



BPI response to the APIG Inquiry on Digital Rights Management

Executive Summary

- The record industry is a successful risk-taking business which is dependent upon the protection of copyright law in order to recoup its investment;
- DRM enables the creation of new and innovative music services and products;
- DRM is the technological solution to maintaining the copyright owner's rights in the digital domain while offering greater flexibility to consumers;
- Legislation over and above the existing provisions is not necessary, since DRM is appropriately dealt with by established law;
- Government should promote the development of DRM standards and can also perform a role in educating citizens about the benefits of DRM technology.

Digital Rights Management

Digital Rights Management (DRM) is a term used to describe technologies which protect and manage the delivery of content in the digital environment, by defining and implementing the terms of access and usage agreed with the users. In a world of digital music, DRM is essential in developing new products and services.

The record industry

The UK recording industry has long been the UK's most successful cultural industry.

Not only has it enjoyed success domestically - UK consumers on average buy more music than those in any other country in the world¹ - ever since the 'Beatlemania' of the 1960s the UK has been a world superpower in popular music.

Despite the increasingly local tastes of music fans around the world, the UK is second only to the US as an exporter of music. In 2004 the UK boasted an 8% share of the vast US music market, more than that of any other country outside North America.²

While the nominal trade value of the UK recording industry in 2004 was £1.2 bn³, UK expenditure on music overall totals almost £5 billion a year and music activities generate the equivalent of 126,000 full-time jobs in the UK.

The BPI is the British record industry trade association representing over 340 record companies. The bulk of these are small independent music companies. The BPI also represents the four biggest multinational players, the so-called 'majors' – Universal, Sony-BMG, EMI and Warner. BPI members account for around 90% of recorded music sales in the UK⁴. The BPI also represents companies in associated sectors, including manufacturers and distributors of sound recordings, both for physical and digital products.

¹ BPI research based on IFPI data 2005

² BPI research based on Nielsen Entertainment data.

³ BPI Surveys 2005

⁴ BPI Research based on Official Charts Company (OCC) data 2005

Investing in music

The essential role of record companies is to discover, invest in, market and distribute new music. As such the record industry is one of the riskiest of the creative industries. In 2004 6,127 singles and 29,510 albums were released in the UK⁵. Just 250 sold over 100,000 copies⁶. The industry rule of thumb is that less than one in 10 releases is a hit (i.e. features in the music charts). Far fewer make a profit.

The result is that the recording industry has to invest an extraordinary amount in new talent.

The BPI estimates that the UK recording industry invested £145m in new music in 2004⁷. No other sector of the UK music industry invests as much in new music as the recording industry. The mechanism by which record companies are able to recoup this investment is through the copyrights in the sound recordings they own. It is therefore crucial that companies are able to protect and enforce these copyrights; DRM enables companies to design the features of music products on the digital market and it affords the protection necessary to ensure that those terms of use are implemented.

The digital opportunity

The UK record industry has embraced the opportunities of the internet to offer new music services to the consumer. There are now over forty legal download sites offering in excess of 1.7 m different tracks in the UK including mass market operators such as the Apple iTunes Music Store, Napster, HMV Digital, Virgin Digital and MyCokeMusic as well as specialist offerings from companies such as 7 Digital Media and label sites such as Ministry of Sound.

Such services allow the listening to excerpts or whole works, the downloading to one or several computers, the copying onto CD-R and the copying onto portable devices, such as the iPod or other MP3 players. By way of example, iTunes currently allows users in the UK access downloaded music on 5 iTunes-authorized devices at any time, burn the same play list up to seven times and store products from up to five different accounts on certain devices, such as an iPod, at a time.

The success of online music services has been dramatic. From sales of effectively zero in 2003, download sales reached 5.7m units in 2004 and 26.4 m⁸ in 2005.

The development of such a market would not be possible without DRM.

