

Music Managers Forum

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THE MUSIC MANAGERS FORUM SUBMISSION FOR THE FUTURE - DEVELOPING A COPYRIGHT AGENDA FOR THE 21st CENTURY. FEBRUARY 2009.

Who we are

The UK Music Managers Forum comprises managers and representatives of featured artists. Featured artists are the performers who are personally contracted to the record company. Featured artists may be a solo featured artist such as Robbie Williams or a band such as Coldplay. All the members of Coldplay are featured artists.

Featured artists are the source of over 95% of the income in the global music industry. Featured artists are always performers but in many cases they are also authors (songwriters and composers). Non-featured artists are session players and singers who are brought in to augment a recording by a featured artist. They may also be orchestra players.

Managers of featured artists receive a commission based on the actual income that a featured artist receives, so the interests of featured artists and their managers are identical once the initial artist management agreement has been agreed.

Executive Summary

- We agree that “the copyright system is of fundamental importance to the future health and prosperity of our creative industries and our economy”.
- We wholeheartedly welcome the recognition of the central role of performers and creators, especially the wider role they play in culture over and above any economic gain. The copyright system absolutely must support their creativity.
- It is a big move in the right direction to “engage directly with creators, SMEs and consumers who are often not directly engaged in the copyright debate”

- We recognise that the current system no longer works effectively for consumers, artists, rights holders and the wider business community looking to license content.
- The purpose of this review should not be about 'butchering' copyright but evolving its usage and application, especially in relation to the two key communities of our industry, artists and consumers.
- We are excited by the opportunities that have come with the 'digital' age; they provide conduits for direct relationships between artists and their fans. These opportunities in turn generate new economic opportunities for all concerned.
- Copyright has a key role in this artist/fan relationship, but its application needs to evolve from being at the centre of a product based model to a more service orientated 'access model'.
- We believe that the little understood and poorly applied 'making available right' is potentially key to any solution.
- Government needs to take action to help foster this evolution and help protect and promote artistic endeavours. At this critical time, change cannot be 'largely left to the law of contract'.
- Current illegal use cannot be reversed; the genie is out of the bottle. We either accept that it happens, as we have done for several generations, or we decriminalise it by legalising and monetising existing behaviour.
- Protection of copyright through punishment of widespread consumer practices is counterproductive for everyone.
- Those that benefit from the provision of current illegal practices, especially technology companies, are an important part of the value chain; as such they should be brought within the scope of an economic solution.
- As bitter as this may be for some, the licensing system needs a radical overhaul. It is far too complicated and cumbersome. It can be simplified.
- We ask that all government departments work together to speak with one voice on copyright issues and we look to government to react more quickly to new technological challenges.
- We look forward to a healthy debate with all interested parties!

SUMMARY OF SPECIFIC COPYRIGHT & RELATED RIGHTS ISSUES WHERE THE GOVERNMENT CAN HELP

The government should address the following issues to create an improved copyright framework:

Introduce contract regulation to protect vulnerable authors and performers from unfair exploitation from corporations in a dominant position.

Legislate that moral rights be inalienable in harmony with many EU member states.

Legislate that transfer of copyright can only be by licence rather than by assignment (as is the case in Germany).

Legislate that the term of any transfer of copyright would be limited to a maximum of 35 years (as in USA)

Provide regulation for transparency wherein all third party agreements involving an author's work or a performer's fixed performance are disclosed to the author or performer.

Phonogram producers and Publishers should have a fiduciary duty to the performers and authors who have signed exclusively to them.

To promote access by the public and consumer convenience, there needs to be a comprehensive 'use it or lose it' provision if a copyright owner does not make recordings available to the public in both physical and on-line formats. If this is not effected, all artists are in practice subject to an unreasonable restraint of trade and the only way consumers can obtain these recordings is by illegal copying or filesharing.

Authors and performers should have a right of audit for the full limit of the Statute of Limitation and should be able to audit foreign licensees and affiliates in the music value chain worldwide.

9. Collection societies who are monopolies must have a board structure and ownership that accurately reflects the rights that they administer.

10. The government should support WIPO and the EC in bringing in rights for audio-visual performers and a WIPO Audio-Visual treaty. When a performer makes a video and it is broadcast on television there needs to be an equitable remuneration right for the performers and the copyright owner.

11. The government should engage with the EC concerning pan-European licensing and the damage being caused to collection societies such as MCPS because of the EC's misguided position on anti-competitive behaviour.

12. The government should take a far more pro-active position on new EC initiatives rather than the reactive UK position taken in the past.

