

Music Business Group

**Response to UK IPO consultation
on copyright exceptions**

The Music Business Group is a coalition of the following organisations:

INTRODUCTION

This response represents the collective view of the UK's music industry – principally artists, composers, songwriters, performers, managers, producers, record labels, music publishers, and their collecting societies.

We set out a proposal that has far-reaching implications for creators in the UK, which we ask both the United Kingdom Intellectual Property Office and our own Government to consider carefully.

Our proposal improves upon the central objective of this consultation: that is, to ensure that the UK's copyright framework provides a careful balance between the interests of technology companies, consumers, and our creators' talent and ability.

- Unquestionably, there is a value produced by the ability to format shift for both consumers and commercial enterprises which directly arises from the transferability of music
- It is imperative that creators and performers should benefit directly from this value; ultimately it is their creativity which underpins the entire value chain
- The only solution which achieves these goals is a flexible and market-led approach based upon a business-to-business relationship
- For over 100 years the music industry has provided exactly this infrastructure: the ability to develop such business relationships and distribute income directly back to creators and right holders

Signed,

THE MUSIC BUSINESS GROUP

EXECUTIVE SUMMARY

Music right holders represented by the Music Business Group – composers, songwriters, performers, managers, producers, record labels, music publishers and their collecting societies – enable a value chain that directly contributes £6bn per year to the UK economy. It employs an estimated 120,000 people, and substantially enhances the business models of a huge range of commercial music users.

Copyright is the core mechanism underlying this vast value chain. Any changes to the copyright system must be carefully balanced, so as not to prejudice the success of one of the UK's largest creative communities.

Enormous value is derived from the transferability of music. Last year alone, over 20 million MP3-capable portable devices were sold in the UK, and over 90% of music on the average MP3 player is music that has been copied.

UK creators and right holders are legally entitled to benefit from this value. At present, this value is enjoyed by both consumers and technology companies while creators and right holders are effectively excluded from any value. This constitutes market failure.

The UK IPO's current recommendation, an exception to copyright for format shifting *without compensation*, would enshrine this market failure in national legislation.

Such an exception would place the UK Government at odds with established European policy. This was reiterated as recently as 14th February 2008 by the EU Internal Market Commissioner, Charlie McCreevy: "*There can be no question of calling into doubt the entitlement of rights holders to compensation for private copying.*"

This was echoed by the UK's largest academic survey into the music consumption habits of young people, undertaken by the University of Hertfordshire and British Music Rights, where 90% of those who supported a licensing system agreed that creators should be compensated for a private copying exception.

We need to redress the balance which underpins copyright - one that allows consumers to enjoy their music, drives technological innovation, yet recognises music creators' and right holders' place in this market. Our proposal creates an easily-implemented, flexible, future-proofed and transparent solution: an exception *subject to licence*.

Our response is restricted to copying in the offline world – that which does not take place over the internet. It does not seek to legitimise the wholesale copying and sharing of music; instead, it simply ensures that a fraction of the value gained by others, and the injustice suffered by creators and right holders, is reversed.

Licensing is an established and accepted mechanism for exercising copyright – enabling a range of businesses, from hairdressers to broadcasters to digital media, to benefit from music, while at the same time ensuring creators and right holders get paid.

The apparatus and mechanisms for distributing such licensing income to creators and right holders are well-established and have been in operation for almost 100 years, namely the MCPS-PRS Alliance and PPL.

An exception subject to licence is a sophisticated and market-responsive solution: the licensee fees will be subject to commercial negotiations.

A licence would result in a non-disruptive and mutually-beneficial outcome: clarification for technology companies, remuneration for the UK's music community and – most importantly – it would allow consumers to carry on enjoying their music.

This principle is already established and accepted; for example, technology companies pay a commercial licence to use MPEG software for their services.

An exception for formatshifting should be based on very clear principles:

- That the initial copy is legitimately owned and retained;
- The copying is done by the owner;
- That it is done for the owner's private/ domestic use;
- That it is done solely for the use of copying from a physical format;
- That there shall be no onward distribution, communication or exploitation in any way

The European Parliament and Council have clearly mandated in the Copyright Directive their objective that creators and right holders are entitled to fair compensation.

Numerous systems already exist throughout Europe based on developing relationships between technology companies, creators and right holders. We propose that a balanced relationship is best achieved in the UK through a licensing scheme.

Precedents for this already exist and operate successfully in the UK. For example, educational recording of broadcasts (ERA scheme) and multiple copying for the visually impaired (MPA's VIP scheme).

The UK-IPO's proposal as framed in this consultation would prejudice the interests of creators and right holders and further weaken the potential for creators to develop their future career paths.

CROSS-REFERENCE GUIDE

- For questions relating to paragraphs 80 to 88 in the UK IPO consultation:

What impact would the introduction of a format shifting exception have? What costs or benefits would accrue to right holders and users of copyright works?

See paras 32, 34, Box A, 54 and 61

Do you agree with the conditions proposed above? **See paras 43 and 44**

Would a requirement to dispose of a format shifted copy if the original was given away or sold or otherwise disposed of, be practical or enforceable? What alternatives can you suggest to address the problem of original copies going back into circulation after copies have been made? **See paras 43 and 58**

Should further conditions be imposed? If so, what are these? **See paras 43 to 53**

Should the non-infringing acts differ depending on the class of work concerned? **N/A**

- For questions relating to paragraphs 89 to 92 in the UK IPO consultation:

Should the proposed format shifting exception be limited to recorded music and film or should it also apply to other works? If so, which ones? **N/A**

What impact would the introduction of a format shifting exception have on particular sectors of the creative industries? **For impact on the music sector, see paras 32, 34, Box A, 54 and 61**

- Questions relating to paragraphs 93 to 95:

How many format shifts should be allowed? **N/A**

Should the exception allow additional format shifts to take account of changing technology? **See paras 42 and 45**

Should more than one copy be allowed to address the technological process of transferring content? **See paras 42 and 45**

- For questions relating to paragraphs 96 - 101 in the UK IPO consultation:

Should the exception apply to works:

- published after the date the law changes;
- purchased after the date the law changes; or
- copied after the date the law changes?