In the digital world perfect copies of sound recordings can be produced very easily and cheaply with instant distribution. The advent of digital music has made DRM essential as it makes it possible to protect music and to define flexible terms on which the consumer can enjoy that music. DRM allows rightholders to offer a wide variety of different types of use at a variety of different prices. Without DRM neither record companies nor artists could be assured of receiving any payment for their work or investment. Moreover, for the online market, DRM enables record companies to maintain meaningful sales records and pay the artists. These records are used in accordance with data protection legislation.

The new business models for providing music online could not have been brought to the market without DRM. Examples include:

- **Portable subscription services**, such as Napster To Go. These services allow unlimited access to around 1m tracks in return for a monthly subscription fee. These tracks can be downloaded to portable devices such as MP3 players and enjoyed for as long as the subscription is paid. If the subscription ceases, the downloads become unplayable. It is DRM which manages this process.

⁵ BPI Research based on Official Charts Company (OCC) data 2005

⁶ As above

⁷ As above

⁸ OCC data 2005

- **Try before you buy.** This is an increasingly popular function which allows record companies to distribute downloads – typically of new acts – free of charge to consumers. These downloads are playable free of charge 3, 5 or 10 times, but when the free plays are exhausted, payment must be made in order to listen to the track again. It is DRM which manages this process.

Issues on DRM

Our comments in the main body of the text relate to DRM in general and in particular its usage in the context of online music services. Among the many uses of DRM, a technology applied to CDs (Copy Control Technology, or ‘CCT’) has recently generated media coverage. **For a comprehensive discussion of the application of CCT see APPENDIX 1.**

This submission represents the broad consensus of BPI members’ views. For differing views of a small segment of record companies, **we refer to Appendix 2.**

Interoperability

The legal download market is relatively new; it is therefore inevitable that there are a variety of technical standards, not all of which may be compatible with each other.

The recording industry believes that there should be greater interoperability enabling consumers to play whatever music file they buy on whichever portable device they own.

Ultimately full interoperability is something that can only be achieved by agreements among technology companies and online retailers. Record companies cannot dictate terms unilaterally.

See Appendix 2 for further detail.

Inquiry Questions

1. Whether DRM distorts traditional tradeoffs in copyright law;

This question is based on a misapprehension of the nature of copyright law. There are no “traditional tradeoffs” in copyright law. Copyright legislation affords the copyright holder with certain exclusive rights, preventing others from doing various acts with a copyright work without the permission of the copyright holder. There are certain exceptions to this which are right and proper – such as for educational uses, criticism, review, etc. DRM complements the protection of copyright provided in legislation. DRM enables copying and other uses of music above and beyond the boundaries of legal exceptions to rights in this regard it is very attractive to consumers. For example, DRM may allow a person to make multiple copies of a sound recording in different formats for personal use or appropriate sharing with friends and family. The recording industry has always taken a reasonable and proportionate approach to permitting flexible uses while maintaining the economic viability of their copyrights.

2. Whether new types of content sharing licence (such as Creative Commons or Copy left) need legislation changes to be effective;

These licences rely on existing law and require no changes to legislation. **See Appendix 3 for further detail.**

3. How copyright deposit libraries should deal with DRM issues;

We understand that libraries and rightholders are in dialogue – in particular through the Joint Committee on Legal Deposit - on the use of technical protection measures when works are

digitised to ensure appropriate and effective use. It is crucial that there is an effective balance between the needs of rightholders and consumers in any model involving the digitisation of copyrighted work.

4. How consumers should be protected when DRM systems are discontinued;

Solutions to this problem are found in the market place and depend on the situation in question. Often, DRM itself will be part of the solution. For example, if a consumer changes PC, they are able to 'unregister' the PC and a licence will be reissued for the new PC. Changing standards and formats are not a new challenge. As has been the case in the past, solutions follow from the contractual arrangements, within the framework of consumer protection law.

