



October 2016

## Digital Economy Bill

### House of Commons Public Bill Committee Stage Briefing

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.
2. UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. A full list of UK Music members can be found in annex.
3. The music industry is worth £4.1 billion to the economy and generated exports of £2.2 billion in 2015. The industry now employs 119,020 people. Based on UK Music's annual Measuring Music report, the value of music the sector has grown by 17% over the past four years, out-performing much of the rest of the UK economy.<sup>1</sup> During this time there has been a massive change in consumer behaviour, from ownership of music to streaming. The music industry strongly supports the growth of a legal functioning digital market and believes that the creative content produced by our members will continue to enable this significant part of the economy to flourish.
4. We welcome the Digital Economy Bill. It enables Parliament to consider what the UK music market looks like and ensure the legislation that provides its framework is robust enough to address the opportunities and challenges of leaving the European Union.
5. In order to assist the UK economy and maintain further growth we ask members of the Public Bill Committee to address the following:-
  - **Clause 26 (Offences: infringing copyright and making available right)**
6. Copyright is of fundamental importance to the music industry. It enables creators to derive a financial return for their work and provides an incentive for businesses to invest in creative content.

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<sup>1</sup> <http://www.ukmusic.org/research/measuring-music-2016/>

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7. We strongly support the intention behind the clause, which is to extend online penalties for copyright infringement from 2 to 10 years. This removes an inequality between existing penalties in the physical and the digital world. Increasing penalties for the online world and creating reciprocity recognises changes to the way copyright protected content is now consumed. Globally, digital music contributes 45% of recorded industry revenues, this year overtaking physical market revenues for the first time. Music needs to be respected in the digital world.

***We ask members of the Public Bill Committee to support clause 26 as drafted.***

- **Clause 28 (Copyright etc where broadcast retransmitted by cable)**

8. We support the principle of the repeal of the exception within Section 73 of the Copyright Designs and Patents Act relating to retransmission. This existing exception is a hangover from the cable infrastructure of the 1980s and 1990s. Given technological developments and market changes this policy is clearly not relevant any more. The law as it stands grants a competitive advantage to cable infrastructure providers. The removal of section 73 will create a level playing field to negotiate fees for the use of material and the licence fees for the underlying works used in broadcasts, including music.

***We ask members of the Public Bill Committee to support the clause 28 as drafted.***

- **Search Engines (NC3)**

9. The Digital Economy Bill presents an opportunity for the Government to fulfil its manifesto commitment to reduce copyright infringement and ensure search engines do not link to the worst-offending sites.<sup>2</sup> There is an absence of a specific provision in the Bill to achieve this however. The Bill therefore represents a missed opportunity unless this is addressed.
10. Copyright infringement remains a significant challenge to the music industry with 78 million music tracks being illegally accessed between March and May 2016.<sup>3</sup> 20% of internet users participated in some form of illegal music activity online during the same period.<sup>4</sup>
11. Search engines are one of the key means for consumers to discover music and artists. To warrant a prospering commercial market for UK music which benefits right holders as well as consumers it is essential that the main method of discovery of music and artists directs consumers to legitimate sources. Creating a legitimate marketplace increases industry's capacity for growth and supports overall economic wellbeing. Consumers also stand to benefit from higher-quality search results, clear sign posting to legal content, and reduced exposure to malware, viruses, and other types of deceptive advertising. Studies demonstrate these risks to internet security are prevalent on infringing sites.

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<sup>2</sup> <https://www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf> p. 42

<sup>3</sup> <https://www.gov.uk/government/news/online-copyright-infringement-down-as-people-turn-to-streaming>

<sup>4</sup> <https://www.gov.uk/government/publications/online-copyright-infringement-tracker-survey-6th-wave>

12. The ability of search engines to link to legitimate websites is straightforward given that the music industry has identified legitimate websites. For example, pro-music.org identifies legal online legal services. The site identifies that the UK has over 50 legitimate music websites (28 download, 19 subscription and 14 ad-supported services).
13. The effectiveness of Google making changes to its algorithms, an infringement solution this particular search engine advocates, remains to be seen. The Government itself admits algorithm changes make it “not possible to say exactly how this equates to changes in infringement”.<sup>5</sup> Similarly the Government also believes it is not possible to analyse the effectiveness of related measures to decrease autocomplete suggestions that provide access to stream ripping and other illegal converter technologies via search results.<sup>6</sup>
14. Right holders are in the process of discussing voluntary arrangements, such as a code of practice, with search engines to reduce the prominence of known infringing websites in search results through demotion and delisting. Such practices are already used by search engines in connection with a range of illegal activities.
15. The demotion of illegitimate websites would be attractive in that verified artist websites would benefit in the same way as licensed retail stores. This is because they will be promoted in the rankings at the expense of infringing sites. A code of practice should recognise that its scope includes legitimate artist websites where appropriate.
16. Whilst we support the objective of a code of practice with search engines being achieved on a voluntary basis, the Digital Economy Bill presents an opportunity to introduce a backstop legislative power if a voluntary agreement fails. Similar measures are becoming common in other aspects of intellectual property law, such as codes of conduct for collecting societies which were introduced by the Enterprise and Regulatory Reform Act 2013 and now enshrined within the Collective Management Directive.<sup>7</sup> The existence of backstop powers in law has been an effective tool in achieving positive outcomes, often without the need to enact them in order to affect change.