What would be the practical implications of the above options? Can you think of any alternatives? **See paras 43 to 53**

- For comments relating to paragraphs 105 to 115 in the UK IPO consultation:

See paras 54 to 75

Part A: Format shifting exception

Creativity and copyright – basic principles:

1. Creators are at the very heart of the value chain of the creative industries, which together contribute 7.3% to the UK's economy. The music industry alone is estimated to contribute around £6 billion annually to the UK economy and employs some 120,000 people.
2. Composers and performers are entitled to earn a living from their creative endeavours so that they can continue to create and perform; so are those who invest in them, namely their music publishers, managers, producers and record labels. Consumers want a rich and varied supply of music. At the heart of this relationship is the currency of exchange that has resulted in our existing copyright framework.
3. Copyright is the core mechanism that enables creators to earn an income from their artistic endeavours, whether direct from the consumer or from those businesses that build value from their work. For that reason, it is sacrosanct.
4. Copyright is the currency that underpins the rest of the creative economy. The Government's recently published strategy paper *Creative Britain* states that "intellectual property rights are the catalysts which help turn creative activity into creative products and services" and "We need new business models which recognise changes in technology – and their democratisation of content – yet capture the value provided by content providers and distributors." Copyright is the basis upon which composers and performers as well as their music publishers and record producers license commercial users, which ultimately deliver the product to the end consumer.
5. The copyright framework has evolved over time to meet the challenges of technological change. It strives to provide a careful balance between the rights of creators and right holders to earn from their creative endeavour, and the interests of all those who wish to consume music - whether as private individuals for their own enrichment, as businesses to add value to products or services, as educational establishments for instruction, or indeed for any other purpose.
6. When further exceptions to copyright are proposed, creators must be duly compensated in order to keep this fine balance, provided the conditions of international treaties' "three step test" are met. In the case of format shifting, this boils down to two basic issues: i) a clearly drafted exception to cover formatshifting within the limitations described in the Gowers Report and the current consultation on the implementation (paras 85 – 88 of the consultation document) and ii) the means of compensating creators.
7. The entitlement to compensation for composers and performers and the other music right holders has been firmly established in Art 5 (2b) and Recital 35 of the Copyright Directive. This fundamental principle has been reiterated by Commissioner Charles McCreevy in a statement on 14th Feb 08: "*There can be no question of calling into doubt the entitlement of right owners for compensation for private copying.*"

Copyright and revenue – how copyright enables creators to derive an income from their creative endeavour:

8. It is worth highlighting the global value of recorded music sales in which all players in the music industry as represented by the signatories to this submission participate: composers and performers as well as their music publishers and record producers. In 2006 the trade value of recorded music sales (including digital and video) was US \$ 19.5 billion with a retail value of US \$ 31.8 billion. Record companies also increasingly derive revenue from individual licensing deals with brands (e.g. synchronisation licences for advertising, subscription music services, advertising supported services, and social networking sites).
9. The music industry also gathers its revenue via its collecting societies (MCPS/ PRS and PPL) and is developing various and continuously evolving revenue streams (ranging from product based to licensing based). The range of activities highlight the capability of the music industry to administer the revenue flow, from the very smallest licence to multi-million pound agreements.

MCPS

MCPS licenses all physical formats/products, including CDs, DVDs, computer games, novelty toys etc, the use of music in TV advertising and Production music (or library music) written specifically for inclusion in audio and audio-visual productions.

- **The number of licensing schemes MCPS operates**

Licensing 'Schemes':	21	(e.g. Audio Products, Covermounts)
Licensing 'Frameworks'	12	(e.g. Multimedia, Novelty Products)
Production Music Categories:	26	(e.g. Gaming Machines, TV adverts)
- **The total number of users that MCPS licenses:**

Blanket licensees:	441	(e.g. AP1)
On manufacture licensees:	6581	(e.g. AP2, Production Music)
- **The range of their businesses in terms of turnover and licence fees**

AP2:	£2	(Smallest)
LM:	£5	(Smallest)
AP1&DVD1	£31.9m	(Largest)

PRS

PRS licenses the public performances of music in practically every type of premises across the UK – from concert halls to corner shops, from schools to workplaces. The Public Performance Sales team deals with every size and type of customer from some of the largest corporate companies in the country to an individual running an amateur music group.

- **The number of licensing schemes PRS operate:** 45
- **The total number of users that PRS license:**
157,000 customers covering 313,000 premises and events
- **The range of their businesses in terms of turnover and licence fees:**
Smallest permit licence is £12; however, the charge for a single event can be as little as a couple of pounds when charged as part of a premises licence. The largest customer is paying approx £2.8m per year.

MCPS and PRS (in many cases jointly)

MCPS and PRS license broadcasting (terrestrial, cable and satellite radio and TV), mobile and online use of music. New licences are issued jointly and gradually all licensees are being moved from individual licences to joint licences.

- **The number of licensing schemes MCPS and PRS operate:**
25 Broadcast and Online licensing schemes
- **The total number of users that MCPS and PRS license:**
912 licensees (as at the end of February 08)
- **The range of their businesses in terms of turnover and licence fees:**
Smallest licensee is paying £60
Largest is paying £48.9m per annum.

Distribution:

MCPS

- **The number of "performances" and/or usage returns which MCPS now process 3,518,500** separate 'usages' (e.g. individual Audio Products)
- **The average number of members to which MCPS routinely distributes on each distribution 2,950** on average each month

PRS

- **The number of "performances" and/or usage returns which PRS processed in the year ending October 2007: 53,699,764**
- **The average number of members to which PRS routinely distribute on each distribution: 32,733**

PPL

PPL is the music industry organisation licensing and distributing airplay and public performance royalties in the UK on behalf of over 3,500 record companies and 47,000 performers.

- PPL operates 58 public performance tariffs and 8 VPL public performance tariffs.
- PPL have 224,727 licensed users and have recently implemented an entirely new system to deal with increasing numbers.
- PPL license a wide variety of business that play music in public, from a small 15 square meter corner shop to a large 100,000 square meter superstore, from an individual operator with a single outlet to large entertainment and retail groups with hundreds of sites.

PPL licenses diverse outlets for instance:

- Over 40,000 shops
- 41 Skating rinks
- 39 Puppet show operators
- 43 Amusement Parks
- The amount of uses of PPL repertoire received for the 2007 airplay period is in excess of 24m. For the 2006 airplay period PPL and VPL collected revenue on behalf of over 42,000 creators and right holders.

Unlicensed use of music – a market failure:

10. We welcome the acknowledgment in the current consultation (para 88) that file-sharing is *not* under consideration and would not fall within the scope of any exception. This corresponds with the situation of most countries providing an exception.
11. Likewise, we wish to make clear that online file-sharing services (including peer-to-peer and non-network) are *not* included in the evidence we produce in this submission. All references we make to “*copying and sharing*” relate to copying and sharing music in the ‘offline’ world, i.e., that which does not take place over the internet – such as consumers copying their own CDs for their own private use; consumers sharing their CDs (originals or copies) or the contents of their MP3 player with other people; consumers copying other people’s CDs or digital music collections into their own music.
12. While the music industry *is* currently exploring proposals for new business models that can better monetise the copying and sharing of music in the online world, i.e. over the internet, these explorations are taking place in a wholly separate arena between the relevant commercial stakeholders such as under the auspices of the Value Recognition Strategy. For clarity’s sake, we wish to emphasise that online peer to peer file-sharing is a wholly separate issue to the offline copying dealt with in this consultation.
13. For the music industry, advances in technology and convergence should mean opportunity. Potential new music markets exist that didn’t before, while consumers can access music in more direct and personalised ways.
14. This explosion in technological development has led to new devices, technologies and applications that provide consumers themselves with the ability to copy and share ever increasing volumes of digital music – and crucially, unlike earlier technologies, with no apparent loss in sound quality.
15. Music and in particular, the *transferability* of music has fuelled much of this technological innovation and entrepreneurialism, adding huge value to other sectors and to consumers. There is a significant correlation between the transferability of music, and the growth in sales of devices and technologies that exploit the transferability of music.