5. To what extent DRM systems should be forced to make exceptions for the partially sighted and people with other disabilities;

The Copyright, Designs and Patents Act 1988 (as amended) ('the Copyright Act') already makes provision for the making of copies of a work for the personal use of the visually impaired to ensure accessibility. These provisions do not apply to sound recordings as there are no such accessibility issues. We note that section 19 of the Disability Discrimination Act (DDA) 1995, provides that it is unlawful for a provider of services to discriminate against a disabled person by making it impossible, or unreasonably difficult, for a disabled person to make use of a service. We do not believe that DRMs being utilised by the record industry discriminate in this way but if complaints are made we believe they must be dealt with responsibly.

6. What legal protections DRM systems should have from those who wish to circumvent them;

Current legislative provisions at UK and EU level should continue to apply in order to prevent circumvention of systems.

7. Whether DRM systems can have unintended consequences on computer functionality;

It is important to recognise that any new software which is loaded on to a PC can, in some cases, have unintended results although this is not desirable. It is not something that is specific to DRM.

The problems encountered in November 2005 by Sony-BMG in the US with its use of copy protection on CDs led to media coverage in the US and the UK. One of the content protection technologies, XCP, was provided by a third-party vendor from the UK, First4Internet, and was designed to prevent unlimited copying and unauthorized redistribution of the music on the disc. As it later turned out, one aspect of the First4Internet technology could, as a side effect, be abused to increase the risk for malicious attacks on the user's computer system. Sony BMG took immediate measures in response to security concerns, including an addition posting of the deinstaller programs on their website, the recall of releases that carried the First4Internet XCP software, and a halt to the production of XCP-protected discs. Sony BMG has also devised an exchange program in the interest of consumers that had purchased XCP-protected discs. **For more details on this issue and the steps taken by Sony BMG in response see their dedicated website at <http://cp.sonybmg.com/xcp/>.**

8. The role of the UK Parliament in influencing the global agenda for this type of technical issue.

We do not believe that further legislative action is required in this area as the EU Copyright Directive⁹ and 1996 WIPO Treatise offer adequate and balanced provisions. There is a risk that additional legislation would impede the development of technical protection measures and rights management systems; these systems must be allowed to develop through market mechanisms.

The Government should facilitate and continue to promote the development of technology standards, including those used in connection with DRM, and could play a useful role in educating consumers about the importance of DRM and its potential to enhance consumer experience and choice.

This should include building on the work that has been done by the Broadband Stakeholders Group and EU High Level Working Group on Digital Rights Management.

⁹ Directive on the harmonisation of certain aspects of copyright and related rights in the information society. Directive no: 2001/29/EC

Appendix 1

The Application of Copy Control Technology (CCT) by some companies on some CD releases

- **Enforcing copyright**

The rights which allow record companies to invest in new music are enshrined in the Copyright, Designs and Patents Act 1988 subsequently updated in October 2003 to take into account the digital age.

The Act grants the copyright owner of the sound recording (normally the record company), the exclusive right to copy that work, issue it to the public, rent or lend it, perform it, communicate it to the public or make an adaptation. These acts require the permission of the record company (unless it falls within a specific exception).

Since the record company – the copyright owner – always retains the exclusive right of distribution of the sound recording, the ‘sale’ of a sound recording to the consumer is different in kind to the sale of other types of consumer product, since the economic ownership remains with the copyright owner.

The relationship between record company and consumer has long been enshrined in the copyright notice which appears on the packaging of physical sound carriers like vinyl LPs and compact discs.

Typically this reads as follows:

“The copyright in this sound recording and artwork is owned by X Record Company Ltd. Unauthorised copying, hiring, lending, public performance and broadcasting of this sound recording is prohibited.”

In a world of physical soundcarriers, the technology required to manufacture those soundcarriers placed its own limits on the extent to which the record company’s copyright could be infringed. In plain terms, the equipment required to duplicate vinyl LPs and CDs in perfect copies was beyond the reach of all but the most determined pirates. There was therefore no need in this era to encrypt or otherwise control the ability of consumers to further duplicate or distribute a sound recording they had bought, since to do so in high quality copies was expensive and difficult. Copies made by consumers at home were not of a quality that competed directly with commercial products.

