



Title: UK Music's response to the IPO consultation on the future of copyright

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“The future – developing a copyright agenda for the 21st Century”

Executive Summary

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 large and small, music managers, music publishers, studio producers and collecting societies.
2. We welcome Government’s acknowledgement of the significant and beneficial role that the creative industries play and in particular, the ability of these industries to further develop and support the United Kingdom both economically and culturally. We look forward to working closely with Government to ensure our shared goals and ambitions are met.
3. Against that background we are hopeful that Government is mindful of the intense spotlight on copyright and creativity emanating from a number of Government departments. This consultation is taking place in parallel to the Digital Britain report by the Department for Business, Enterprise and Regulatory Reform (DBERR) and the Department for Culture, Media and Sport (DCMS) and by ongoing reviews of copyright by the Intellectual Property Office’s (IPO) and Strategic Advisory Board for IP Policy (SABIP). In February 2008 DCMS published their strategy document *“Creative Britain: New Talents for a New Economy.”* We are confident that our ambition is identical to that of Government – to provide a robust, future-proof framework within which the creative industries can flourish and the consumer, the industries and the UK economy can benefit from the world-class creativity that defines this country.
4. Traditionally, copyright has provided the basis for a system which not only ensures that those who create can be rewarded but also those who invest in creativity can be rewarded. This strength is based upon the principle that copyright is agnostic as to its subject, democratic as to its beneficiary, yet provides a flexible and open system for society. Most importantly of all, copyright empowers the creator to exercise a choice of, if, how and when they exploit their creativity, and provide a return on investment to the entrepreneurial sector who invest in that creativity.

There is, however, a distinction to be made between the practical application of copyright and its underlying principles. The principles of copyright are sound; we should be focusing our energies on improving their application.

General principles of copyright

5. Our vision of copyright is underpinned by five general values.

- **Creators must have the opportunity to be rewarded.** The relationship between creator and consumer is at the core of our industry. The creator sits at the beginning of a value chain which brings benefit to many others providing employment, economic growth and stability. As acknowledged by Government, the creative industries now contribute some 7.3% to the UK's GDP comparable to, and now likely to exceed, the financial sector.¹ Failure to reward the creator will ultimately have but one effect - to render the entire value chain unsustainable. The creators' economic power comes from their ability to make a free choice as to when, how and where they allow exploitation of their work, whether for payment or not.
- **Copyright is the currency of creativity.** Copyright sits at the heart of a system that enables composers, songwriters, artists and musicians to derive employment from their work. It is copyright that enables creators, and those who invest in their creative talent, to build value from that creativity. Consequently, any change to the copyright framework has to be extremely carefully considered in order to avoid any unintended or irrevocable damage either to the individual creator or the creative industries. The path from creator to consumer is populated by a large number of entrepreneurially led companies who take significant investment risks in order to bring creative works to a wider audience. It is this activity which is at the heart of the economy of creativity and supports the cycle of investment, reward and reinvestment, building a portfolio of works, culminating in the UK music industry commanding more than 8% of the worldwide music market, second only to the US. It is therefore as much an imperative for the creators as it is for the industries supporting them and the UK economy that the currency of this creativity is robust and fair.
- **Licensing Works.** Licensing provides access to a significant and growing catalogue of music. Our members already licence both the offline and the online world providing access to over 10 million pieces of music and generating over £630 million in income for our members.² During 2007, revenues generated from the digital and physical sales of recorded music were £943 million all of which creates a value chain where each participant is rewarded.³ Licensing however not only offers commercial solutions, but also benefits many others, for example, educational establishments, the visually impaired and public libraries. It is the existence of copyright which allows the exchange between creator and music user to function properly. New delivery platforms may evolve but they do not, and should not, alter the fundamentals of copyright.
- **Equilibrium must be maintained.** Copyright law already provides a finely-tuned balance between the interests of the creator and the general public. This ensures an incentive for creativity and innovation, whilst at the same time respecting the public interest. For over 300 years the existing system has proved to be remarkably adaptable, and we would question whether any new exceptions can ever be future-proofed.