Many MP3 players are marketed according to how many tracks they can hold (e.g. Apple's iPod classic, "up to 40,000 songs"). As technology develops, the capacity of devices to store creative content will only increase both in terms of volume, and of quality.

16. There are many different ways to try to define the correlation and calculate the value of the transferability of music. We do not attempt here to come up with a definitive monetary value. Instead, we provide an indicative measure of the value accrued to consumers and device manufacturers from the transferability of music, by looking at device sales and consumers' behaviour.
17. Music has played a significant role for ICT businesses in selling very large volumes of devices and applications within a short time frame. For instance, Sony's Playstation 3 is increasingly becoming the principal multi-media player for the whole household, including music. More than 1.1 million units have been sold in the UK alone. The PS 3 enables the connectivity and hence the availability of music throughout the home. Similar products are offered by other parts of the ICT.
18. The phenomenal growth of MP3 players – and in particular, the iPod and mobile phones with in-built MP3 players, illustrates most powerfully the fantastic power of music to drive sales of devices. In 2007, over 20 million MP3-capable portable devices were sold in the UK in 2007 alone, according to data from Music Ally. Around 37% of all MP3-capable devices sold (7.49 million) were dedicated portable MP3 players such as Apple iPods or MP3 players from manufacturers other than Apple. Over the period 2004-2007 the total number of portable music devices sold was 43.5 million units, an average of over 10 million devices sold in each year (see Table 3).

Table 1: MP3 player sales (units sold, thousands)

	2004	2005	2006	2007
Non iPod MP3 players	111	888	1,904	2,730
Ipods	1,190	3,912	4,046	4,760
Total MP3 player sales	1,300	4,800	5,950	7,490
Phones with MP3 player: sales	305	2,965	7,940	12,720
Total portable music devices	1,605	7,765	13,890	20,210

Source: Music Ally, February 2008

19. In the UK and across the worldwide market as a whole, Apple is the market leader in portable MP3 devices thanks to its iPod music player. As a result, the term "iPod" is employed by customers as a byword for MP3 player, much as "Walkman" was, during the 1980s, used as a generic term for portable cassette machines. Apple has sold over 127 million iPods worldwide since the product's launch in 2002. In the last quarter of 2007 alone, Apple has sold 22 million iPods worldwide, representing 17% revenue growth compared to the same quarter of 2006. Presently, UK music creators do not derive any income from the sale of iPods.

Table 2: Number of iPod devices sold worldwide per financial quarter
 (Source: Apple official figures)

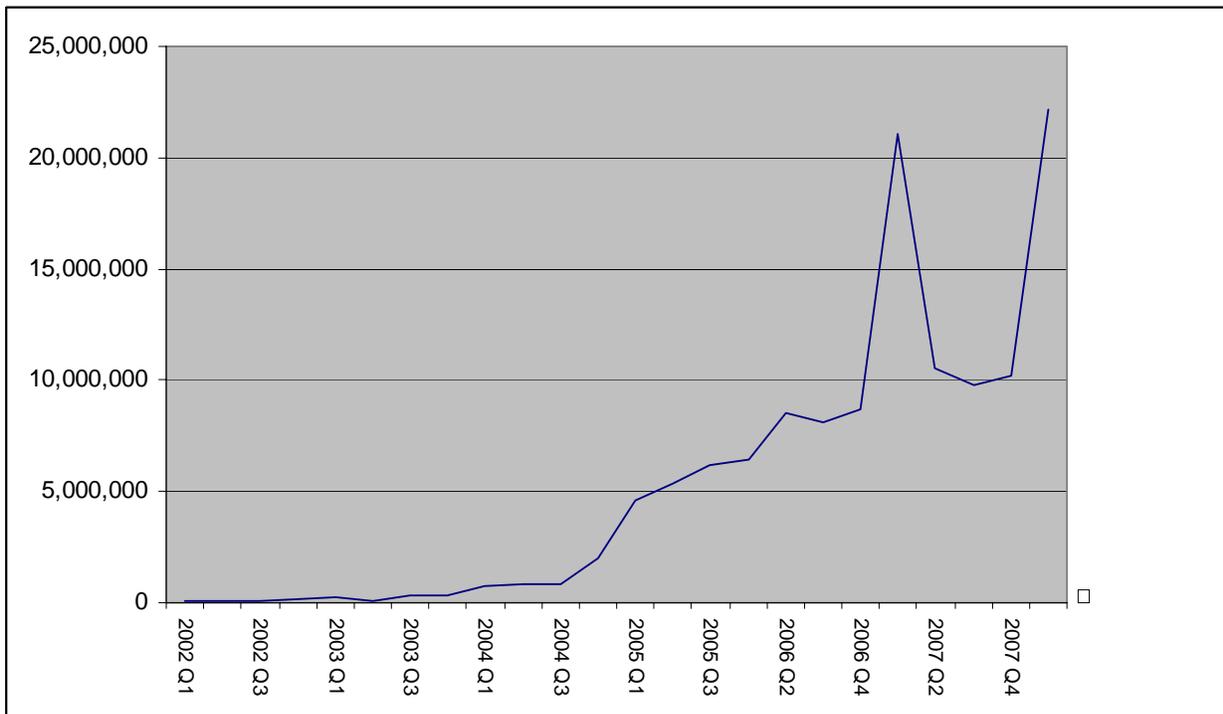
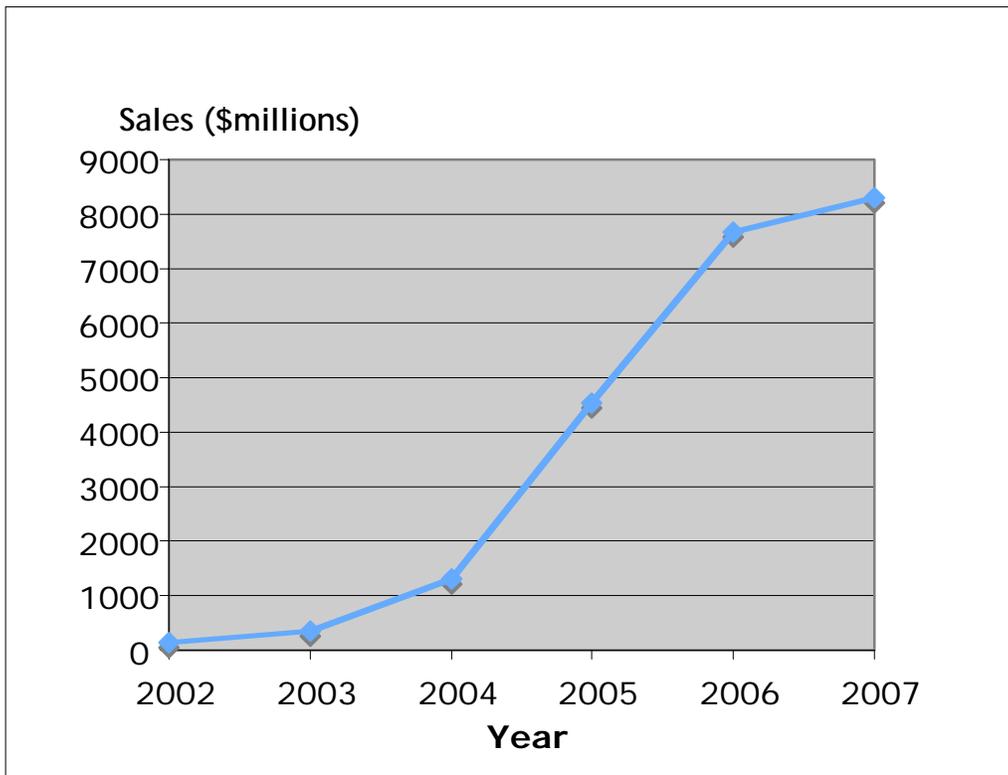
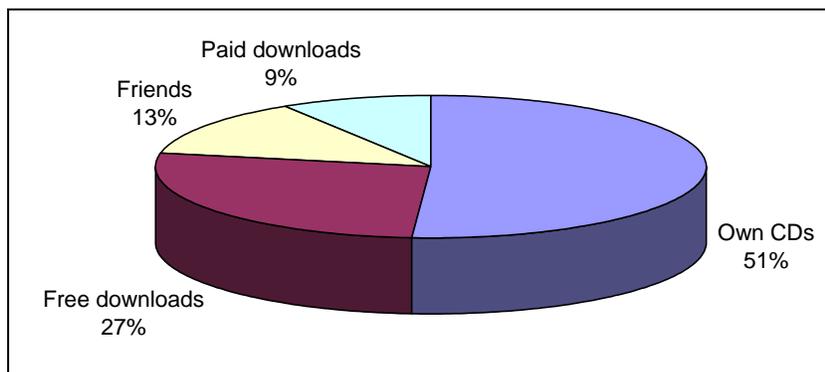