***We ask members of the Public Bill Committee to support NC3:-***

***After Clause 28,***

***Insert the following new Clause –***

***“Power to provide for a code of practice related to copyright infringement***

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<sup>5</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44176/>

<sup>6</sup> <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-09-02/44175/>

<sup>7</sup> The Collective Management Directive was implemented into UK law via The Collective Management of Copyright (EU Directive) Regulations 2016 <http://www.legislation.gov.uk/ukSI/2016/221/contents/made>

- (1) ***The Secretary of State may by regulations make provision for a search engine to be required to adopt a code of practice concerning copyright infringement that complies with criteria specified in the regulations.***
- (2) ***The regulations may provide that if a search engine fails to adopt such a code of practice, any code of practice that is approved for the purposes of that search engine by the Secretary of State, or by a person designated by the Secretary of State, has effect as a code of practice adopted by the search engine.***
- (3) ***The Secretary of State may by regulations make provision –***
- (a) ***For the investigation and determination of disputes about a search engine’s compliance with its code of practice,***
- (b) ***For the appointment of a regulator to review and report to the Secretary of State on-***
- (i) ***the codes of practice adopted by search engines, and***
- (ii) ***compliance with the codes of practice;***
- (c) ***for the consequences of a failure by a specified search engine to adopt or comply with a code of practice including financial penalties or other sanctions.***
- (4) ***Regulations made under this section –***
- (a) ***May make provision that applies only in respect of search engines of a particular description, or only in respect of activities of a particular description;***
- (b) ***May make incidental, supplementary or consequential provision;***
- (c) ***Shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.”***
- **Safe harbours for service providers (NC15)**

17. Access to music, as opposed to pure ownership of music, is an increasingly important business model for the music industry. There is a need for the provisions within the Electronic Commerce (EC Directive) Regulations 2002 to acknowledge the technological and commercial developments that have occurred since it passed into law.

18. Online platforms such as YouTube provide access to commercially produced music and actively provide and distribute content services as part of their bundled offer. They provide an opportunity to curate content with services benefiting financially when users access works. It is outdated that some services can benefit from safe harbour defences that enable them to avoid or pay licence fees that are drastically below value. In 2015 YouTube increased its music rights payments by 11% on the previous year despite total streams growing by 132%. Equivalent per stream rates fell from \$0.0020 to \$0.0010.<sup>8</sup>

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<sup>8</sup> <http://www.ukmusic.org/research/measuring-music-2016/> p. 11 - 12

19. There are examples of case law that acknowledge safe harbours were not intended to support services that benefit from these activities yet there is a need for clarity in legislation to prevent abuse and create a level playing field between all services.
20. Streaming services such as Apple, Spotify subscription and Tidal offer value-added curation and care. The challenge is to convince all services to properly value the brilliantly gifted music we make. Realising the growth of subscription streaming is dependent upon a market which operates effectively and fairly.
21. Whilst the European Commission's Digital Single Market strategy is attempting to address these issues, the UK's recent decision to leave the European Union provides an opportunity too. This can be achieved without interfering with the general purpose behind the safe harbour protection for service providers, i.e. where they play a genuinely passive role and storing content they should maintain their exemption from liability as originally envisaged.
22. Additionally, service providers come in many forms. Where they provide access to copyright protected works uploaded by their users it would be useful to restate the legal situation in the UK within the context of this Bill. Under various legal decisions such as Newzbin<sup>9</sup>, and Dramatico<sup>10</sup> ISPs were held to infringe copyright by communicating the works to the public by electronic transmission, thus committing an act which requires the permission of the right holder. The judges in these cases found that the internet service providers played an active role in the process.

***We ask members of the Public Bill Committee to support NC15:-***

***After Clause 28***

***Insert the following new Clause—***

***“Storage of uploaded works***

***(1) The Electronic Commerce (EC Directive) Regulations 2002 is amended as follows.***

***(2) After Regulation 19 (a)(ii) there is inserted –***

***“(iii) does not play an active role in the storage of information including by optimising the presentation of the uploaded works or promoting them.”***

## **Annex**

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies.

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<sup>9</sup> <http://www.bailii.org/ew/cases/EWHC/Ch/2011/1981.html>

<sup>10</sup> <http://www.bailii.org/ew/cases/EWHC/Ch/2012/268.html>

- BASCA - British Academy of Songwriters, Composers and Authors – BASCA is the membership association for music writers and exists to support and protect the professional interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing.
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition – the voice of the featured artists.
- MMF - Music Managers Forum - representing 425 managers throughout the music industry.
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers.
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music.
- Musicians' Union representing 30,000 musicians.
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs, nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 114,000 composers, songwriters and publishers and an international repertoire of 10 million songs.
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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