



## UK Music observations on SABIP Strategies

1. UK Music is the umbrella organisation which represents the collective interests of the UK's commercial music industry - from artists, musicians, songwriters and composers, to record labels, music managers, music publishers, studio producers and collecting societies. The members of UK Music are: AIM, BASCA, BPI, MMF, MPA, MU, PPL, and PRS for Music.
  2. We welcome the opportunity to comment on SABIP's reflection on strategic priorities for copyright with a long term perspective for the creative industries in the UK. We trust that this strategy will be co-ordinated with the number of current initiatives looking into copyright and the creative industries at all levels in the UK, in Europe, and at the World Intellectual Property Organisation. We are confident that SABIP's approach will be based on an objective, impartial, evidence based assessment of how the creative industries can best contribute to the Government's broader economic priorities in terms of growth, productivity and job creation.
  3. **Government's strategy should be to provide an environment that is conducive to innovation and reward through the following:**
    - a. **Creating respect for copyright by supporting it and educating people about its value and importance;**
    - b. **Providing a secure (digital) environment for copyright works so that right holders feel confident that they will be remunerated if they make their works widely available – this will in turn benefit consumers who will be able to enjoy the widest possible choice;**
    - c. **Incentivise business to invest in developing innovative new services, secure in the knowledge that they will have the opportunity to get a return on their investment.**
- We are looking forward to working with SABIP in developing pragmatic policies for the creative industries which are based on appropriate research and will thus provide a long term strategy to support UK business.**
4. The underlying philosophy of copyright has been examined comprehensively since its first written manifestation, the Statute of Anne in 1709. The balance between the rights of the author and the interests of the general public have been subject to legal analysis in the UK - starting with Millar v Taylor and Donaldson v Beckett (in 1769 and 1774 respectively).

5. Copyright (also in its continental manifestation as “author’s right” as established during the Enlightenment period by, amongst others, Immanuel Kant) is based on the natural right of the individual creator in his/her creativity. Copyright is built upon two fundamental and overarching principles: *rewarding and protecting the creator* and allowing a mechanism by which those who invest in creativity can be rewarded. It also provides the enabling framework for right holders and intermediaries (producers / commercial users) to offer creative works to consumers in the way they want to consume it.
6. Copyright is the basis of the economic success of the creative industries. Our composers, artists and musicians are at the foundation of a long and significant value chain. Our creative economy already constitutes 8% of the UK’s GVA (Gross Valued Added) and is growing at twice the rate of the rest of the economy. There is a substantial and growing contribution from the music industry to the UK’s economy, as well a collateral impact on other sectors. The total value of the UK music industry is £6 billion – which represents 0.95% of total UK GVA, with the total employment covered by the Creative & Cultural Skills Music sub-sector being just short of 100,000 people (July 2006). Furthermore, the UK music industry has a strong position as a global net exporter with the UK being the third largest market in the world for sales of recorded music, accounting for 10% of the global market in 2008.
7. In addition to the economic value of the creative industries, our creators, artists and performers are also invaluable to UK society and culture. Furthermore, our creativity is widely appreciated and greatly enhances the UK’s reputation and perception across the world.
8. We have commented extensively on consultations issued by the IPO on a range of copyright issues. Rather than reiterate our comments we have enclosed our response to the IPO consultation on the future of copyright – Developing a Copyright Agenda for the 21<sup>st</sup> Century.

Specific observations on the questions:

### **A paradigm shift?**

**Does the paradigm shift towards a digital economy necessitate an equally fundamental adaptation of the copyright framework or its component parts? Alternatively, can innovation within the existing framework bring about effective adaptation in a more incremental way?**

9. The founding principles of copyright remain sound and still applicable. We have outlined in our enclosed response to the IPO consultation on the future of copyright the five general values which, in our view, underpin copyright and apply equally in the digital environment. It is their *practical application* we must focus our energies on.
10. The music industry is at the vanguard of licensing and enabling the promulgation of new digital services, offering the end consumer access to music in a multitude of different ways. It would be worthwhile for SABIP to take into consideration the sheer range of legal online music services in the UK - ranging from download stores such as Apple’s iTunes Store, Amazon MP3, 7digital and eMusic, to free-to-the-consumer streaming services like Spotify and We7.