- **The digital difference**

The commercial release of the first compact discs in 1983 meant that for the first time the consumer had access to a perfect digital copy of the original master recording. In the analogue world of the vinyl LP, copying a copy of a copy would involve degrading the quality, whereas with a CD each copy is identical to the original.

Significantly the technical standard for the compact disc devised by the technology companies Philips and Sony did not offer protection, i.e. the content was unencrypted. This was not in practical terms a problem for the first two decades of the CD. Despite the invention of consumer digital copying technologies – Digital Audio Tape (1986), Digital Compact Cassette (1992) and MiniDisc (1992) – these proved expensive and failed to take off.

- **CD burning**

The fact that the CD standard is unencrypted was not a problem when few had access to duplication equipment. In 2005, it was estimated that 43% of households had a computer with CD recording capacity¹⁰. Each one of them is potentially a mini CD factory.

The bulk of the counterfeiting identified by the BPI’s Anti-Piracy Unit - which acts on behalf of the wider music industry – is now done on a cottage industry basis on home computers and

¹⁰ Understanding and Solutions 2005

distributed through car boot sales, pubs, clubs and workplaces. Over the past five years the counterfeiting problem has grown hand-in-hand with the growth in sales of domestic CD burners. Data from technology consultants Understanding and Solutions¹¹ shows that out of a total of 365 m data CD-Rs sold in 2004; no fewer than 58% were used for home audio recording – the vast majority of which were unauthorised copies.

- **Internet filesharing**

If the challenge of CD burning was not enough, the record industry has also faced the rise of internet piracy.

The combination of unencrypted source CDs ripped to the hard drives of home computers and then made available simultaneously to millions via unauthorized use of P2P networks has been dramatic. Research suggests that around 8m people in the UK have uploaded and downloaded music illegally in the UK over P2P networks¹². Independent estimates of the cost to the UK industry of illegal use of P2P service in terms of lost sales suggest it was £278m in 2003 and £376 m in 2004¹³.

- **Copy Control Technology (CCT)**

In some countries, a small number of record companies use a particular type of DRM applied on physical CDs, generally known as Copy Control Technology (CCT). These technologies are aimed at preventing uncontrolled copying; particularly copying which has led to unauthorised filesharing and large-scale CD burning, but allow a certain amount of reasonable copying for personal use.

While millions of CDs have been sold with copy control without generating any consumer complaints, there has been controversy recently over the use of the First4Internet technology by Sony BMG.

The BPI believes that consumers should be allowed to make an educated choice, and should be made aware of any CCT applied on the product they are buying. The BPI's sister international organisation, the International Federation of Phonographic Industries (IFPI), has developed clear labeling guidelines to help to ensure that record companies adopt effective and consistent practices in labeling CDs if and when CCT is applied, to maintain consumer confidence and comply with existing law and regulation¹⁴.

The guidelines cover the use of the copy control logo indicating to the consumer that a recording is protected, and set the rules for additional information to be provided relating to the functionality of the product.

Individual record labels take their own decision whether, when, and how to apply CCT and – if a decision is made to apply this technology - how to design, choose, and apply appropriate labels to their products. The IFPI's labeling guidelines have been applied widely to releases carrying CCT that have entered the marketplace.

Copy control and DRM applications on music product are generally less restrictive than those consumers experience on other products such as computer software.

¹¹ Understanding and Solutions 2005

¹² TNS 2005

¹³ TNS 2005

¹⁴ Sale of Goods Act 1979 (as amended) Trade Descriptions Act 1968

- **Securing a return on investment**

Only the richest of individuals would be able to afford to commission their own personal recording of an artist. But the risk-taking and marketing skills of record companies mean the costs of commissioning a recording are shared by many consumers.