Table 3: Worldwide Apple iPod sales value US \$ millions
 (Source: Apple official figures):



20. Consumers enjoy and value the transferability of music. Music Ally research shows that half of the music on the average MP3 player is music copied from one's own CDs. Another 40% of music is copied from other sources, i.e. not paid-for. So over 90% of music on the average MP3 player is music that has been copied. Less than 10% of tracks on an average MP3 player is music from bought downloads.

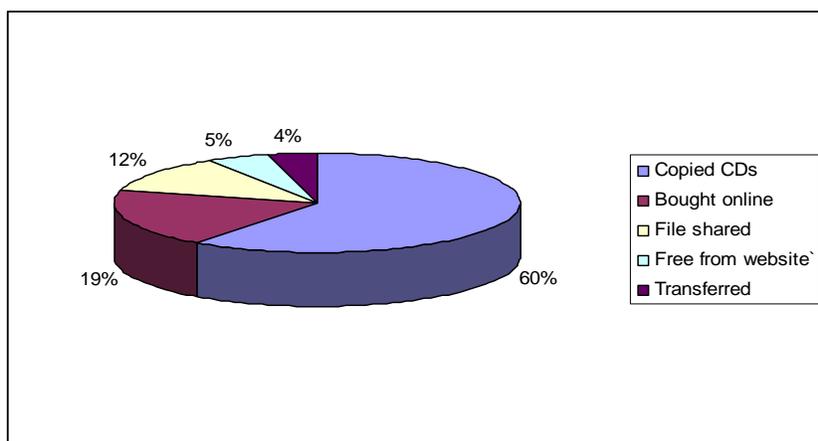
Table 4: Source of digital music tracks for UK music fans



Source: The Leading Question, Speakerbox 2007

21. Further data from an earlier survey from M-Labs for IFPI from 2006 appears to confirm the Speakerbox data. This survey found that 60% of UK iPod owners' tracks were sourced from copied CDs

Table 5: Source of digital music tracks for UK iPod owners

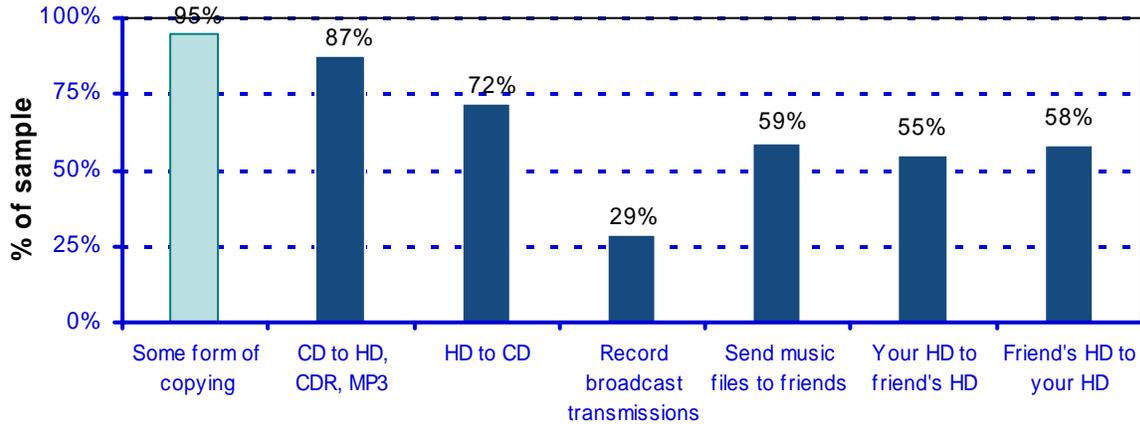


Source: M-Labs for IFPI 2006 (UK only)

22. The University of Hertfordshire recently conducted the largest ever academic study of music experience and behaviour in young people in the UK. The survey found that 95% of respondents engage in some form of copying of music. The University of Hertfordshire survey also confirms that around half the tracks on respondents' MP3 players had not been paid for.
23. For younger people in particular, copying and sharing music between friends is an accepted and widespread means of acquiring music.

Over half of respondents in the University of Hertfordshire survey had shared their digital music collection with friends, and an even higher proportion had copied a friend's music collection into their own collection (hard drive to hard drive).

Most young people engage in some form of copying



Type of copying

Source: University of Hertfordshire study of music experience behaviour in young people, March 2008

24. By law, the right to copy a musical work and the recording of that work lies exclusively with the respective right holders, and it is a primary means by which they are able to earn from their creative endeavours.
25. This raises the important question: what is the *value* to consumers of their ability to copy and share music? In previous decades, when the CDs replaced cassette tape and vinyl, many consumers re-purchased their favourite music.
26. Apple has offered the iTunes Music Store since 2003, which sells digital songs that can be transferred to iPods or played within the iTunes jukebox application on a PC or a Mac. iTunes Music Store is licensed by the music industry; the music industry receives a proportion of every track sold through iTunes and the music industry's entire digital revenues are strongly dependent upon the iTunes store.
27. However, overall sales value from the iTunes Music Store is substantially smaller than the sales value of iPods. Apple CEO Steve Jobs reportedly described iTunes in 2003 as "not a money-maker" and Apple has said that the store operates "just above break even". It is clear that consumers' preferred way of acquiring music for their MP3 player is by copying rather than purchasing music as downloads.
28. Another way of approaching the question is to ask how much *less* value would consumers attach to devices -- MP3 players, computer hard drives, CD and DVD burners -- if music were not transferable?

