



**Response to:  
Creative Content in a European Digital Single Market: Challenges for the Future.**





**Creative Content in a European Digital Single Market:  
Challenges for the Future.  
UK Music response.**

**INTRODUCTION.**

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 very much welcome the Commission's Reflection Paper on Creative Content in a European Digital Single Market: Challenges for the Future published by DG InfoSoc and DG Market; in particular the importance it places upon Europe's culturally diverse and economically vibrant creative content sector. We further applaud the Commission's approach to call for fresh thinking and are happy to share our experiences and to offer our insights into what is working well in the UK. To help provide some further background on this important issue we enclose a copy of UK Music's response to the consultation "i2010: priorities for new strategy for European information society (2010-2015)."
3. We would like to emphasise how much we share the Commission's ambition to create for Europe an online market that enables creativity to flourish for the benefit of all – creators, consumers, right holders and other businesses. Our vision for the future is for a stable digital marketplace where the disruption, divisions and barriers of the past decade are replaced with mutually beneficial partnerships, flexibility, choice and an explosion of new cultural goods and services. For this to happen, we also need fair and transparent rules, an acceptance by all participants of their responsibilities to play by the rules, and the means by which rules can be enforced.
4. For Europe and indeed the world, the digital age has brought with it opportunity and challenge in equal measure. But it has yet to balance the tantalising appeal of endless limitation with a realistic sense of everyday pragmatism.

5. As in every other sphere of such social and economic importance, the online world must have rules and regulations. This is crucial both for protecting the public and for the creation of a properly functioning marketplace. The internet – engaging children and adults in their millions and connecting people from all over the world – is unquestionably a powerful and enticing place with more goods and services (legal and illegal) and more information and mis-information on offer, than any other marketplace in history. That it now commands such a dominance and influence in so many lives yet currently is the least regulated sphere of public life is almost inconceivable.
6. Ultimately, “Markets need morals,”<sup>1</sup> and whether those morals arise from philosophical or economic imperatives matter little - for the ability to exercise morality, and to build from a foundation of strength, requires structure; structure enabled through control, control facilitated by rules, and rules which are defined, supported and maintained by applicable and proportionate boundaries.
7. What would an ideal online market look like? For music creators and right holders, it would mean sharing in the rewards wherever and whenever their music adds value. For those using music to help build their businesses, it would mean seeking, and being granted, the rights to do so legitimately, quickly, and for a fair price - as a matter of course - on a Pan-European basis. For consumers, it would mean an endless array of licensed online shops, services and forums where music is available, experienced, recommended, distributed and enjoyed fully in the knowledge that it is all legal and the creators is being paid. And for those who don't play by the rules, it would mean swift and effective punishments, with nowhere to hide.
8. Yet for all of its exciting potential, for many investors in creative content, what the current environment has delivered is a great deal of uncertainty. For many it would appear difficult, if not impossible, to reconcile the dilemma of how to maintain financial support in the origination and creation of music (or any other form of creative content) when the perceived reality is that the only element of certainty provided to an investor - control - has been removed from the equation.
9. Against such a background the appeal of digitally available content still presents significant opportunities for Europe, but it also highlights a significant number of challenges.
  - In the UK we are making steady progress in developing the licensed online market. Music fans now have the ability to access more than 35 legitimate UK based digital online services, ranging from “a la carte,” downloads to streaming services, with a further 255 digital services available throughout Europe. Like all industries our primary objective has to be responding to customer demand, especially in such an evolving, disruptive, and competitive market. Our members are, and will continue to be, acutely focussed on delivering what music consumers want.
  - Clearly there are advances still to be made. For example, our creators in conjunction with performers, music publishers and record companies, collecting societies and the European Commission are working towards a more efficient cross border European licensing structure, and as an industry we remain committed to driving this market forward, maximising benefits to consumers, music fans, creators and investors alike. The goal is simple: providing music fans with whatever music they want, on whatever platform they want it.

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<sup>1</sup> Prime Minister of the United Kingdom, Gordon Brown, during speech to the Labour Party Conference 2009.

