
RESPONSE TO A COMMUNICATIONS REVIEW FOR THE DIGITAL AGE

The BPI (British Recorded Music Industry) is the representative voice for the recorded music industry. Our membership comprises 426 record companies and associates including 384 independent labels and the four major record labels – Universal Music, Sony Music, EMI Music and Warner Music. Together, these account for more than 85 per cent of the sound recordings sold in the UK every year.

BPI welcomes the opportunity to respond to the open letter from the Secretary of State that begins the process of reviewing the UK Communications sector. BPI particularly welcomes the focus of the Government on the potential for the sector for economic value and growth for the UK.

The Creative Industries are an important sector for the economy, accounting for 5.6% of Gross Value Added (GVA) in 2008;¹ nearly 2.3 million people directly or indirectly; exports totalling £17.3 billion in 2008, equalling 4.1% of all goods and services exported; and an estimated 182,100 businesses, representing 8.7% of all companies.

The UK music industry is a world leader, although it faces fierce challenges as its business rapidly transitions from the CD to online and mobile services. The UK has a 12% share of global sales of recorded music. This is significantly higher than the UK's average share of trade in goods (3%) and services (7%); and it is the second largest exporter of music, after the United States. In 2007, 2008 and 2009 the top-selling global artist album has come from a British act²; and in 2010, for the third year running British artists accounted for around one in 10 of every artist album sold in the US, with cumulative share of sales totalling 9.8%.

In one week in March 2011, the UK claimed the top 3 positions in the US Billboard Album chart with *Adele*, *Mumford and Sons* and *Marsha Ambrosius* for the first time in over 25 years. Adele's *21* has (at time of writing) been No1 in the US Billboard Album Chart for 10 weeks, the longest run for a UK act this century and her single *Rolling in the Deep* has been at the top of the US Billboard Singles chart for 6 weeks.

The record industry has worked hard to create new business models for the digital age. The UK has 72 licensed digital music services, more than any other country in the world and more than £1bn has now been spent on digital music in the UK since the first legitimate services were launched in the UK in 2004. In Q1 2011, digital revenues accounted for 46% of industry revenue and digital retail sales in the UK grew by 18.2% to £316.5m, accounting for 26% of sales in 2010.

BPI wishes to see a vibrant market for content and continuing investment in original work. The Government's approach to communications markets should recognise the global strength of the UK music and creative content industries contribute greatly to the cultural and economic wealth of the country. Networks and services rely on world class content to win the battle for ears and eyes of consumers, and the communications policy and regulatory regime should, as the review letter acknowledges, be the opportunity for a thorough conversation about the best way to protect the

¹ ONS Autumn 2010 statistical release

² Amy Winehouse - *Back to Black*, 2007; Coldplay - *Viva la Vida* 2008; Susan Boyle - *I Dreamed a Dream*, 2009.

investment and production of creative works as part of the wider discussion about UK communications markets.

Q1. What could a healthier communications market look like? How can the right balance be achieved between investment, competition and services in a changing technological environment?

Q2. What action can be taken to facilitate greater innovation and growth across the wider competition regime, and how can deregulation help achieve this?

BPI will respond jointly to questions 1 and 2 as we take the view that a healthier communications market which achieves the right balance between investment, competition and services is inextricably linked with innovation and subsequent growth of content industries.

The Communications Review comes about at a time of changing business operations in the UK creative sector. Over the last decade the rapid growth of the internet has created a vast new marketplace for UK products and a new forum for the exchange of ideas and innovation.

Music drives consumer demand for technology platforms. Many segments of the ICT sectors rely heavily on music and other entertainment content to drive their business models. Internet Service Providers and search engines also rely, albeit indirectly, on demand for music and other creative content, obtained legally or illegally. The record industry values its relationship with the technology sector but would stress that it must continue on a sustainable footing, i.e. one where the tech sector can feedback sufficient returns to creative businesses to further incentivise investment in new content. Further development and growth of the broadband market is largely dependent on the production and marketing of this high quality content.