29. In 2003 Sony introduced digital music versions of its Walkman portable player, called the "Network" Walkman. Sony's players were initially compatible only with Sony's proprietary music format. In order to move tracks from CD to the Sony ATRAC3 players, customers were forced to use specific Sony software.
30. Purchasers of Sony Network Walkman players were not easily able to play podcasts, tracks copied from friends' hard drives, tracks downloaded from filesharing networks and so on. Eventually, in August 2007, Sony responded to the business failure and announced that future players would support the more common Windows Media and MP3 formats as well as AAC which is used by the iTunes store and jukebox. "By going open-standard, Sony will increase customer choice and make its audio players more versatile," said Jeffry van Ede, vice president of Sony Europe. "We did something perfectly simple. We listened to what our customers want."
31. The clear implication of Sony's decision, and of van Ede's statement, is that customers want the ability to transfer tracks from CDs and from illegal sources, and that Sony's failure to cater to this market resulted in lost sales.
32. This question of *value* gained from the transferability of music is very important in this context because currently the value accrued to consumers and device manufacturers from the transferability of music arises through the infringement of copyright – the very system designed to enable creators and right holders to extract value from an intangible asset. If the market were working efficiently, creators and right holders would have been able to share in the value gained to consumers and device manufacturers from the copying and sharing of music – because in law, the ability to copy and share music is exclusively theirs. Yet instead, the full value of the transferability of music is accrued entirely to consumers and device manufacturers. Meanwhile, the creator is totally isolated from the value that arises from the transferability of his or her own musical work.
33. It is very difficult to try to define a monetary value for the transferability of music. But for the purposes of this consultation, we must ask the further question: what proportion of the value of the transferability of music can be attributed to format-shifting, and what proportion of the value can be attributed to the other types of copying beyond the scope of this consultation?
34. Creators and right holders are excluded from value gained to consumers/device manufacturers from copying and sharing. Box A provides an economic description of the gap that arises from the inability of creators to extract value from the transferability of music.

Box A: The economics of consumption, and the economic impact of introducing a private copying exception

1. The disconnect between consumption and utility...

Copyright goods are unlike conventional 'economic goods' in terms of what is being priced, as it is confined to the rights which are contained within the good - and not the externalities associated with it. As with many other industries, the value of the primary good is 'commoditised' over time, hence growth in 'value added' properties makes up the short fall and, if lucky, grows the business. Copyright industries are unable to capture this added value because of gaps in the current application of copyright law. Whilst 'percentage of gross revenue' forms of licensing go some way to correcting this in the context of licensing performing rights, mechanical rights are restricted to the reproduction of the unit which is priced - not the utility which is being derived.

2. Pricing the economic value, as opposed to copyright's value...

Copyright, in the 'mechanical' context captures the reproduction value of the intellectual property. Private copying, in the economic context, represents additional value - otherwise the activity would not have been carried out. That is to say, the consumer has a 'utility' on the transferability of an asset. This helps us understand the economic value of transferability, relative to the priced value of copyright - iPods capture more wallet than iTunes.

3. Marginal analysis - What happens when you change the law...

So far, we've been able to understand how copyright is a 'tool' which prices (only) consumption, be it a download onto an iPod or consumption of the use of music on a television station, whilst utility captures externalities which are not priced in. Should a private copying exception 'relax' the law to bring it into line with consumer behaviour, we should recognise that this relative 'gap' will increase as a result.

4. Options, and intervention, to consider...

The Government faces a marginal trade off. Should this policy be passed, it has changed the law and, whilst this might not appear to change behaviour, it does widen the gap between value and utility yet further. Put another way, it increases the gap between a consumer's willingness to pay for music content and hardware by making hardware relatively more valuable to the content. So, for example, if a consumer had a utility value of £100 per annum on music, of which 2/3 was taken up by the cost of an iPod and the residual on CDs and iTunes, that balance can be expected to shift towards hardware as a result of increased transferability of the content. Interventions should narrow the gap, not widen it.

5. Rebalancing act - utility and property....

An easy answer to offer is 'do nothing' and recognise that copyright has been eroded (further) as a result. However, a legitimate question to ask is what other means can be employed to rebalance the margin, while enabling consumers to legitimately transfer their music onto different formats. The music industry proposes that any new copyright exception be accompanied by a new licensing scheme certified by the Secretary of State. This would require device manufacturers to acquire a licence from creators and right holders, to correct a market weakness that apportioned the value accrued from the transferability of music to the enabling technology, rather than to the originator of the music itself.

35. Right holders offer many business models to businesses that gain direct value from music as explained in Part II, but where this is not possible, there is the need for further political and/or legal interventions.
36. Just as it is important to consider value gained to consumers and device manufacturers from the transferability of music, so it is important to consider the *loss* suffered to creators and right holders from displacement of sales through the copying of music.
37. Whilst the harm to the right owner is but one criteria in determining the value of fair compensation (Recital 35 Copyright Directive) other criteria such as commercial gain should also be considered. We note the decision of the U.S. Court of Appeal decision in *Leadsinger v BMG MP* in October 2007 which decided that when the intended use of copyright material is for commercial gain, market harm for the right owner may be presumed.

A licensing solution:

38. The music industry wants consumers to have the freedom to enjoy music they legally own on any device, provided that creators and right holders are fairly compensated.
39. Technology can bring many benefits and innovations but it should not remove the ability of creators and right holders to get paid when their music is copied.
40. For this to happen, there must be recognition that businesses, services or device manufacturers who gain direct value from their customers' ability to format shift music have a responsibility to creators and right holders.
41. The music industry proposes a balanced solution namely a format shifting exception for consumers to copy their legitimately owned music onto a device for private, non commercial use subject to licensing manufacturers and distributors of devices substantially used or marketed for making copies of music.
42. This solution provides a future proof, yet easy to manage system which is responsive to market realities, allowing consumers to enjoy the benefit of the exception and take into account the business models of licensees whilst at the same time assuring creators and performers that their creativity will be rewarded.

How it could work in practice:

43. We propose that any exception in the UK needs to be subject to the following conditions:
 - That the initial sound recording is legitimately owned and retained;
 - That the format shifting is done by the owner of the sound recording;
 - That it is done for the owner's private/ domestic purposes;
 - That the copying is done solely for purposes of format shifting from a physical format;
 - That there shall be no onward distribution, communication or exploitation in any way
44. The exception would then be qualified by additional provisions to enable the licensing of device manufacturers and distributors. This will be the mechanism for providing the

compensation which the European Parliament and Council have clearly mandated in the Copyright Directive of 2001 that creators and right holders should be paid in exchange for such an exception.