13. The government should encourage and support President Obama in introducing a public performance right in sound recordings for free-to-air radio in USA which would open up a new income stream for UK performers.
14. Assist the music industry in monetising the anarchy on the internet by bringing the ISPs and the MSPs in to the value chain.
15. The government needs to make the very small changes necessary in UK Law to clarify the regulations on Fair Dealing. The Berne Three step test should be accurately incorporated in to UK Law.
16. The government should introduce home copying levies on recordable media and recording hardware including computer hard-drives, mp3 players, mobile phones etc in line with the 24 EU Member States that already have such compensation mechanisms. It is embarrassing that the PRS/MCPS Alliance and PPL are collecting such income from abroad but we in the UK cannot reciprocate. As the Anglo-American (English-speaking) catalogue is the most powerful in the worldwide music industry, this revenue source will be a net gain for the UK economy.
17. There should be a move away from exclusive rights to remuneration rights that cannot be assigned or waived in contract and which can be easily cleared by users.
18. The making available right should be made a right of equitable remuneration rather than an exclusive right, or it should be made to be an exclusive right that is only assignable to a collection society.

Overview and responses to the specific questions

Introductory Comments:

The ubiquity of digital technologies has become one of the defining elements of the 21st century so far. However, much of the content industries – and especially the music industry – continue to function as if we were still in the analogue world of the 20th century.

A painfully slow transition from an analogue, product-based business model towards a more service oriented access model has begun. Progress is however hampered by a reluctance to accept the fundamental paradigm shift brought on by the advent of the digital revolution; a revolution driven by technology but more importantly by the consumers that enjoy its benefits.

If this review of copyright, the cornerstone of the product based model, is to achieve anything, it needs to grasp the reality of what's happening, embrace it's implications and drive the change needed to secure the opportunities for both creators, those that serve the creators and consumers.

It is of critical importance that this review recognises that there are two primary groups that are key to the music market – the artist (the source) and the fan (the destination). All businesses or entities that find themselves part of the chain between the source and destination, must be encouraged to promote this relationship as it needs protecting and nurturing.

Any attempt to develop a system of copyright for the future needs to take onboard that change is not necessarily in the direct best interests of incumbent rights holders in the music industry. However, efficient, effective and equitable systems of copyright administration that allow for the development of the music services customers want and that lead to fair remuneration to the creators of music must be the goal of any redrawing of the copyright map.

We welcome a broad, forward-looking review of copyright and its future development. This cannot be a euphemism for destruction of copyright as a whole, but rather an examination of what is required to stimulate the investment of time and money in ways that can provide a stream of revenue that goes to those who create the works that people want to listen to or use in some way.

In addition, we would like to praise this attempt to get input from the wider music industry, especially the stated need to “engage directly with creators, SMEs and consumers who are often not directly engaged in the copyright debate”. We hope that you will always include us, a group of individuals who work closely with creators and whose livelihood depends solely on their success, in your future debates, and in your search for solutions.

We would also like to point out that there are so many governmental agencies involved in the issues raised here and in other consultations, both here and in Brussels, that it becomes as difficult to communicate with the governmental bodies, as they find it difficult to deal with our industrial bodies. In the same way as different agencies have differing views, so do different sections of the music industry.

Whilst we appreciate your desire to see a single view from the music industry you also need to accept that there are various zero sum games involved where what is good for one sector is only at the expense of another, and it is often hard to find common positions that go beyond the banal.

Comments on the ‘Background’

It is pretty much common knowledge that there is a near zero cost of reproduction of digital files, the consequences of which have been a downward pressure on the price of music sold legally. Over time it is expected that prices will continue to move ever more downwards, heading towards zero. However, whilst technology

permits extremely easy copying which it is virtually impossible to stop, the woes of the music industry cannot be seen to be mainly an issue of p2p file sharing.

The use of memory sticks, portable hard drives, Bluetooth and other devices and technologies make copying music incredibly easy. Historically, attempts to stop digital copying have been remarkably unsuccessful in either stopping unauthorised use, or of increasing revenue to the creators or their investors. Furthermore the potential for inexpensive encryption means that future attempts to control copying will be liable to make detection of activity ever harder, generating devastating consequences for the security services.

It is also the case that origination costs of music are still requisite, even if these costs are lower than in the recent past. More importantly, skilled and professional work requires time, craft, expertise and experience. It is the same for music as it is for any other industry; directed, well targeted and efficiently used investment reaps substantial rewards.