¹ Work Foundation report, Staying ahead: the economic performance of the UK's creative industries. 25th June 07 www.cep.culture.gov.uk/index.cfm?fuseaction=main.viewBlogEntry&intMTEntryID=3095

² PPL & VPL annual report 2007, PRS annual report 2007

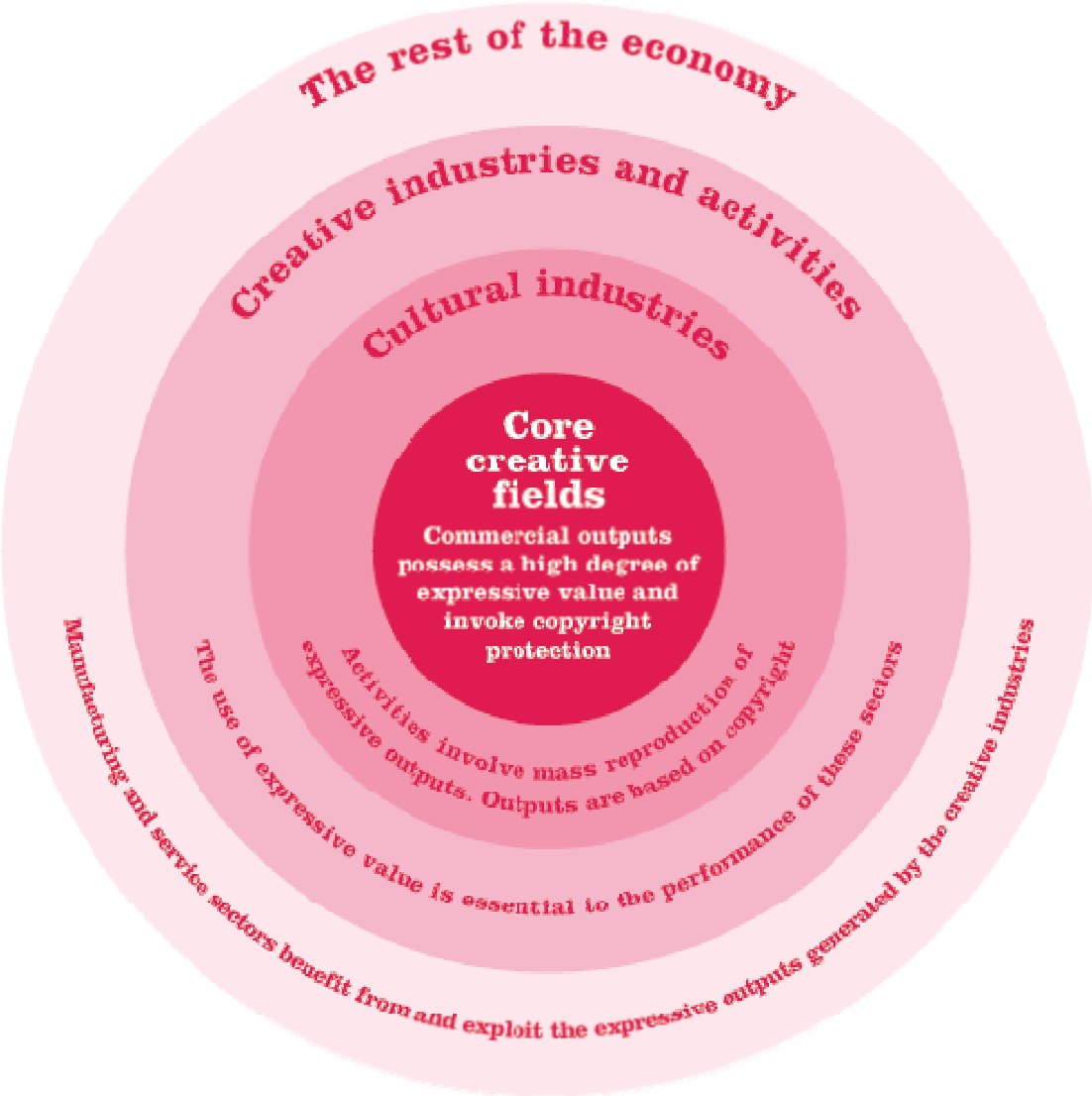
³ BPI Statistical Handbook 2008

- **The Berne Three Step Test.** It may be helpful to recall one of the founding principles of the Agreement on Trade Related Aspects of Intellectual Property; specifically, Article 13 states: “*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.*” This internationally-recognised test ensures that the creator has the ability to control and financially benefit from their creativity. Any change to the system of exceptions must be compatible with it.