- We do welcome the Reflection Paper's recognition that the current scale of illegal downloading can jeopardise the development of an economically viable market. We would draw your attention to the recent solutions put forward by the Governments of France and the United Kingdom and would recommend to the Commission that they consider a harmonised approach to digital infringement throughout all member states.
  - We would also ask the Commission (and national competition authorities) to reconsider its approach to the "public interest test" when applying competition law. We believe that the current approach is restrictive and ultimately damaging to the interests of commercial users and consumers. In the current climate it is more vital than ever that open and transparent discussions can take place (excluding discussions on price), not only between right holders but also between right holders, platform owners and service providers. We would suggest that a more flexible and consistent interpretation of competition law, one which respects the benefits that pro-competitive collaboration can bring, would make the task of creating a functioning European digital market significantly easier.
10. The UK is justifiably renowned as a world leader in culture and media. Latest estimates suggest that in 2007 revenues from the UK creative industries amounted to some £67.5 billion. The UK's creative sector now contributes over 6.4% of our nation's Gross Value Added and sustains an estimated 1.8 million jobs while delivering a greater proportion of the UK's GDP than any other nation. At the time of its publication the Work Foundation's: *Staying ahead: the economic performance of the UK's creative industries* placed the UK's creative industries on a similar economic footing as the financial services sector.<sup>2</sup>
  11. The music industry is, undoubtedly, one of the UK's greatest cultural and economic assets. In 2008 four of the ten largest selling artists in the world were British artists; during the same period 1 in 10 of all artist albums sold in the USA were recorded by UK acts. However, as a cautionary note, record labels currently remain the primary investors in new and emerging talent, yet between 2005 and 2008, UK sales of recorded music declined from £1.74 billion to £1.26 billion (a 28% drop). While sales from digital revenues are growing – and diversifying – they are simply not enough to offset the loss of income from physical sales. Should this pattern continue to evolve it will have a very real and potentially very negative impact in the ongoing development of, and investment in, British talent.
  12. **Below we address some of the specific points raised by the Reflection Paper and look forward to continuing and full engagement with the European Digital Strategy.**

## CONSUMER ACCESS AND EDUCATION.

13. **Complexity:** It is understandable that a system which has evolved over three hundred years and which has primarily been of interest only to creators, investors, right holders and commercial users might appear complicated to the general public. Undoubtedly, as has happened on a number of previous occasions, changing technologies have challenged some of those traditions. But throughout, the overriding consideration of copyright has always been the protection of the creator. That must not change.

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<sup>2</sup> [http://www.culture.gov.uk/reference\\_library/publications/3672.aspx](http://www.culture.gov.uk/reference_library/publications/3672.aspx)

14. There is however clearly an acute need for greater support for the consumer, to help them better understand the purpose of copyright, its aims, its objectives, its benefits and the role which the consumer plays in the creative cycle. Customer education is something which the UK industry takes very seriously and we already run a number of educational initiatives to help consumers develop a greater understanding.<sup>3</sup> As recently highlighted in Music Week that work continues and will accelerate throughout 2010.<sup>4</sup>
15. We would wholeheartedly support any initiative, particularly on a pan European basis, which might help the consumer develop a greater understanding of, and sensitivity to, copyright, creativity, the creator and the consumers' ability to access creative works set against the creator's moral and economic rights. And we are happy to share with the EC details of our copyright education and awareness initiatives.
16. It is also important of course to highlight that the application of copyright law has traditionally operated within a business to business environment. While it might prove challenging we feel that ultimately this will still provide the best possible solution for the consumer. Ideally copyright should be applied in a manner that is all but transparent to the consumer regardless of their tastes and interests.
17. **User created content:** The business to business environment might also be the best place to address the use of user created content. A permission for the consumer to upload user generated material can and perhaps should be incorporated into the overall licence provided to platform providers; particularly since the latter are benefiting commercially from the added value they can offer consumers.
18. A number of our members have already successfully licensed platform providers for the use of user created content, but others, and in particular the independent record companies are facing considerable opposition from providers even if the labels are in a position to offer an aggregated licence. A single European digital market can only function if there are willing participants on both sides.
19. **Exceptions:** The Reflection Paper also touches upon an area of exceptions some of which currently form part of the recently published consultation "Copyright in the Knowledge Economy." Throughout its three hundred years of development copyright, has shown itself to be sufficiently flexible to cope with the challenges currently faced, without the need for further exceptions. The Commission may wish to consider the solutions established in the UK<sup>5</sup> where exceptions to copyright are provided subject to a licence. For the last eight years a system has operated in the UK which not only protects the needs of the visually impaired, but also successfully balances access with the interests of the creator.
20. The scheme developed by UK Music member, the Music Publishers Association, currently operates under the Copyright (Visually Impaired Persons) Act 2002 and allows for the copying of printed sheet music by educational and not for profit organisations for the benefit of the visually impaired. We would very much welcome the support of the European Commission in promoting this flexible approach at an international level.

