and most effective operational infrastructure in each jurisdiction in which they operate. Universal anticipates global savings of up to [ ] per annum. Universal thinks that many parts of EMI’s recorded music business can be

<sup>34</sup> We note that the Commission did investigate the exclusive nature of industry body PPNZ, with regard to music licensing in 2010, but that following the investigation structural changes were made by PPNZ that were satisfactory to the Commission.

integrated into Universal's business with limited incremental overheads, thereby bringing considerable scale to centralised and back-office functions and allowing the combined entity to exploit a combined more diverse Universal / EMI catalogue business without duplicative operations.

- 166 These savings will allow Universal to lower its costs per unit, which in turn will benefit Universal's customers and ultimately consumers by enabling Universal to increase its spending on developing and promoting artists, offering keen prices and licensing innovative platforms and services. As described above, participants in the recorded music industry must cater for not only constantly changing tastes in popular music, but also rapidly evolving models for delivering that music to customers.

**PART 6: FURTHER INFORMATION AND SUPPORTING DOCUMENTATION**

167 Please find below, contact details of relevant market participants:

<b>Name of company</b>	<b>Contact details</b>	<b>Relevant contact person</b>
Warner Music New Zealand Limited	Level 2 14 Jervois Road Ponsonby Auckland New Zealand www.warnermusic.co.nz	[       ]
Sony Music Entertainment New Zealand Limited	Cnr Nuffield St & Remuera Road Newmarket Auckland New Zealand www.sonymusic.co.nz/	[       ]
The Warehouse Group Limited T/A The Warehouse	26 The Warehouse Way Northcote Auckland, 0627 New Zealand www.thewarehouse.co.nz	[       ]
Apple Pty Limited T/A itunes New Zealand	Level 13 Capital Centre 255-259 Pitt Street Sydney, NSW 2000 Australia www.apple.com/nz/	[       ]
Recording Industry Association Of New Zealand ( <i>Industry body</i> )	Level 1 2a Hakanoa Street Grey Lynn Auckland 2 New Zealand www.rianz.org.nz	[       ]
PPNZ Music Licensing Limited ( <i>Industry body</i> )	Level 1 2a Hakanoa Street Grey Lynn Auckland 2 New Zealand www.ppnz.co.nz	[       ]
Independent Music New Zealand ( <i>Industry body</i> )	PO Box 68-890 Newton Auckland New Zealand Phone: +64 9 376 0115 www.indies.co.nz	[       ]
RHYTHMETHOD Limited ( <i>Independent</i> )	Level 2 18 Northcroft Street Takapuna Auckland New Zealand www.rhythmmethodnz.blogspot.co.nz	[       ]

## UNIVERSAL MUSIC – NOTICE SEEKING CLEARANCE

Let The People Speak (Independent)	<a href="http://www.letthepeoplespeak.tv">http://www.letthepeoplespeak.tv</a>	[  ]
Frequency Media Group (Independent)	<a href="http://www.frequencymedia.co.nz">www.frequencymedia.co.nz</a>	[  ]
Flying Nun Records (Independent)	PO Box 12320 Thorndon Wellington New Zealand <a href="http://www.ppnz.co.nz">www.ppnz.co.nz</a>	[  ]

- 168 The most recent annual report for Universal's parent, Vivendi, can be found at: <http://www.vivendi.com/vivendi/Annual-Reports,4975> and financial statements for Universal Music New Zealand Limited are available on the Companies Office website.
- 169 The most recent annual report for EMI's parent, Citigroup, is available at <http://www.annualreports.com/Company/433>.

## **PART 7: CONFIDENTIALITY**

### **The fact of the proposed acquisition**

170 Confidentiality is not required for the fact of the proposed acquisition.

### **Specific information contained in or attached to the notice**

171 Confidentiality is requested for all the information deleted from the attached “public version” of this notice on the grounds that the information is commercially sensitive to the Applicant. Disclosure of such information would be likely to unreasonably prejudice the commercial position of the Applicant in terms of section 9(2)(b) of the Official Information Act 1982.

172 In this application, all confidential information is **bold** and enclosed in square brackets.

**This Notice** is given by Adam Holt, Managing Director of Universal Music New Zealand Limited.

I hereby confirm that:

- all information specified by the Commission has been supplied;
- if information has not been supplied, reasons have been included as to why the information has not been supplied;
- all information known to Universal which is relevant to the consideration and determination of this application has been supplied; and
- all information supplied is correct as at the date of this application.

I undertake to immediately advise the Commission of any material change in circumstances to the application.

Dated this 16 day of March 2012

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Adam Holt

I am the Chairman of Universal Music New Zealand Limited and am duly authorised to make this application.