6. These general values of copyright need to be built upon two fundamental and overarching principles.
 - **Rewarding the creator**
 - **Rewarding the investor**
7. It is those very objectives which have allowed authors’ rights to develop throughout Europe as a natural law; the law of the creative, the law of the individual, the law of the human being. In doing so copyright replaced a century’s old system of feudal privilege and patronage something we do not wish to return to. That evolution is perhaps best illustrated by the draft 1791 French Copyright Act, “*The most, sacred, the most legitimate, the most indisputable, and if I can say so, the most personal of all the properties is the work and fruit of thought of the writer.*”
8. The commercial music market is dependent upon the creativity of composers and performers. From here, copyright underpins, supports and cements the entire music industry, from composition to consumption. The British music industry is, and is ambitious to remain, a world leader. British success at the 2009 GRAMMY awards is testament to our global standing with winners including Coldplay, Adele, Duffy, Radiohead and Robert Plant. It would be foolhardy to contemplate wholesale changes to principles upon which this industry relies and in doing so undermine this success story, thereby jeopardising the very livelihood of UK creators.
9. To quote Gordon Brown when he became leader of the Labour Party in 2007: “I am optimistic about Britain because I am inspired when I see the genius of our arts and creative industries, the flourishing of our universities, scientists, entrepreneurs and cities. A new energy, dynamism and often untapped talent which it is our patriotic duty to encourage and it would be thrilling to help unleash.”⁴
10. DCMS’s 2007 report: “Staying ahead: the economic performance of the UK’s creative industries,” illustrates this concept well.

⁴ Ref: http://www.culture.gov.uk/reference_library/publications/3672.aspx

The creative industries
A stylised typology



II. Specific comments on the four areas identified in the paper:

Recognising creative input

Q. “Does the current system provide the right balance between commercial certainty and the rights of creators and creative artist? Are creative artists sufficiently rewarded/protected through their existing rights?”

11. Copyright is the sole mechanism which ensures the protection and therefore the ability of creators and artists to earn a living.
12. The relationship between creators and those who invest in creativity has always been symbiotic. Providing a balance between commercial certainty and the rights of creators is, and always has been, a constantly evolving process. Music industry contracts are clearly subject to national legislation and any prevailing case law. The doctrine of restraint of trade is one example of how contract law, and therefore music industry contracts, have adapted to national expectations and standards.
13. Commercial certainty is a precondition for the exercise of the rights of creators and creative investors, only if commercial certainty exists will creators and investors be able to sustain long-term employment as a direct result of that creativity. Commercial certainty would therefore be a key component of incentivising our creative industries.

Access to works

Q. “Is our current system too complex, in particular in relation to the licensing of rights, rights clearance and copyright exceptions? Does the legal enforcement framework work in the digital age?”

14. Licensing of rights/ Rights clearance: The global changes that have impacted on our national economy, have equally impacted on the music industry. Additionally, vast technological advances have accelerated the speed of change in recent years and our industry faces many challenges.
15. These are however challenges that we can and will overcome. Transition can on occasion be a difficult process but this industry is adapting and responding to new forms of exploitation.
16. Clearly it is in the long-term interests of this industry to ensure that music is made as widely available as possible. It is the number one priority for artists to get their work out for as many people as possible to enjoy. To that end, our members have invested, and continue to invest considerable resources in developing appropriate rights clearance systems which are compatible with the market whilst providing a flow of income back to creators.
17. Our licensing structures are in transition. Our industry has for over 300 years been based on the creation of an artefact, from the printed music sheet to the recorded format and has been based on territoriality of rights ownership. Whilst the industry is transitioning to an international licensing and supply structure, there are significant concerns within Europe over the preservation of cultural diversity, protection of minority languages, specialist music composition and the SME’s who are the laboratory for all new musical expression.