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3 [www.soundrights.org.uk](http://www.soundrights.org.uk); [www.pro-music.org](http://www.pro-music.org)

4 <http://www.musicweek.com/story.asp?sectioncode=1&storycode=1039344>

5 Copyright (Visually Impaired Persons) Act 2002/ Educational Recording Agency under Section 35 Copyright Designs and Patents Act 1988

21. In April of 2008 we provided the UK Intellectual Property Office with a proposal which outlined our approach to private copying (format shifting): an exception subject to a licence. Licensing of this kind is a long established mechanism in the UK and enables a wide range of businesses to benefit from music while also ensuring that the creator gets paid. Our experience tells us that exception subject to licence provides a sophisticated, flexible and market-responsive solution with licensee fees subject to traditional commercial negotiations. By way of a final example, the UK's Educational Recording Agency <sup>6</sup> has, for twenty years, successfully brought together right holders and users to help facilitate distance learning access for the benefit of educational establishments and their students.

## COMMERCIAL USERS.

22. **Simplification of licensing:** Progress is being made. Significantly, in the joint statement signed by participants at the fourth meeting of the Roundtable on the Online Distribution of Music, chaired by the then Commissioner for Competition, Neelie Kroes, on 19<sup>th</sup> October 2009, right holders and service providers set out some general principles which we feel should underpin the online distribution of music. Participants of the Roundtable are now actively engaged in driving forward the progress of developing a Global Repertoire Database as part of the Common Framework for Rights Ownership Information programme, to help further facilitate multi-territorial licensing.

23. Other initiatives currently being undertaken by the industry include the Digital Data Exchange system, which will see the development of a cross industry standard of data transfer and reporting to help streamline the exchange of information between industry and music users.<sup>7</sup> In other sectors similar initiatives are ongoing, for example the book-publishing industry is developing an Automated Content Access Protocol (ACAP) in co-operation with digital search engines. ACAP will enable the providers of all types of content published on the World Wide Web to communicate rights management information relating to access and use of written content in a form that can be automatically recognised and interpreted.<sup>8</sup>

24. Over coming weeks UK Music will publish an online music licensing guide; its objective, to provide a simple, step by step illustration for commercial users on how to obtain a music licence. It is our belief that in most cases, licences are and will continue to be obtained by commercial users not the consumer.

## FURTHER REFLECTIONS.

25. **Withholding tax:** An issue of some concern to our members relates to withholding tax – a tax which is applied at a local level by member states to creators' royalties when the creator is resident in a different European country. A significant number of member states would appear to impose these withholding taxes on creators' royalties. This places considerable administrative burdens on individual creators, right holders and their collecting societies. Not only does this carry with it the imminent possibility of double taxation but it also disproportionately impacts on the creator and SMEs. More specifically we feel this system is creating an additional barrier to the effective development of a multi-territory licence.

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6 [www.era.org.uk/about\\_era.html](http://www.era.org.uk/about_era.html)

7 [www.ddex.net](http://www.ddex.net).

8 [www.the-acap.org](http://www.the-acap.org)

26. **Unitary license:** The Reflection Paper touches upon the subject of an aggregated unitary licence, suggesting the combining of “the two indispensable digital copyrights involved in the interactive online dissemination,” the digital right of reproduction and the digital performance right. Such aggregation to create a unitary licence might well be appropriate in areas where it is both economically and practically sensible. In the past voluntary solutions have been created which achieve that objective - one example of which would be the PRS for Music’s Joint Online Licence (JOL) which allows commercial users to obtain an online licence in a one-stop procedure. Any further opportunities to compete to aggregate rights would be of great interest to our members and we look forward with interest to hearing the Commission’s further thoughts on this issue as discussions progress.
27. **Collective management:** The ability to collectively manage works has always been of huge importance to the industry, both for creators and right holders. The Commission may feel that it is now time to consider developing an overriding set of principles for the operation of European collecting societies and to provide guidance on issues such as transparency, governance and the consistent application of rules at a local level, while also respecting the choice of creators and right holders. We understand for example that eighteen years after its introduction some member states have yet to implement the Rental and Lending Directive 92/ 100/ EC. The Commission might now consider it appropriate to remind member states of their obligations and press for immediate implementation. In areas where currently no collecting society for performers and record producers exists, might we suggest that the Commission may wish to look to PPL in the UK as an illustration of an efficient and respected organisation.
28. **Competition law:** There have been calls for a one-stop shop solution in order to help simplify the licensing process both at national and international level. However, within the current competition framework and ongoing levels of competition intervention, right holders and collecting societies are facing continuing uncertainty as to how best to proceed towards an aggregated solution. The Roundtable on the Online Distribution of Music is a positive and constructive step forward. We believe that it is ultimately damaging to the interests of all parties to prevent right holders and collecting societies from being able to address the justified demands of commercial users; moreover it would clearly be in the public interest if such discussions could take place without fear of repercussions. Of equal importance should be the ability to open discussions between right holders and platform providers regarding developing and facilitating new business models (excluding, of course discussions on price). We would urge the Commission (and subsequently national competition authorities) to take a common sense approach when applying competition laws, to help provide a flexible and pro-competitive framework which ultimately can only benefit commercial users and consumers.
29. **Extended collective management:** Whilst extended collective management does not provide the panacea for the general questions on music licensing, it might be appropriate in specific limited areas such as orphan works.