At the most basic of levels, respect for copyright enables creators and businesses to monetise demand for their music and secure a return that can be re-invested into new works. This requires an Intellectual Property framework that supports investment and allows rights to be enforced. The internet has afforded opportunities to creators, but it poses real risks for the future of the creative sector without effective action to regulate illegal uses of the internet. Digital piracy – or online copyright infringement – has negatively affected the music industry, restricting the cycle of investment from operating profitably and increasing uncertainty for creators and record companies, the primary investors in new musical talent.

We would call on the Government to swiftly implement the Sections 3 to 18 of the Digital Economy Act. The Act is a “moderate and proportionate Parliamentary response to a serious economic issue”³ and will significantly reduce illegal file-sharing across the networks of many ISPs. BPI firmly believes that the scale of illegal downloading and unauthorised sharing of music is holding back the digital market from reaching its full potential. The Communications Review should seek the objective of a healthy internet ecosystem where legal digital markets of entertainment content can thrive and compete on a level playing field, without being persistently challenged by the widespread availability of “illegal free”.

BPI believes in a light touch regulatory regime, where content creators are free to make market-based deals with people wishing to use creative content. However, strong backstop powers help ensure effective oversight of markets with a potential to exercise market power. Such regulatory

³ British Telecommunications plc anor v Secretary of State for Business, 20 June 2011

powers are important to protect content businesses that rely on transmission networks, search engines and technology platforms to get products to consumers in a digital age.

With the Digital Economy Act's amendments to the Communications Act 2003 specifically in mind, one effective change would be to allow industry (in addition to Ofcom) to take direct action for breach of a regulated service provider's general authorisation conditions. The present regulatory position under section 104 of the Communications Act is unsatisfactory in that it requires those who are aggrieved by a breach of conditions by a regulated service provider to obtain Ofcom's consent before seeking a legal remedy. This is cumbersome and unnecessary.

Q3. Is regulatory convergence across different platforms desirable and, if so, what are the potential issues to implementation?

BPI's view is that regulation of communications markets should, as far as possible, be maintained in one authority to ensure lower costs and greater certainty for regulated sectors. BPI is aware the review will have some discussion of Ofcom's statutory duties. We will engage in any such discussion but would do so from a position of concern that significant cost and disruption is attached to regulation.

BPI believes that regulation of copyright and Intellectual Property are specialist disciplines that do not share the characteristics of content and economic regulation. BPI does not believe that transference of such powers to a converged regulator such as Ofcom would be in the best interests of a healthy sector.

Q4. What barriers can be removed to facilitate greater exports and inward investment and make the UK more globally competitive in digital communications?

The trade in invisible services for music is a significant net benefit to the UK economy. Taking income abroad and payment made overseas from UK record companies for public performance royalties, synchronisation and licensing for use on sound carriers and digital income, the trade surplus for the industry in 2009 was £137.7m, the highest annual total since 2001.

However, despite the exceptional creative achievements of UK artists and the expertise of UK labels in marketing their music abroad, the UK recorded music sector faces difficult times. At the same time, increasing online illegal infringement of copyright has deprived the industry of revenue which is essential to ongoing investment. Revenues of UK record labels have fallen by 32% since 2004 from £1,220.4m to £823.8m.

Certainty for investors that the Government will take all steps possible to protect copyright and intellectual property is a necessary condition for supporting one of the UK's most successful industries. However, we are falling behind our major competitors in taking this issue seriously.

In France and the US, the Government has taken the lead on piracy and illegal downloads. In the United States in 2008, the new position of Intellectual Property Enforcement Coordinator was created and placed in the Executive Office of the President, to coordinate the enforcement work of all federal Government agencies. Starting in June 2010, the Department of Justice and the ICE began an enforcement push against websites that illegally offer copyrighted and counterfeited goods, called "Operation In Our Sites".

In the UK, the costs of enforcement under the Digital Economy Act are borne by the industry. This has implications for UK competitiveness as money spent by the creative industries is, traditionally, money that would be invested in new talent.

Q5. What further market and regulatory developments would lead to widespread take-up of superfast broadband? What regulatory action would government need to take to make superfast broadband more readily available in a) urban areas; and, b) rural areas?

BPI believes that Government should ensure that the benefits from superfast broadband – of access to high bandwidth services, including streamed media services – are achieved through access to legal sites that protect the rights of creators. Consumers need to have confidence online that the services they are accessing are legitimate sources, free from malware and protect their personal information and data.