18. We acknowledge that one key task will be to demystify the licensing process for music users, by clearly explaining its operation and providing relevant signposting. One of our member organisations is already working closely with Government to provide consumers and commercial users alike with an easy step-by-step guide on how to obtain appropriate licences.
19. Copyright exceptions: Copyright exceptions exist to balance the interests of right holders and specific beneficiaries. Since legislating for every eventuality is not practical, current UK legislation quite sensibly evolved to provide a framework which balances the interests of right holders and the public. Legislating for exceptions should always be a last resort as it not only prejudices the interests of creators, performers and right holders but also is very inflexible by nature. The system of exceptions is the main reason for the complex nature of copyright legislation.
20. We must be certain that any change to the system of exceptions will not hamper commercial certainty for creators, artists and those who invest in them.

Incentivising investment and creativity

Q. “Does the current copyright system provide the right incentives to sustain investment and support creativity? Is this true for both creative artists and commercial rights holders? Is this true for physical and online exploitation? Are those who gain value from content paying for it (on fair and reasonable terms)?”

21. Copyright provides the right incentives to sustain investment and support creativity. This is true for both artists and commercial right holders. Copyright legislation provides the framework within which creators, right holders and commercial users can cooperate for the benefit of everyone.
22. In the area of enforcement, it is a national imperative that smaller rights holders are given much greater support, particularly in the online environment. Some of the issues which are not dealt with in current legislation, such as the responsibility of ISPs for illegitimate p2p filesharing services, are being addressed elsewhere.⁵
23. Legal enforcement for right holders in the digital age is problematic; however, efforts should be, and are being made to enforce rights. Digitisation, whilst offering a huge range of exciting possibilities for music has also increased the scope, level and quality of infringing. Illegality through unlawful filesharing and non-network infringement costs this industry more in terms of actual lost sales than physical counterfeiting. Only one in 20 downloads is now legal.⁶
24. The music industry is sensitive to the consumers’ undoubted affection and enjoyment of music and wishes to work with government to find the balance which allows consumers to access and enjoy our output whilst ensuring fair reward for the creators and investors who have invested into making music commercially available.

⁵ DBERR Consultation on legislative options to address illicit p2p file-sharing <http://nds.coi.gov.uk/imagelibrary/downloadMedia.asp?MediaDetailsID=248066>

⁶ IFPI Digital Report Jan 09 <http://www.ifpi.org/content/library/DMR2009.pdf>

25. UK Music argued in its submission to the DBERR Consultation on legislative options to address illicit p2p file-sharing (October 2008)⁷ that, although consumer awareness and compelling music services will assist in persuading substantial numbers of people to engage with legitimate services “for the remainder who persist in filesharing services... without permission or payment, further sanctions are required.”
26. While it is true that most music service providers have been open, transparent and cooperative in obtaining licenses, unfortunately there remain many instances where music service providers have failed to engage with parts of the music industry, most notably the smaller copyright owners, be they artists wishing to commercially exploit their own works, or the independent record companies who exist to provide professional guidance and opportunity to artists who do not wish to run their own business.
27. We are hopeful, that ultimately those who gain value from content will recognise and reward that value. It is vital that during these challenging times we can rely upon Government’s continued support to achieve that goal.

Authenticating and protecting works

Q. “What action, if any, is needed to address issues related to authentication? In considering the rights of creative artists and other rights holders is there a case for differentiation? If so, how might we avoid introducing a further complication in an already complicated world?”

28. It is important to separate issues relating to authentication. While we welcome administrative initiatives which would help facilitate the management of our works, such a registration should not be made a requirement to qualify for copyright protection. The introduction of any authentication requirement would remove the democratic element of copyright. Such a two-tier system would invariably dismantle the agnostic, open and flexible system provided by copyright protection. No doubt this is the reason why previous generations of legislators removed the registration requirement in the 20th century.

⁷ [UK Music submission accessible through: www.ukmusic.org/page/submissions](http://www.ukmusic.org/page/submissions)

III. Possible questions to further the discussion on “The future – developing a copyright agenda for the 21st Century”

- What is Government’s long term vision for our copyright system?
- What is Government’s long term policy for our copyright system?
- Should the creator and those who invest in creativity be remunerated? If so, how?
- What are appropriate measures for dealing with persistently illicit downloaders that will be effective and proportionate?
- Are there any gaps in the rights granted to creators in their work?
- Do any of the current proposed and existing exceptions fail the Berne 3-step test?
- What level of understanding of copyright should consumers and young people have in the digital age? Who is best placed to assume responsibility for that? And how?

Annex: Overview of Licensing and retailing activities of our members