11. Additionally there are a number of mobile music offerings such as Nokia's Comes With Music and Omnipone's MusicStation. Music is a key – if not the key - driver in attracting users to social networking sites. New music services are emerging and being licensed on a daily basis.
12. All the aforementioned services acknowledge the principle that copyright rewards those who create, as well as those who invest in creativity. They are fuelled by music. Without that principle being practiced, the value chain collapses. In the words of Mr Justice Willis in the judgement of *Millar v Taylor* (1769): *"It is certainly not agreeable to natural justice, that a stranger should reap the beneficial pecuniary produce of another man's work."*
13. Whilst it is in the interest of the creative industries to respond to consumers' desires to access content in the time and manner they wish, it is ultimately up to the market to dictate the price of that content within reason, recognising that the price must be able to sustain the continued production of content.
14. Music has become significantly cheaper to consumers over time – the average price of an album (in real terms) has fallen dramatically (41 per cent) over the past eight years. The average retail price of a CD album is at an all-time low of £7.97. Meanwhile, Amazon is now retailing a significant number of new release downloads for £0.29 and ad-supported streaming services such as Spotify and We7 are free to the consumer. Our members will strive to license an even greater range of services, but at this present point in time it has never been easier or cheaper to access legally the widest possible range of music.

### **The role of copyright in stimulating creativity and innovation**

**SABIP will investigate how different types of copyright law enhance or reduce creative output. Does the system assist creators in earning appropriate rewards, notwithstanding the apparently widespread illegal and unpaid-for dissemination of products? SABIP will analyse differences in returns to stakeholders within national copyright frameworks of varying approaches and will further explore the implications of technologies of mass copying and distribution on these returns. Is the existing system equipped to respond appropriately to the effects of the new technologies?**

15. For creator and consumer alike, digital innovation has opened up innumerable choices – both in how creative works can be exploited and distributed and in how they can be accessed and enjoyed. Within this hugely positive evolution, copyright empowers the creator and the consumer to exercise these choices. It also offers the entrepreneurial sector which invests in that creativity the opportunity to make a return on their investment.
16. As the research published by SABIP in May 2009 shows, there are shortcomings in the application of copyright law which prevent creators and right holders from earning appropriate rewards. Although consumer demand for music is higher than ever, IFPI estimates that 95 per cent of music available online is being downloaded illegally. The situation whereby paying for creative content has become, in practical terms, voluntary, is totally unsustainable for the future. Whilst the technology underlying p2p file sharing is not illegal in itself, we share the belief that the widespread 'free-riding' on the internet indicates a failure of the digital market.

17. For UK Music, the ultimate objective is to facilitate the growth of the licensed digital market by encouraging platform providers such as internet service providers, content aggregators and mobile operators to co-operate with right holders and develop competitive and mutually-beneficial services that serve the needs of music fans.
18. To achieve this goal we need a framework that allows consumers to consume music in the way they want whilst enabling those who create and invest in creation to be remunerated. Any such approach need to be flexible and most of all technology neutral. Further actions, e.g. along the lines of the co-regulatory Memorandum of Understanding put forward in July 08, <sup>[3]</sup> are indispensable if filesharing technologies are to be harnessed as a legitimate mechanism for content distribution, allowing legitimate services to play a part in a successful creative economy.
19. Does copyright hinder creativity? We have never been presented with any evidence to show that it does. Copyright reserves the right to copy the expression of an idea. It is intellectually and philosophically difficult to understand how mere copying is creative. Copying is very different from being inspired by the creativity of someone else.
20. Whilst we are actively addressing problems associated with the exercise of copyright such as orphan works and format-shifting, these problems *per se* do not put into question the basic principles of copyright. Please see our comments in response to the issues paper published by the IPO: © the future – Developing a Copyright Agenda for the 21<sup>st</sup> Century.
21. There is a lack of evidence regarding the extent of the actual problems which copyright poses for consumers - most aspects of the licensing process concern commercial negotiations between businesses. They do not impact upon individual consumers and citizens.