Considering the blizzard of content on the internet, getting noticed and developing an audience are tasks that require additional time, energy, expertise and resources. Whereas, much can be done by the amateur, the well-resourced professionals will always have an advantage. This applies nationally and internationally. If we wish to maintain and develop our export opportunities we need more professional organisations supporting well-resourced originators.

The technology has another aspect that needs to be considered. It is arguable that wanting access to recorded music at a time and place of your own choosing does not mean that you have to buy a physical object carrying that recording. Equally, downloading a recording does not mean that one wants to keep -'own'- that recording.

The distinction between a download and a stream is a purely technical distinction; it does not imply a difference in use. Buying a record and listening to the radio could be seen as totally different activities. These activities have different copyright structures, institutions and systems of administration, which in turn have led to different systems and types of payment to the creators. We raise the question whether any system that distinguishes between a performance (stream) and a download (sale) has any real functionality in the digital environment. This distinction is important as it is used to justify different types of licences for music services and for different scales of payments to the creators.

These varying systems lead to problems for music services in terms of the number of licenses needed for them to be able to legally offer music to the public. This reality generally distorts the business and confuses and infuriates anyone trying to launch a new service. The download/stream issue demonstrates itself in that a download is considered a sale and therefore creators are paid in the same way as in the retail environment (i.e. 10-20% of dealer price) as per contract. In the case of streams income is usually split 50/50.

Thus the idea that how one acquires music (i.e. a download or a stream) has any relevance to its value is hard to use as a basis for business models. Consumers in the developing music ecosystem are in fact becoming users more so than remaining consumers, and will often repeatedly access a favourite piece of music rather than wanting to own it.

The development of models to exploit these differing attitudes and the valuations that go along with them will be a significant part of the future music business, and the segmentation and differentiation of the users of music is an important part of the strategy for the future.

The digital world has also made the creative use of 'cut and paste' technology another challenge for the existing copyright institutions. Whereas we can understand why the Creative Commons movement has grown up it should not be seen as an excuse to use other people's work without compensation, permission or recognition of the original authors.

Equally those who use technology in this way are often using new tools for making new art, and we feel that the existing collection societies and the Creative Commons movement should be obliged to relate to each other so that those who want to use a Commercial Creative Commons license can get paid when their work is used creatively. This illustrates our conviction that one cannot address the problems of copyright without looking at its administration.

There is also no doubt that what is happening in the digital world is endangering the existing business model. Simply dealing with the problems of, say, format shifting as a stand alone issue is disingenuous. How can anyone distinguish between format shifting and passing on a copy to a friend, and when is this a bad thing, and when is it fair use?

So any movement on exceptions without reference to a fundamental review of copyright law and administration in the digital world is not very helpful, and is liable to increase problems. At the same time maintaining the illegality of format shifting is nonsense as far as the user and the public are concerned.

We would suggest that the failure to adequately address the implications of the introduction of the new 'making available' right has a lot to do with the problems that we face when considering the remuneration problems for creators. The excessive focus in law and in practice on exclusive rights, rather than remuneration rights lies at the heart of many of the problems as well. The need to get permission for use is so cumbersome that it is the cause of so much of the non-authorised and therefore non-remunerated use of copyright material.

We would also argue that the destruction of the collecting society structures within Europe, rather than the regulation and reform of their activities, has made the whole system even more complicated and uncertain for all concerned. This has restricted the development of legal services, leaving the way open for the rampant growth of non-authorised services. In turn this very uncertainty of payment has

had an inhibiting effect on the ability to invest in recorded music where the structures of sale or payment for the use of the end product are so unpredictable.

Layered across all of this is an important economic shift in the term 'value'. Too often value is deemed to be a monetary gain. In today's music business, value can be zero in a monetary sense, but important in a data and relationship sense. For most young, up and coming artists, free recorded music is one of the most valuable tools at their disposal – with it they can capture a market from which they can launch their career.

Consequently we welcome a broad forward-looking review of copyright and its development. This cannot be a euphemism for destruction of copyright as a whole, but rather looking at what is required to stimulate investment of time and money in ways that can provide a stream of revenue that goes to those who create the works that people want to listen to or use in some way.

A Possible Way Forward

All this needs to occur in a manner that is easy for the consumer, (like paying for one's phone or electricity) and allows the fair distribution of economic gain to the creators of the content and those who have helped to finance, market, select and personalise the services that distribute music to the user. If the business model provides a service that the user appreciates and wants there will be no problem in getting paid for it.