30. **Orphan works:** Collective management can, we believe, provide a sensible solution for orphan works at a European level. At a national level, this situation is already being addressed as part of the Digital Economy Bill, currently before the UK Parliament. Compared to other creative sectors, the issue of orphan works is less relevant to the music industry – chiefly because of the comprehensive and substantial information databases which the collecting societies hold. But in other areas the exploitation of works for which the right holder can not be identified or located might be more difficult. The Digital Economy Bill addresses orphan works by suggesting collective management to help enable the use of an orphan work following a due diligence search for the right holder. We understand that this is the route which the European Commission might consider and would support that position. Might we however suggest that it will be key to have a clear and transparent definition of a qualifying collecting society.
31. **Satellite and Cable Directive of 1993.** We oppose the extension to online delivery of audiovisual content as considered in the Reflection Paper. The Satellite and Cable Directive was intended to address a specific issue of satellite broadcasting which is rather different to the online world; therefore we consider that an extension to the Directive would be inappropriate.

## **SAFEGUARDING THE FUTURE.**

32. **Overarching principles:** We strongly believe that any approach to copyright needs to be founded upon the two overarching principles, to protect and reward creators and performers and those who invest in their creativity and talent.
33. **Collective management:** Copyright is, and should continue to be about creators' and right holders' choice as well as user respect. Mandatory collective licensing removes the choice of creators and right holders as to how they exploit and monetise their works. As has already been established by the European Commission's GEMA decision of June 1971 and reinforced in its Recommendation on online music in October 2005, it is the choice of the creator and right holder as to where they place their rights for licensing. The creator or right holder should be able to exercise their own judgement based on criteria such as transparency and good governance.
34. **Collaboration:** We wholeheartedly support the idea that there needs to be much greater collaboration between ISPs, content industries and technology companies; once again however we also note the constraints currently placed upon all parties by a strict application of competition rules.
35. **Moral rights:** We welcome the recent activities by the UK Intellectual Property Office to strengthen the creator's moral rights and would ask the Commission not to lose sight of this key aspect of copyright law which has not been harmonised at European level nor indeed fully at international level given that a creator's moral rights are enshrined as part of Article 6 (2) of the Berne Convention but are currently excluded from the application of TRIPS. There are quite considerable differences in approach to moral rights in countries which are based upon common law as opposed to civil law. In addition to differences regarding duration and the need to assert the moral right of attribution as a precondition for its existence under UK law, moral rights are not assignable or waivable under the author's rights system, whereas under the copyright system they are waivable, but not assignable. Additionally, under the author's rights system, making a judgment on infringement would be a subjective view, one based upon the opinion of the author; whilst under the copyright system, a wider, more broad ranging viewpoint is generally taken, one not based solely on the author's viewpoint or opinion.

36. We would very much welcome the Commission's further engagement regarding the European harmonisation of moral rights; not only in view of the different approaches throughout the European Union but also in view of current discussions at international level concerning a possible WIPO Treaty on audiovisual performances (c.f. Article 5 providing for moral rights).

#### **CONCLUSION.**

**37. As an industry, we stand at the threshold of a new beginning while creativity, now stronger than ever, is poised to take centre stage. Artists and industries that invest in creativity are at the heart of Europe's ever-evolving digital economy. It is vital that they find support and encouragement to ensure they make the most of this opportunity.**

**UK Music.**

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