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Intellectual Property Reform for the Internet Generation: An Accident Waiting to Happen.

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Abstract

In July 2009, whilst delivering the 2009 Ludwig Erhard Lecture (The Lisbon Council's flagship event), EU Commissioner for Telecoms and Media Viviane Reding (2009) posed the following question:

> *'Does our present legal system for Intellectual Property Rights really live up to the expectations of the internet generation?'*

For a generation for whom 'Electronic life' is a reality, is our present European regime of intellectual property fit for such an age **?** The UK Gowers Review (2005) on Intellectual Property when asked whether UK intellectual property law was fit for purpose in an era of globalisation, digitisation and increasing economic specialization had answered with a qualified 'yes'.

The precision found in Gowers has, however, been lacking in the subsequent stages of reform. Whilst the Digital Britain Report carried through the precision Gowers several sets of consultations and reports in the UK and EU have muddled the debate and have hindered the process of coherent reform.

This paper will argue that the reform agenda has lost focus on what are the appropriate aims and objectives for intellectual property in the digital age. In apparently ignoring the lessons of recent history and contemporary economic evidence these proposals have become preoccupied with the vested rights of one group of stakeholders (rights holders), and have ignored the rights of consumers and other follow on users. As such they will lead to an increasing alienation between rights holders (and their performers and creators) and their users/consumers and so stand in contradiction to other strategies including the growing of the digital economy. Such failings have had a significant effect on innovation and culture within music, leading to the stifling of new musical genres and of the means to acquire and distribute music. Lessig (2004) refers to this process as the locking down and appropriation of culture. The record industry as a result fails to provide variety, diversity and choice at a time when interest and usage in music is increasing. The industry now fails to provide clarity in vision for its users and innovators.

1. Introduction Reform Activity

Considerable effort has been expended within Europe in the last decade on issues of intellectual property reform for the digital age. The UK, for example, has been deluged in the last 4 years with numerous reports and consultations primarily from the Strategic Advisory Board on Intellectual Property (SABIP) created in 2008 under the auspices of the UK Intellectual Property Office - an executive agency of Department for Innovation, Universities and Skills.

The UK Gowers Review (2005) on Intellectual Property when asked whether UK intellectual property law was fit for purpose in an era of globalisation, digitisation and increasing economic specialization had answered with a qualified 'yes'. With refreshingly clear focus, clarity and a healthy pragmatism Gowers had set out a series of principles upon which reform of intellectual property law could be based.

Such clarity however has been lacking in the subsequent proposals (IPO, 2007).

Foremost in these were reports of the Strategic Advisory Board on Intellectual Property (SABIP). SABIP was set up following a recommendation of the Gowers Review of Intellectual Property and was operating as a non-departmental public body providing strategic independent advice to Government on Intellectual Property policy. The responsible UK government department the Department for Business, Innovation and Skills announced in July 2010 the streamlining of its organizations and SABIP was dissolved. One particular report commissioned by SABIP, *Copycats? Digital Consumers in the Online Age* (SABIP, 2009a) (undertaken by UCL's Centre for Information Behaviour and the Evaluation of Research (CIBER)) evidences this confusion. This report evaluates digital consumer behaviour and attitudes and its implications for intellectual property policy. In a somewhat erratic and hysterical report the authors conclude that the scale of the "problem" is "huge" and growing. Consumers are confused about what is legal and that in the online world there are fewer cues to guide behaviour. As such there is a powerful idea that there is 'no victim', and so 'no crime'. Little clarity was provided as to possible reforms.

Further confusion then came from a set of consultations emerging from the controlling government department, the Department for Business Innovation and Skills Consultation on Legislation to Address Illicit P2P File-Sharing (DBIS, 2009). After initially accepting the approach of the Digital Britain Report (2009) some three months into the original consultation in a supplement the department commented that 'its thinking had developed' (DBIS, 2009) and that it was now minded to introduce a series of more draconian measures against file sharers. Other than stating that 'some stakeholders have argued strongly that none of the technical measures is powerful enough' there appears to be no evidence provided to justify refusing to endorse and carry forward the original recommendations contained in the Digital Britain Final Report.

With several and varied messages coming from these reports and consultations it would have been reasonable to expected legislative activity to be placed on hold to enable some form of consolidation to take place, but this was not to be the case as the government pressed ahead with legislation in the form of the Digital Economy Act 2010.