BPI shares the Government’s objectives on growth, and believes that the availability of superfast broadband, as well as access to spectrum for 4G and other mobile services, will open up markets for content providers. However, we remain concerned about the potential for greater piracy through superfast broadband networks in absence of action from the Internet Service Provider industry.

BPI hopes that the Government will ensure that the infrastructure should be developed with a view to promoting a healthy, safe and legal market for the exchange of goods online. ISPs need to fully recognise their role in contributing to this ecosystem. In particular, we note the Government’s intention to invest a significant sum of taxpayers’ money (£530m) into supporting the roll out of superfast broadband. With public money should come greater responsibility, including action to reduce illegal activity, including theft of copyrighted materials, on taxpayer subsidised networks.

Q6. What are the competing demands for spectrum, how is the market changing and how can a regulatory framework best accommodate any rapidly changing demands on spectrum and market development?

Q7. How should spectrum be managed to deliver our growth objectives whilst also meeting our policy objectives of furthering the interests of citizens and consumers in relation to communications matters?

Q8. How should the UK engage on an EU/International level in relation to spectrum?

The BPI does not take a view on the issue of spectrum management.

Q9. Is the current mix of regulation, competition and Government intervention right to stimulate investment in communications networks?

Investment in communications networks relies on compelling content and a variety of legal options for viewers to source content. Investment should be based on an expectation of profit from rights protection. BPI have sought self and co-regulatory initiatives to deal with this issue, but if there is an unwillingness to take enforcement action against copyright infringers on networks it is inevitable that there should be a backstop power of Government intervention.

Record companies are the venture capital for the UK music industry. They take risks on new artists, invest in talent development, provide marketing expertise and help nurture the creative talent that the UK is a world leader in promoting. Record companies have always done this without tax incentives or public subsidy for their operations.

BPI welcomes the Government’s commitment to driving the growth of UK content production and the aim to lead the world in generating new and innovative content. We await the Government’s response to the Hargreaves review and the proposals contained within.

Like other industries with a large number of small businesses, access to finance is challenging. Additionally, investment in creative content is a risk for uncertain reward. The Government should

use the Communications Review to examine the growth potential of the sector and ensure that UK creative industries, a net exporter and world-wide growth sector, can compete on an even footing with other nations. BPI believes that the research undertaken on behalf of the Government, by Warwick Business School and IFF Research, “*Access to Finance for Creative Industry Businesses*”⁴ was flawed in its analysis of music. The report recognises its flaw, in that it could not separate music from visual performing arts in its quantitative analysis, and that the qualitative research did not include interviews with a music business or record company.

Music does not benefit from exceptions in the tax regime and the public funding regime for music is not as generous as that for broadcast content or film yet the UK music industry shares the same risk profile of investment. Whilst we believe the market provides the necessary innovation and diversity, we are concerned about the implications of piracy and the price competition in digital for the revenues of record companies and hence their traditional investment profile. A&R investment in the UK music industry has traditionally invested around 20% or above of industry revenues in new talent. Pressure on revenues inevitably will squeeze margins and reduce the levels of investment from the industry.

One idea we believe is of merit is that of the “copyright box”, to create a more favourable tax regime for new content that could help stimulate investment in creative content which would aid the UK’s industry, leading to a healthier export sector.

Q10. Are there disproportionate regulatory barriers to investment in content? If so, what are they and how can increased investment in UK content production be encouraged?

BPI does not believe there are disproportionate regulatory barriers to investment in content, although does caution that any extending of current regulation, particularly of content, will of course impact on the level of investment in content. BPI believes that a healthy market exists for music, with a large number of small and large competing content providers able to enter into commercial deals. Encouragement of further investment in content is more likely to be achieved by a more favourable tax regime for original works (see Q9 above) and through a stronger regulatory approach to the dissemination of illegally sourced content.

Q11. Should the core focus of public service broadcasting be on original UK content?