### Ownership and coverage of copyright

**SABIP will undertake research into alternative approaches to copyright coverage which distinguish between economic and moral rights and their potential advantages and disadvantages. SABIP may, for example, conduct comparative studies of copyright legislation in other countries where the respective emphasis on moral and economic rights differs from that in the UK. Notwithstanding the difficulties of effecting change within the context of the relevant internationally binding treaties and agreements, SABIP will also consider the likely economic and social impact of potential changes in the law.**

22. Copyright *per se* is in the public interest; in particular it has liberated the individual creator from the restraints of patronage, be it private or by the state, and has effectively democratised creativity by, providing all creators with the opportunity to attempt to earn a living from their creativity. It was a great achievement of the Enlightenment to remove any such undue control and censorship which clearly conflicts with the public interest in the development of creative diversity protecting the freedom of expression of the creator.

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<sup>[3]</sup> <http://www.berr.gov.uk/files/file47139.pdf>

To quote Anthony Trollope in his autobiography (Chapter 6): *“Take away from English authors their copyrights and you would very soon take away from England her authors.”*

23. Copyright constitutes a democratic mechanism which is agnostic as to its subject matter. A two-tiered approach to copyright, distinguishing the economic value of a work at the time of creation, runs contrary to the long-held belief of empowerment of the individual, as stated by Immanuel Kant stated in his treatise *Von der Unrechtmäßigkeit des Büchernachdrucks* in 1785: *“The author and the owner of the copy may both say about it with the same right: it is my book! but in a different sense. The first regards the book as writing or speech; the second only as the mute instrument that delivers the speech to him or the public, i.e. as a copy. This right of the author is however no right to the thing, namely the copy (since the owner may burn it before the author's eyes), but an innate right in his own person, that is to prevent another from delivering it to the public without his consent, which consent can by no means be presumed, because he has already given it exclusively to another.”* The economic value of a work may not become apparent until a later time.
24. Such a two-tier system would invariably dismantle the agnostic, open and flexible system provided by copyright protection and introduces a class system for creativity depending on the commercial value. Additionally, who would be mandated to evaluate the commercial value of a work and at what point in time should it be evaluated and how would they achieve this?
25. It is important to note that economic and moral aspects of copyright are intrinsically linked and cannot be divided - whether one follows the monist theory, as is the case in Germany, or the dualist theory, as in France.

## Rights management techniques and technologies

**SABIP will review the effects on the various parties (creators, publishers and other providers, professional and other users) of the adoption of Digital Rights Management (DRM) Tools. In doing this, SABIP will explore sectoral differences and the effect of external deterrents or any barriers on take-up. SABIP will seek to identify the patterns of use of DRM tools, their individual benefits and weaknesses and their overall implications for various stakeholders.**

26. We welcome SABIP's acknowledgement that existing Digital Rights Management tools, such as ACAP, can enable and further advance the ways in which music is consumed. Licensing is at the heart of the rights management process and this is the way in which copyright is actually being applied for most creative works (especially for music) given the fact there are rarely only one off payments for works.
27. As far as Creative Commons [CC] is concerned, we would not view CC primarily a Digital Rights Management tool as expressed in the paper. CC proposes a model licence for creators based on US Copyright law, allowing certain uses of their work depending on their choice and their purposes. In practice, this has been the basis of copyright licensing for several centuries. For instance, under the existing copyright system, there is nothing to stop a creator giving away certain rights of their work away for free, forever, and to the world.