45. The licence fee would be determined by commercial negotiations between creators and right holders and manufacturers and distributors of devices substantially used or marketed for making copies of music.
46. Collecting societies are and have been operating equivalent licensing schemes to collect and distribute the licence fee to creators and right holders in a transparent and efficient manner.
47. The precedence for an exception subject to licensing already exists and operates successfully under UK copyright law based on licensing schemes (e.g. educational recording of broadcasts (ERA scheme). Similar licensing schemes also exist, for example as regards the multiple copying for those who are visually impaired (the music publishers' VIP scheme).

Box B: ERA licensing scheme :

The UK already provides a functioning example of such a licensing mechanism under Section 35 CDPA. www.era.org.uk: The Educational Recording Agency (ERA) grants licences in accordance with the Licensing Scheme, which has been certified by the Secretary of State under Section 35 CDPA. The licences issued by ERA under Section 35 CDPA authorise the following activities:

- Recording from broadcasts made in the UK of the works and performances owned or represented by ERA members for non-commercial and educational uses.
- Electronic communication of licensed recordings within an educational establishment.
- The licence fee is then divided up between all creators and right holders involved who have signed up to the ERA scheme including the majority of the members of the MBG.
- The system works for users (educational establishments) as a convenient licensing mechanism as well as for the creators and right holders of the works included in a broadcast. Collecting societies already have had the infrastructure in place to deal with the ERA licence since 1990.

48. It should be noted that the ERA scheme only involves two parties (educational establishments and creators and right holders). The format shifting scheme would involve three parties (Creators and right holders; device manufacturers and distributors; and consumers) which needs to be considered in the drafting.
49. Licences will only be issued under a licensing scheme to manufacturers and distributors of devices substantially used or marketed for making copies of music.
50. This licensing scheme we would recommend would be approved at inception by the Secretary of State (Section 143 CDPA). The Secretary of State would also retain authority to approve subsequent amendments to the scheme, and the ability to undertake periodic reviews.

Such a model has already been established under the UK Copyright Act (c.f. Sections 31D, 35 and 66 (2) CDPA). The day to day operation of the licensing scheme would fall under the jurisdiction of the independent Copyright Tribunal.

51. The legal basis for a licensing scheme should be enshrined in wording which mirrors the scope of the exception.
52. Creators and right holders will set up a licensing body which will provide a convenient one stop shop for device manufacturers and distributors to obtain a licence and to also distribute any income to its members.
53. The licensing body will be empowered to enter into reciprocal agreements with overseas bodies, so that UK creators and right holders can benefit directly from foreign private copying schemes.

A critique of the format shifting recommendations without fair compensation:

54. Introducing an exception without compensation as the consultation suggests prejudices the creator and right holder and conflicts with European law due to Article 5 (2B) of the Copyright Directive. It also contravenes the international “Three Step Test” since, in spite of the argument put forward in the consultation paper, the proposed exception would conflict with the normal mode of exploitation. Reference to Luxembourg as example for an exception without compensation is misleading both in view of the limited commercial significance of the Luxembourg music market as well as the fact that it has actually implemented the requirement for compensation into its law (Article 10 para 4), but has yet to provide compensation in practice.
55. The consultation paper supports its contention that the proposed exception does not conflict with the Three Step Test with the argument that consumers are currently format shifting works and notes that such infringement is not the subject of litigation. However, this argument is a non sequitur. Whether or not current format shifting is subject to litigation has no bearing whatsoever on whether or not it conflicts with normal exploitation. The decision on whether to pursue infringement is based upon considerations of the costs of such action. The decision not to pursue does not imply that infringement is not taking place, nor does it imply that infringement is not conflicting with normal use.
56. The basis of argument rests upon the assertion that a narrow exception would have little or no impact on the right holder. “The exception proposed in this paper is very narrow in scope and, therefore, we consider that there would be no obligation for payment under the Copyright Directive for a limited format shifting exception, as there is no significant harm to the right holder which would need to be compensated.” As we have established in Part III: the effect of an exception will be considerable and hence excludes the applicability of the de minimis clause in Recital 35 Copyright Directive.
57. A format shifting exception, without accompanying compensation to creators, puts the UK on a collision course with the EU Commission and would leave creators in the UK worse off than their European counterparts. Some 550 million Euros are earned for creators from private copying in Europe and the UK should not put this in jeopardy.

Whilst some Member States are generous enough to pass a share of their private copying revenues to creators in the UK most do not because we cannot offer reciprocity. The proposed solution would enable us to do so and so boost revenues flowing back to the UK from private copying in Europe.

58. Moreover, the Government cannot ignore the fact that (as our research highlights) a substantial amount of copying will continue to take place outside the boundaries of the exception, however defined. This illegal copying has a substantial impact on the legitimate revenues returned to music creators. It is likely that the introduction of an exception which liberalises the regime surrounding copying of music in the UK will encourage further copying to take place, both inside and outside the scope of the exception. To introduce an exception without compensating creators in these circumstances will not in our view comply with the Government’s own guidelines for better regulation to “ensure that regulation and its enforcement are proportionate, accountable, consistent, transparent and targeted”.
59. We do, however, acknowledge and credit the Government for wishing to disbar activities which harm the interests of creators and right holders. There are over 40 million MP3 players in circulation in the UK, and 40% of the music on a typical MP3 device is not paid for, i.e. sourced from copying and sharing. We predict that widespread copying and sharing will continue to take place, no matter how clear the law is on what is and what is not permitted within the limits of a new “private copying” exception for certain formats. The technology that enables the transferability of music can add tremendous value as we have shown elsewhere in our submission. But by the same token, composers, songwriters, performers, managers, producers, record labels, music publishers are isolated from the value derived from the transferability of music.
60. The UK-IPO consultation acknowledges that all of the value arising from the ability to copy music has already been captured by the device manufacturers and the consumer: “*The available technology and equipment enabl[es] consumers to format shift themselves, for no or little additional cost [to them].*” None of the value has been captured by the music industry because there is currently no mechanism to be able to exercise their exclusive rights over the copying of their music. That is where Government intervention should focus – on mechanisms to ensure that creators are able to effectively exercise their right to earn an income from their creative endeavours and the value derived from them. There is also an important educative value for the consumer into understanding how creators and performers get paid for their work.

Whilst there has been an exponential value accrued to consumer electronics music industry revenues went down in Western Europe form 2002 to 2005.	
Total digital consumer electronics:	+ 114%
Music industry revenues	- 17%