These services will have to be cheap at the margin (remembering that an extra file has virtually zero cost to distribute), decisions about payment have to be minimised and collection of the money has to be mechanical, painless, efficient, transparent and predictable. At the same time the demands of the various super fans and users also have to be met, if so they will be happy to pay extra for high quality value-added services.

In this context legalising existing behaviour is the only sensible way to go, providing it is combined with some sort of payment (statutory or otherwise) from the ISPs or MSPs who are getting the economic benefit of the provision of unauthorised music services and activities.

This will require major reform of both the licensing system and of the collection societies, throughout Europe, and ultimately the world. This approach also recognises that the ISPs and MSPs have a very good idea of the types of traffic found on their networks. ISPs and MSP support will be all the easier if they are included in the value-chain.

In this context we would welcome the support for mediation, adjudication and other forms of conflict resolution, but would urge the control of costs so that these forms of dispute resolution are open to all, whilst at the same time trying to avoid 'nuisance suits'.

Comments on The Issues

Recognising Creative Input

As recognised in the IPO document, Creators are an essential part of the picture. Moreover, a review of whether copyright should be 'largely left to the law of contract' especially the concept of 'assignment' is well timed.

From our collective experiences, encouraging creative artists to assign their copyrights to be traded as part of a catalogue business is not in the best interests of artists or consumers. Artists should be responsible for and continue to have an ownership relationship with their works especially as their copyrights are promoted and their administration evolves over time.

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

In the music publishing field, the normal contracted agreement provides payment as a percentage of income according to type of use, limited to the term of copyright license. This has made the adjustment to the digital world less problematic for the relationship between writer and publisher (at least where modern contracts are concerned).

On the whole however, publishing has been a relative 'passenger' on the journey of exploitation; 'recorded music' has been the vehicle driving the economics and this is where the real issues lie.

With recording contracts, the assignment or long term license of copyright to rights holders has continued unabashed even though recorded music economics have been substantially eroded. This reluctance to move away from a 'copyright trading', 'product based' model, along with the collapse in profitability of the physical market and the launch of digital at prices a fraction of physical, has resulted in rights holders making efforts to obtain digital income in ways that potentially avoid or minimise how much the artists receives. The current system has therefore started to distort the balance against artists in respect of recorded music.

To illustrate this we would point to the income from the Kazaa settlement and the monies raised from suing users, particularly in the USA. In addition the equity and up front advance payment deals that have been done with start up initiatives, have resulted in little if any payment to the performers and often no payment to the publishers and the writers. The YouTube and the MySpace Music deals are especially worthy of note because equity was acquired by rights holders in exchange for these companies being allowed access to catalogues. To our knowledge, none of this equity has been shared with the creators of that music.

Traditionally rights holders have had a primary duty to their shareholders, not the creators of the art they trade. Creative artists are a cost centre to these enterprises and at a time of huge economic strain there is a potential incentive not to reward or protect these rights in an effort to protect shareholder value.

Not dissimilar to the financial industries, a drive towards either maximising or protecting shareholder wealth can potentially result in the abuse of a stakeholder. In a creative industry such as music, where a key stakeholder is the individual artist, it can prove tough to protect rights when coming up against corporations with economic power.

In this context we would welcome the legal assertion of a fiduciary obligation by anyone to whom copyrights are already assigned and believe it imperative that for future copyrights, these should be licensed to rights holders for fixed periods of time only, and with certain obligations attached. In both Germany and the US there are limits on the length of licenses that anyone can make.

No one can negotiate fairly for their rights with regard to technologies and business models that have not even been dreamt of. Nobody in 1955 could have allowed for the changes that have occurred in the music business since then, let alone considered the 'making available right'.

We would ask you to note that this is especially important as our industry continues to change. Contract law assumes a free bargain between two equal parties, but in the future one can only imagine what it will be like making contracts between artists and telecoms companies (which make the current rights holders look like SMEs).

Access to Works

Overall, the insistence to assign rather than license one's rights and to have a business model focused on trading copyrights for monetary value, has created an imbalance that has stalled the development of sensible consumer friendly online digital services. By way of example, it took Apple, a company operating outside of the music business to seize the initiative in respect of digital opportunities.

Exclusive rights are a double edged sword, and the administration of these rights could well be re-examined, from the point of view of both creators and the public - the only two essential players in any market for works of art. It is hard to see how the present copyright system and its administration will help either of the two essential players in the market going forward.

The System is complex, but is it unnecessarily complex? 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?

Yes, the system is too complex.