The UK has not been not alone in failing to find clarity in this area of reform. Numerous

European countries as well as the European Union appear to have been influences by 'rights holders'. The European Parliament voted in April 2009 to extend copyright on sound recordings by 20 years, and in September 2009 the French National Assembly adopted the so called three strikes law that could lead to suspension of internet connection, a compromise finally being hammered out in December 2009 in the Telecoms Reforms. Most recently the Irish High Court in *EMI (Ireland) Ltd and Ors v. Eircom Ltd* [2010] IEHC 108 has endorsed a three strikes policy in Ireland.

2. Rational for Reform - the Record Industry.

The record industry (a subset of the music industry, part of a collection of creative industries which as a whole accounted for a significant 7.3 per cent of the UK Gross Value Added in 2004[2]) can be characterised as being dominated by a small number of global players, the four major record labels being Sony Music Entertainment, EMI Group, Warner Group and Universal. Together these labels worldwide accounted for 81% of album sales and 84% of single sales in 2009. Each has significant resources that the industry has exploited in lobbying for changes in intellectual property regimes.

Converging technologies of digitization, compression and the internet have brought opportunities and threats to the record industry. The industry has claimed that it has suffered as a result of digital technology, that there has been a decline in revenues and the traditional relationship between label and artist has been placed under strain. Digital technologies do pose different challenges to the role and scope of intellectual property regimes (IPR) which impact on traditional business models. Digitization of recording and compression of songs, twinned with the internet, has led to the rise of peer to peer systems with the consequent increase and rapidity of dissemination of music. The nature of digital technology means listening and sharing now involves copying, challenging traditional ideas of use. Computerised sampling and personal computing allows recording and mixing at a fraction of the cost of professional studios, removing the distinction between producers and consumers, enabling new forms of creativity born of the technology, but relying on the intellectual property of others. These so called 'non-exclusive' rights economies are by their nature stifled by intellectual property regimes born of exclusivity. The problem then as Renee Marlin-Bennett (2004) comments is:

'Who is making the rules about property rights? How are the rules being made? Are protections for rights holders strong enough? Do we need more rights and better enforced rights? How is the public interest protected? Are we preserving a global knowledge common'

This was referred to by SABIP in their report Strategic Priorities in Copyright (SABIP, 2009b) as the Paradigm Shift. They isolated this to mean:

First, the digital revolution has made widely available the ability to create, copy and distribute high quality digital content - including professionally produced material - often at markedly lower cost.

Secondly, it has led to the involvement of the individual consumer at each step of the process, including acting as copier and distributor of materials to the public on a wide scale, not just as end user as in the past.

Thirdly, the ease with which unlicensed copying and distribution can now take place means there may be greater difficulty on the part of rights holders in securing appropriate revenue from their work.

Embodying these into concrete proposals for reform SABIP in *© the Way ahead. Copyright in the Digital Age* (SABIPc) SABIP laid down a number of principles upon which reform of copyright should be based. The principles included the need for legislation to be technological neutral and in echoing Gowers (2006) the need to maintain a fair balance between creators, rights holders and users. Intellectual property regimes should adequately reward innovators by providing a clear set of rights but in doing so these rights should not be excessive so as to both stifle follow on innovators or prevent individuals, institutions or businesses from using content in ways consistent with usage in the digital age. As to how far both previous and current reform agendas abided by these principles is a matter to which I will now turn.

3. Copyright, Music and Technology

The Copyright Act 1710 (commonly referred to as the Statute of Anne) preamble states the function of the Act to be ' *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers*.' Copyright's responsibility to encourage learning therefore requires it to maintain a balance between the rights holders and a range of users. The Act was limited to printed materials**.** Copyright was adapting to the challenges of printing technology and so begins the close and inevitable relationship between copyright and technology. Technological challenges have required copyright to adapt and this has often seen in form of expansion of rights, in turn placing pressure on the balance between rights holders and others.