In other words, record companies take on all the costs and risks of bringing a recording to market in the hope that they can sell the same recording many times to different people.

The cost of breaking new artists is considerable with no guarantee of success but consumers typically pay less than £10 for a compact disc. Indeed the average price of an album in the UK is now £9.79¹⁵. According to Dresdner Kleinwort Wasserstein Bank, recorded music in the UK is now the cheapest in Europe¹⁶.

Recorded music offers great value for money, but the business model, the risk-taking and the investment are only possible if record companies can enforce their rights in the sound recording.

¹⁵ TNS Audio Visual Trak Survey 2005

¹⁶ DrKW European Pricing Survey, October 2005

Appendix 2

Issues regarding DRM in general

- **Interoperability**

The iPod is the most successful MP3 player in the world. The iTunes Music Store is the leading retailer of downloads in the UK¹⁷. However the iPod will only play unprotected MP3 files or songs downloaded from the iTunes Music Store.

The fact that other download stores and MP3 player manufacturers have been unable to license Apple's proprietary DRM has raised concerns among BPI members as to whether this is in the best interests of the market or the consumer.

While the record industry has no direct influence or control over the issue of interoperability, it is actively involved in a number of forums that aim to develop common standards including The Coral Consortium (www.coral-interop.org), an industry-wide technology initiative whose goal is to deliver an open standard for interoperability between DRM technologies for consumer devices and services. BPI members are also involved in the work of ISO standard bodies such as MPEG.

- **Alternative views**

While this submission represents the broad consensus of views of the BPI membership accounting for 90% of UK recorded music sales, it is important to acknowledge that there are differing views.

Some smaller independent labels take the view that with limited resources available for marketing, the most important thing is that their music is heard. Their view is that it is in their interests not to control access to their music by using DRM. They believe that there may be unspecified promotional value in such unrestricted access.

This is a legitimate view, but it is difficult to see how it could be adopted as a matter of policy for the entire industry. Without DRM, rightholders may have no effective control over their copyrights and therefore no certain prospect of being able to ensure that they are paid. In this case, it is difficult to see the incentive for them to make the necessary investments required to bring commercial product to market. On the other hand, any individual rightholder is of course always free to decide not to utilise DRM to protect or manage rights in his or her work.

An elaboration of this view is that music on the internet should be paid via a levy on internet connections – akin to the BBC licence fee - which would then be distributed to artists and labels. Exponents of this view say that such a system would render DRM redundant – if everything is already paid for, they suggest, it does not need to be protected.

The BPI view is that this is both utopian and impractical and would effectively amount to compulsory licensing, effectively robbing copyright holders of their rights enshrined in law to decide for themselves how best they should market and exploit their copyrights.

¹⁷ XTN Data 2005

Appendix 3

Creative Commons Licences

Creative Commons (CC) is not – as it is often portrayed - a radical alternative to the existing system of copyright. In fact, CC is entirely dependent on the existing system of copyright. That system is the basis for the enormous contribution that the creative industries make to the UK economy and to British society.

In effect CC does no more than offer a set of template copyright licences. These licences require copyright owners to cede their rights, worldwide, in perpetuity and irrevocably. They provide no mechanism for creators to be paid for their creative effort; effectively implying that there is no value in a creative work. Consequently, CC licences are of no interest to the commercial organisations and creative industries that play a key role in developing a leading knowledge economy.

These licences can however play a role for amateurs, academics and others who do not wish to or do not need to earn anything from their creative work.

Aside from the legislative matters, it should be noted that CC licences can create friction with established licensing arrangements which are already used by thousands of creators in the music industry. Most composers, writers, artists and record company producers, from the most famous to those just starting their careers, have already assigned some rights to collecting societies. These creators would not be able to sign CC licences which give away the same rights. Similarly, granting a CC licence may in practice make it difficult or impossible for a singer or songwriter later to enter into an exclusive publishing or recording contract. Unfortunately it is unlikely that a young artist would realise this.