The review will, BPI assumes, consider the future of public service broadcasting alongside the renewal of the BBC charter. BPI would like the review to consider the importance of the public service broadcasting industry in providing access to new music and across genres. Whilst BPI does not take a view of the scope of public service broadcasting, it believes that the importance of stations such as BBC 6music and programmes such as the “*BBC Introducing*” series have been crucial outlets for the introduction of new music acts in the UK. The radio licensing regime has historically ensured that the radio industry avoids the Hotelling effect. In ensuring there is, albeit limited, a variety of station formats there has been an outlet for breaking acts in different musical genres from pop to classical.

Public Service Broadcasting is a window for the breaking of UK talent, and will take on a more important role if there is consolidation in the commercial radio sector. Where there is public money spent, either explicitly through the license fee or other vehicle, or implicitly through privileged access to spectrum, the Government should ensure a strong emphasis on original content, including

⁴ <http://www.culture.gov.uk/publications/8160.aspx>

music. Rules on such expenditure should encourage investment in and promotion of new creative content, ensuring coverage across musical genres and offering opportunity for the UK music industry to continue to compete globally.

Q12. What barriers are there to innovation in new digital media sectors, including video games, telemedicine, local television and education?

BPI would urge the Government to recognise that the market, with commercially negotiated deals and the protection of copyright and intellectual property is a driver of innovation. Innovation is driven by a strong intellectual property regime, where rights are properly sourced and content owners remunerated.

The BPI is keen to engage with Government on ways in which the music industry can help innovation in the sector. In October 2010 the BPI set up the *Digital Innovation Panel*, a significant new initiative to accelerate the development of the UK's legal digital music market aiming to support both new and established digital music service operators. The panel consists of senior digital and commercial executives from major and independent labels who meet with digital music services to share consumer research and analysis, and assist services in creating consumer propositions that have the best possible chance of success in the marketplace.

The panel has commissioned a comprehensive programme of consumer research and digital market mapping, which has revealed a plethora of potential opportunities still out there in the digital music space. It has held a series of 'Open Session' brainstorming sessions involving a range of service providers including Tesco, We7, MFlow, eMusic and BT. Its latest market insight will focus on different business models and service features, with results due end July 2011.

We would welcome the opportunity to discuss the potential for innovation in services, using licensed rights to content from the music and other sectors, through the innovation panel.

Q13. Where has self- and co-regulation worked successfully and what can be learnt from specific approaches? Where specific approaches haven't worked, how can the framework of content regulation be made sufficiently coherent and not create barriers to growth, but at the same time protect citizens and enable consumer confidence?

BPI believes, wherever possible the Government should seek a light touch regulatory regime, with powers only taken when commercial negotiations or an industry self-regulatory scheme has failed. We only sought the provisions in the Digital Economy Act when it was clear self-regulation would not be applied, and still aim to work with Government where possible to avoid legislative and regulatory measures unless absolutely necessary.

One area of public policy concern is the classification of content to protect children, including music videos and lyrics. BPI believes this is an area where self-regulation is appropriate. The BPI "Parental Advisory Scheme" for record labels and retailers in the UK has been operated by the BPI since 1995. It applies to music or video content on physical formats that may be considered offensive or unsuitable for children, including the use of strong language or depictions of sex or violence.

The BPI has updated its Parental Advisory Scheme to help ensure that parents and consumers are informed before streaming or downloading songs or videos that contain explicit content on UK digital music and music video services. It will stipulate that UK digital music retailers and streaming services should clearly display the internationally-recognised Parental Advisory logo or the word 'EXPLICIT' alongside any music or video files flagged as containing explicit content. The BPI believes

that consumers will benefit from consistent labelling across all music formats through a self-regulatory scheme.

The BPI is also promoting the “Music Matters” badge. This will be used to indicate legal sources for downloading music, to give confidence to consumers that it is a licensed service and that the copy of the music they will be receiving is authentic and high quality. This is also a badge that could be used by Internet Service Providers and search engines to differentiate between legal and illegal sites.

The Communications Act 2003 took a position that Ofcom should not take responsibility for regulation of broadcast type content if delivered over the internet. Whilst BPI does not advocate a move to greater content regulation for e.g. matters of taste, decency and bias, we do hope the review will look at the how the framework can protect citizens and enable consumer confidence through tackling the general problem of illegal content on the internet.

30 June 2011