Source: ECONLAW report of September 2007 accessible via www.gesac.org

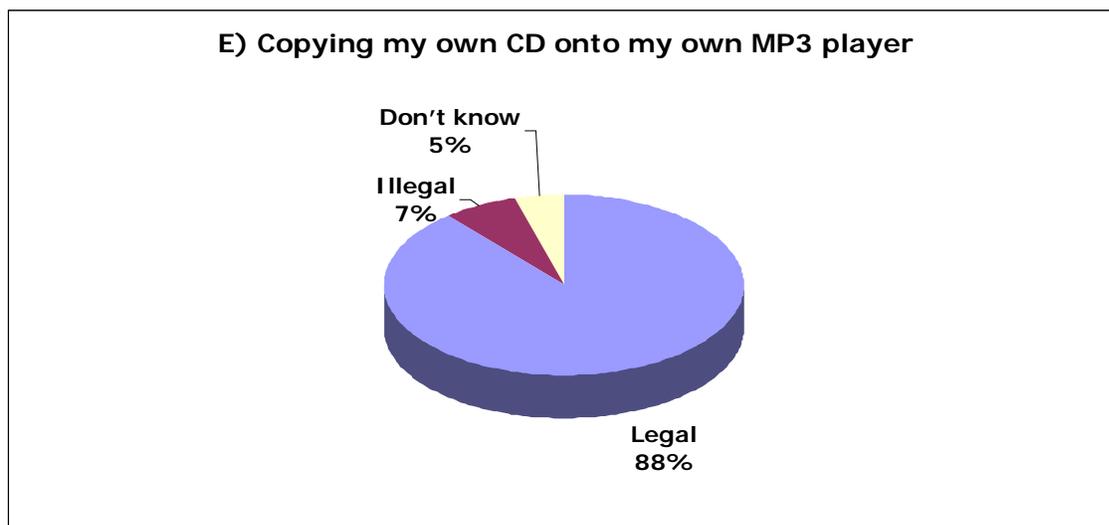
61. A new exception to copyright without compensation would de facto legislate that the full value accrued from the transferability of music would forever accrue to device manufacturers and consumers, while preventing the creator in law from any means of sharing in that value, even though *currently* it is his right.

62. Our proposal for an exception subject to licence does not seek to legitimise the wholesale copying and sharing of music; instead, it ensures that a fraction of the value gained to others, and loss suffered by creators and right holders, is reversed through a licensing scheme.
63. The exception must be accompanied by remuneration that is commensurate to the value accrued to device manufacturer and consumer from the transferability of their legitimately purchased music onto another device in their personal possession.
64. We note the viewpoint expressed by the Gowers' Report with regard to the levy systems as currently employed throughout the majority of European territories and that the UK along with Cyprus and Ireland do not currently provide a system of an exception with compensation.
65. It is however noteworthy that Ireland as the only other major country without private copying exception and levy mechanism promotes its creative community to a large extent through a favourable income tax system. Since 1969 self-employed creative artists who are resident in Ireland are exempted from income tax from sales or copyright fees in respect of original and creative works of cultural or artistic merit, as well as on other specified earnings. This scheme was capped at Euros 250 000 in 2006 but still provides considerable benefit to the Irish creative community.
66. Whilst a private copying levy would provide a simple and tested mechanism to compensate creators for giving up part of their copyright, we are of the view that a flexible licensing approach will be better able to respond to market realities and developments and sits well with the Gowers' stance against private copying levies.
67. We note that the UK IPO consultation states that *"if right owners wish to receive additional revenue to allow for format shifting, this could be incorporated into the sale price of the original. This would allow the relevant industries to price their works at an appropriate level, taking account of the fact that consumers will be permitted to make copies solely for personal use....Survey results have also shown that consumers would be willing to pay more for recorded music that they are able to format shift in contrast to recorded music they can only play back on a single device. Again this supports the argument that there would be no conflict with normal exploitation..."*
68. We readily agree that consumers value music that is transferable over music which is protected by technological protection measures. But in our experience there has been strong downward pressure on the price of music year on year , for a variety of reasons, but chiefly as right holders compete against free. Against such a background, the suggestion in the consultation that creators and right holders can simply raise the price of music is an impractical proposition in the current commercial environment and is based on a lack of understanding of feasible market strategy. Such an approach would also potentially violate competition law.
69. We note that the UK IPO consultation states that: *"a right holder may use technological protection measures to prevent users availing themselves of the exception.*

Additionally, in the digital domain, right owners will still be able to override the exception using technological protection measures if they choose to do so. Consequently, if compensation were to be paid, consumers could end up paying for the right to make private copies which would then be denied to them by the

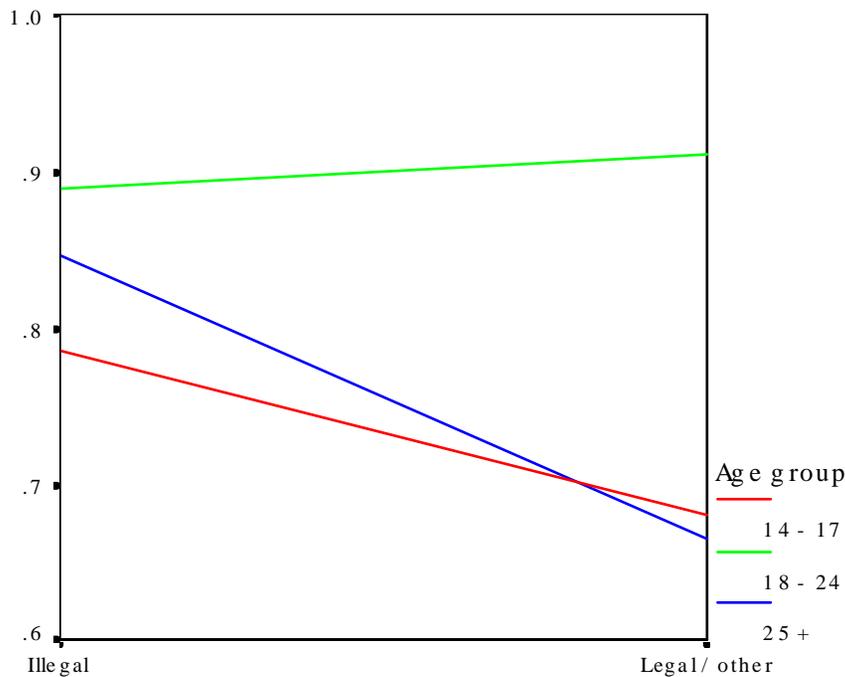
technological measure applied.” This viewpoint overlooks the realities of customer demand. The music industry is increasingly releasing products free from Digital Rights Management systems, specifically in response to market pressure. It should also be noted that other creative industries are having to respond in a similar fashion by releasing products free of Digital Rights Management such as films and books.

- 70. We note that the UK IPO consultation begins with the statement: *“It is now commonplace for consumers to copy recorded music...Among consumers there appears to be a widespread belief that such action is already permissible.”*
- 71. The University of Hertfordshire research strongly bears this out. It revealed that 88% of respondents already believe that copying their own CD onto their MP3 player is legal.



- 72. A central rationale for the Government in introducing a new exception for format shifting is to better align consumer attitudes and behaviour with the law. The consultation suggests that a new exception for format shifting will lead to a higher level of respect and understanding for copyright amongst the public.
- 73. University of Hertfordshire research shows that knowledge of illegality does not prevent someone from actually engaging in that illegal copying. Furthermore, for some types of illegal copying, such as burning a CD to give to a friend, research indicates that people copied *more* when they knew the activity to be illegal.

Figure 6:



Burn a copy of a CD & give to a friend

Source: University of Hertfordshire survey, Spring 2008

Figure 6 shows that the 18 to 24 age group are highly likely to copy whether they think this specific form of copying is illegal or not. People in the other two age groups, 14-17 and 25+, were more likely to copy when they knew the activity was illegal versus when they incorrectly thought it was legal or didn't know. This is strong evidence for inconsistency between copyright awareness and actual behaviour. In general then, knowing that a particular activity is illegal doesn't seem to prevent people from engaging in the same activity.