We have to return to the issue of exclusive rights, which have to be negotiated on an individual, or label by label, or a publisher by publisher, or a country by country basis. A calculation has been made that for a European-wide service one has to get 33 clearances for the publishing alone in order to access the total repertoire.

As for the rights to the recordings there is no limit to how many clearances may have to be obtained. This means that a digital service can either restrict itself to the

major providers or go illegal, as trying to clear all the content is impossible. This is in dramatic contrast to radio which can play virtually any track.

The efforts by the EU have done nothing to help the situation. In fact, the EU has been very successful in weakening the bodies which could at least clear repertoire for the whole of Europe. There were both competition and transparency issues with this system, but what has happened as a result of various measures is that the system is worse and the administration of rights has become even more complex than it was. Furthermore the conflicts within the music industry have been inflicted on the service providers who have been buried in unending complex claims.

A body that can clear the use of all the music and all the rights would be boon for everyone. A 'Meta Collection Society' which could provide a price for music, and receive the money and distribute through the existing rights owners has a lot to be said for it, as it would make the legal licensing of repertoire so much easier. A body like this would need regulation to ensure that it was charging a reasonable price and that its activities were fair and transparent.

With such a system all musical content would be available for all services on the payment of agreed fees, and with the provision of reasonable usage data so that money could be properly distributed to the creators and rights holders. This would on the one hand enable a mighty monopoly to develop, but it would also enable services to develop without having to go through horrendous difficulties in licensing, and permit any content provider, however small to be able to have their music available. The competition between distributors, service providers, and between pieces of music would increase. The development of radical new technologies requires the development of radical new administration systems and also radical new regulatory structures.

There will always be leakage around any system, but if the current unauthorised systems were legalised by the payment of a small charge per customer by the ISP or MSP, and if there was a body that would ensure the easy development of new and differentiated services it is likely that the ISPs and the MSPs would substantially block services which were not legal, and which were unfairly competing with the legal services that they themselves would like to develop to build up their value added services.

Any value added commercial service that was operating would have to negotiate a license from the Meta Collection Society as percentage of their revenues, flat fee or whatever was agreed. The aim of the whole structure would be to get money from all commercial parties using music to help drive their businesses. These should be de minimis fees subject to appeal, but non payment would be a serious offence. The model of radio and TV licensing could be used to help learn from experience.

To provide some further context to all this- there has been much debate over the last couple of years about DRM (Digital Rights Management) and whether it should be included in the provision of music online. That debate has been largely resolved, with most online music suppliers in conjunction with the record companies deciding to drop DRM from their music. In the middle of this debate however DRM became mere shorthand for the sort of technical protection

measures that are used to prevent music copying and to restrict uses by the consumer. There is another side to DRM which is essential and not only must remain, but needs to be more systematically organised and strengthened.

These are the Digital Object Identifiers. DOIs allow digital objects to be readily identified in terms of ownership and authorship. It is essential that an international system should be developed to identify all forms of intellectual property transmitted on the Internet. This would be a system similar to bar-coding that works across a range of products and can identify a product by country of origin. It might also be desirable to instigate an international system for the registration of intellectual property to enable the identification system to be fully effective in oiling the wheels of Internet commerce.

Conclusions

The current copyright system does not provide the right incentives to sustain investment and support creativity in the new digital economy. This is true for artists, consumers and rights holders. The current physical system is not without its problems, but historically it has sort of worked. Now though, it is breaking down under the ability to freely and easily copy and distribute any item that can be digitised.

Licensing music for online distribution is complex and has to cope with the availability of 'free'. The way to deal with unauthorised use of music is through 'feels free' solutions that operate in ways where the consumer is not particularly aware of the cost of accessing music, or feels the cost of that activity is so minor as make circumvention less than worthwhile. As for the people who gain direct value (i.e. revenue) from this activity - the broadband companies - are implicitly selling content, especially to domestic consumers. They could choke this content off, but sensibly no one wants that.

Payments should be made for access to music in this way. A fee of £1 or £2 per month per connection would provide exciting revenue opportunities for creators and their investors. Broadening this sort of approach out to the Mobile Service Providers would inject a substantial amount of money into the industry and would enable MSPs to move into value-added music services.

The ability to differentiate consumer offerings and to take advertising or sponsorship revenue could help pay for such a charge and an added benefit to this approach would be the possible reduction in customer acquisition and retention costs.

To reiterate, efficient, effective and equitable systems of copyright administration that allow for the development of music services customers want and that lead to fair remuneration to creators of music must be the goal of any redrawing of the copyright map.