## The relation between copyright and contract

**SABIP will examine the relative effects of copyright law, contract law and DRM/TPM technologies on incentives, distribution of financial rewards and the protection of user freedoms. Do standard form contracts limit or hinder user freedoms in particular creative sectors? SABIP's research programme may also explore evidence around claims that creators lose out in the negotiation over contract terms. SABIP will compare how legal models used elsewhere offer protection to creators' economic interests and moral rights. In the light of this analysis it will consider whether there is a case for amendment to the balance of UK copyright law in its relation with contract law and how such a change could be implemented.**

28. Digital Rights Management was an often used catchword in the discussions leading to the adoption and subsequent implementation of the Copyright Directive. At the time, much had been written about Digital Rights Management (DRM) and Technological Protection Measures. All of these functions serve the development of economically viable new business models which deliver music to commercial users and ultimately individual consumers according to their choice and preferences, e.g. a la carte download or subscription streaming models. Only if right holders are confident that their works are protected in the digital world will they be able to continue to create, invest and engage in new business models. Digital Rights Management systems encourage this confidence, even though no right holder naively presupposes the availability of unbreakable, 100% effective technologies.
29. In 2009, the discussions have settled in view of the market developments. The music industry is offering its music without Technological Protection Measures (e.g. unencrypted CDs and digital files in MP3 format), but uses Digital Rights Management in offering commercial users and individual consumers flexible access and use of material in a convenient, easy to use way and according to their individual choice, i.e. whether they want to obtain a permanent copy on their PC paying for the individual download or whether they prefer to only listen to streamed music paying a monthly subscription fee.
30. Digital Rights Management systems translate the actual requirements of commercial users/ individual consumers and right holders into machine-operated codes and thus are a significant factor for the management of rights in the digital world. Standardised or interoperable Rights Expression Languages and Data Dictionaries are key for the seamless communication between machines. Examples for rights management information are in their basic form simple IDs such as International Standard Recording Codes (ISRC) or International Standard Work Code (ISWC) or more complex digital identification and description mechanisms enabling easier licensing, monitoring and tracking of online content protected by copyright.
31. Regarding the balance between the parties in music industry contracts, as UK Music stated in our response to the DIUS Issues paper on "Copyright The future – developing a copyright agenda for the 21st Century", the relationship between creators and those who invest in creativity has always been symbiotic. Providing a balance between commercial certainty and the rights of creators is, and always has been, a constantly evolving process. Music industry contracts are clearly subject to national legislation and any prevailing case law.

The doctrine of restraint of trade is one example of how contract law, and therefore music industry contracts, have adapted to national expectations and standards.”

### **Attitudes and behaviours in the Digital Economy: Implications for IP**

**SABIP will: continue to explore the relationship between the general understanding of the copyright framework and compliance with the copyright framework; the extent to which this framework is felt to be “fair”; effective means of education as to copyright rights and responsibilities; and the effectiveness of current or prospective enforcement techniques. For example, SABIP will investigate whether new types of content producer are aware of the copyright protections available to them, and whether they are able to deploy the system effectively. The first phase of this project, a literature review, is due to be completed in April this year. The findings of the review will be presented at a stakeholder workshop that will contribute to the development of a large-scale consumer survey into attitudes and behaviours in the digital economy and their implications for Intellectual Property.**

32. We wish to reserve the right to comment separately on the recently published SABIP research. UK Music will shortly publish its own annual research into young people and their behaviour with music, which demonstrates that people between 14 and 24 have a clear understanding of copyright based on common sense.<sup>[4]</sup> We look forward to discussing our research conclusions in more depth in due course.

**These observations have been agreed and approved by the following members of UK Music: Association of Independent Music (AIM), British Academy of Songwriters, Composers and Authors (BASCA), BPI (British recorded music industry), Music Publishers Association (MPA), Musicians Union (MU), Phonographic Performance limited (PPL), and PRS for Music.**

**UK Music**  
British Music House  
26 Berners Street  
London, W1 3LR  
T. 020 7306 4446  
F. 020 7306 4449  
E. [contact@ukmusic.org](mailto:contact@ukmusic.org)  
[www.ukmusic.org](http://www.ukmusic.org)

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<sup>[4]</sup> The results of the 2009 findings will be published in July 2009 on [www.ukmusic.org](http://www.ukmusic.org)