74. We believe that the vast majority of consumers and businesses accept that composers and performers should receive just reward for the consumption of their music.
75. As Nokia's Executive Vice President remarked earlier this year, without the creator, they don't have anything to sell.¹

¹ **MidemNet 2008: Conversation with Nokia's Tero Ojanperä [from 7m34]** "Ultimately, if there is no [technological] innovation then the [music] industry will die. I mean that of any industry. The [other] thing is how can we reward – even if reward is maybe not the right word - the hard work of the creative process, because we know that creative ideas don't come just like that...because ultimately if you don't have those ideas then there's nothing we can sell. So in that way, it's very important that we think about the whole value chain. How do we sort it so that everyone gets their share of the pie? "With mobile...we actually have to create that market first and then make sure that everybody including, and actually foremost, the artist will get paid."
<http://www.youtube.com/watch?v=VvtLHlrN7RU>

Part B: Other exceptions

Educational establishments (Sections 35 and 36 CDPA)

76. We welcome positive discussions as to the proposal to enable educational establishments to benefit from an extension of the exception to encompass distance learning. Most of our composers, performers, record companies and music publishers (via the BPI and the MCPS – PRS Music Alliance) are members of the Educational Recording Agency which already provides a licence in this field (ERA plus)
77. We however oppose an extension of Section 35 CDPA to also cover a recording of an on-demand communication of a broadcast including music given that this falls outside the scope of the *raison d'être* of the exception. Such exception conflicts with all three steps of the three step test since (i) it is not limited to certain special cases, (ii) will conflict with a normal exploitation of the work and (iii) consequentially unreasonably prejudices the legitimate interests of the rights holder. A number of business models exist to cover on demand communication in educational establishments, and we are decidedly concerned about the possibility of abuse of the exception.
78. As far as the extension of section 36 CDPA is concerned, the MBG agrees with the objective to include distance learning provided the intrinsic limitations as expressed in section 36 (2) are upheld. Section 36 does not cover sound recordings which are covered in section 35; any use of our works beyond reprography and outside the scope section 35 needs a licence from PPL and MCPS – PRS Music Alliance.
79. The provision of secure environments is key to limit technologically the exception to a secure VLE as expressed in the consultation. We are at the disposal of UK-IPO to discuss the details of such measures which will include password protection and firewalls to prevent people from outside to hack into the VLE.

Private study and research (Section 29 CDPA)

80. The MBG rejects the proposal to extend the existing section 29 CDPA. There is no economic justification or actual need to extend the existing exception to allow copying of sound recordings, films and broadcasts for private study and research, in particular in view of the other suggested extension for educational establishments and formatshifting which we understand UK-IPO is committed to implement. We cannot see the need for a wide private study and research exception besides the proposals which we accept. Additionally, the extension of section 29 will conflict with the normal exploitation of works, the more so if looked at together with all the other proposed exceptions.

Library Privilege (Section 42 CDPA)

81. We agree with the proposed extension to section 42 CDPA which allows libraries to make copies of sound recordings, films and broadcasts for archival purposes.

82. A wider communication to the public of sound recordings is however not acceptable for the members of the MBG since it would conflict with the exploitation of our works online via new business models such as iTunes; Napster to go; or Omnifone. The negative impact on the new and developing business model will as well be felt outside the music industry, thus impeding the development of new business models and UK business. A wider communication to the public also infringes European law, i.e. Article 5 (2c) and Art 5 (3n) of the Copyright Directive which limit the communication or making available to individual members of the public by dedicated terminals on the premises of establishments.
83. We also cannot see the need to extend section 42 CDPA to include museums and galleries; as far as sound recordings and musical works are concerned such an extension is not justified.

Parody, caricature and pastiche

84. We reject the introduction of a new exception for parody, caricature and pastiche. There is no need for such an exception in the music industry; parody, caricature have flourished in the UK since the age of Swift and Defoe. The UK Copyright system based on the question whether the copying of an existing work has been of a substantial part of a work has proven to be successful in over hundred years of jurisdiction by UK judges and we can see no reason to change the law, in particular without any economic or moral justification.
85. The consequences for our members would be severe:
- economically, any such exception will open the door for abuse by commercial users of sound recordings and musical works this putting at risk crucial income streams for our composers, performers, record companies and music publishers. The proposed exception affects the area of synchronisation which in the case of music publishers constitutes 10 -15% of their income.
 - morally, composers and performers feel strongly about the use of their creative works in a different format and it is crucial for them to decide on the use either as parody (see the example in the consultation para 191) or as pastiche (c.f. the Tom Waits cases around the world).
86. Also, any uncertainty which such an exception will create will invariably lead to costly litigation which ultimately our members have to shoulder.
87. The law is not broken, it does not need fixing

Annex: The Impact of Remuneration Schemes for Private Copying on Sales of MP3 Players: Source: GESAC (www.gesac.org)

According to research by Econlaw in September 2007, neither the existence of private copying levies nor their level can be considered a key determinant of the consumer prices charged in different EU countries. Pricing decisions for digital consumer electronics products depend heavily on other criteria and national peculiarities (study accessible via www.gesac.org).

The following table illustrates that private copying levies have no impact on market penetration for mp3 players. Whilst these figures relate to 2005 we expect that the market for mp3 players to have grown exponentially.

2005 (Forecast)	EU/EEA Countries								USA
	UK	France	Germany	Italy	Spain	Ireland	Sweden	Norway	USA
Total MP3 Players (000s Units)	6355	5474	8488	1534	1693	277	1400	535	30969
Household Penetration	25%	22%	22%	7%	11%	20%	32%	26%	28%
Population Penetration	11%	9%	10%	3%	4%	7%	15%	12%	10%
Population 15-44 yrs Penetration	25%	22%	26%	6%	10%	15%	39%	29%	25%
Total Households (M)	25.44	25.07	39.35	21.42	15.23	1.37	4.22	2.03	110.38
Total Population (M)	60.44	60.66	82.42	58.10	40.34	4.02	9.00	4.59	295.73
GDP per capita in PPS in €	28000	25600	24600	24000	22600	31600	27100	34800	37100

Source: Understanding & Solutions and Eurostat

The penetration of mp3 players within the age group between 15 and 44 years differs from country to country, irrespective of the existence or the level of a remuneration scheme for private copying on mp 3 players.

Among the big European countries, penetration rates are similar between the UK (no remuneration schemes), France (remuneration for private copying on MP3) and Germany (remuneration for private copying on MP3), which in turn are similar to that of the US. As for the small and/or medium sized countries, we can see that Ireland, which has no private copy remuneration schemes, has a low penetration rate, whereas Sweden, which has such a scheme, has a very high one.

The level of the remuneration for private copying does not have an effect on the market of mp3 players either. The comparison between Italy and France clearly illustrates this neutral effect. Italy has a very low penetration rate in comparison with France, irrespective of remuneration for private copying on MP3 players being much higher in the latter.