The first statutory references to music appeared in the British Dramatic Copyright Act 1833 and the United States Copyright Act 1831. A decade later 'sheet of music' was categorised under the heading of a book (British Dramatic Copyright Act, 1842 s.2) in an attempt to deal with the then greater threat of performance exploitation (British Dramatic Copyright Act, 1842 s.20). The major challenge of technology to copyright was to come at the 19 th Century with the developments of recording technologies that allowed for the first time performances to be both captured and copied. The first flash point was piano rolls where a thriving black market had developed. The legality of producing such rolls was questioned in 1908 in the case of *White-Smith Publishing Co. v. Apollo Co.* (1908) 209 U.S. 1, the US Supreme Court ruled that a mechanical reproduction was not a copy of the 'underlying musical composition', therefore the manufacture of music rolls for player pianos was not an infringement of copyright, there was no distribution of 'copies'. With the courts failing to respond to technology the matter was left to the legislators and the US Copyright Act 1909 and the UK Copyright Act 1911 were introduced. The 1909 Act consolidated provisions on copyright into one Act, introduced the proposition that protection was to arise out of the act of creation, without the requirement of registration, and recognised the rights of recording companies in their recordings and their exclusive rights to prevent reproduction and public performance (*Gramophone Co., Ltd. v. Stephen Carwardine Co* [1934] 1 Ch 450). The UK Copyright Act 1911 abolished the common law protection in favour of statutory protection, increased the term of protection to the

author's life plus 50 years, and provided protection for both published and unpublished works. Further protection for performances was later provided through the UK Dramatic and Musical Performers Protection Act 1925 which prevented the unauthorised recording, and subsequent dealing, of a performance without consent. Stronger protection was subsequently introduced through the Dramatic and Musical Performers Protection Act 1958, the Performers Protection Act 1963, and the Performers Protection Act 1972.

The technology of cassette decks and blank cassette tapes of the 1960's facilitated for the first time easy copying of the musical performance. The industry responded by claiming lost sales, categorising the use of such tapes as theft and lobbying for amendments to the Copyright Act (Firth, 2004, pp. 67-68). In the USA the Home Recording Act (1985) proposed a 'penny per minute' tax on audio cassette tapes. The bill failed to pass Congress and as a result no mechanism to redistribute the taxes has ever been developed. With no means to prevent copying and no mechanism by which to capitalise on the home recording market, the industry was forced to return to the courts. Actions were first brought against the manufacturers of recording equipment arguing that the manufacture and sale of such equipment was an act facilitating copyright infringement, so called secondary infringement. In *Sony Corporation of America v Universal City Studios, Inc* (1984) 464 U.S. 417 , ('the Betamax case'). the US Supreme Court held the video cassette recorder (VCR) to be a 'staple article of commerce' that could be used for significant no infringing used i.e., non-commercial time-shifting of recording programs for playback within the home. Accordingly, 'the sale of copying equipment, like the sale of other article of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes'. Indeed, it needs merely be capable of substantial non infringement uses.

Up to this point copying was based on analogue technology that stored the actual audio signals on or in the media. Such technologies suffered from significant disadvantages, copying (and distribution of copies) was costly and time consuming, with obvious degradation of quality during the copying process - the exception being digital audio recording which maintained the quality of the original but was still limited on all other points. In contrast the development of digital copying has no such disadvantages. The launch of digital recording devices led the US Congress in 1992 to pass the Audio Home Recording Act (AHRA) (mirrored in the EU Directive on Copyright in the Information Society (2001/29/EC). The Act laid the foundation for future legislation by imposing a tax levy on the sale of digital audio recording devices (DAR) and implementing the Serial Copy Management System (SCMS), (a precursor to digital rights management, DRM). SCMS was a system that enabled only first generation copies of digital recordings to be made. The royalty tax was up to $8 for each new digital recording device and 3% of the price of digital media. These taxes were to be paid by the manufacturers. Taxes were distributed to copyright owners in exchange for the waiving of rights against users using the technology within their homes, an action in line with the fair use exception under copyright law.

Hardly had the ink dried on AHR Act before the next wave of technological developments in the form of compression technologies arrived. The most common encoding format is MPEG-1 Audio Layer 3 (often referred to as MP3). These allowed music files to be significantly reduced in size without any perceivable drop in quality. In the US case of

Recording Industry Association of America (RIAA) v. Diamond Multimedia Sys. Inc., (1999) 29 F. Supp. 2d 624(C.D. Cal 1988) the RIAA attempted to halt the manufacture and sale of the Diamond Rio MP3 player claiming firstly that it serialised the copying of MP3 music, secondly that the player was a DAR, and as a result the player was not complaint with the AHRA. Despite claims by Diamond that the Rio was not a DAR, the courts ruled in favour of the RIAA but refused to bar the sale of the Rio, the RIAA failing to prove that sales would result in irreparable harm to its members. Upon appeal, the Ninth Circuit upheld the refusal to grant an injunction but overturned the ruling that the Rio was a DAR, and stated that it did not fall under the context of the AHRA - a significant ruling for the MP3 software and hardware industry giving the green light to development of subsequent generations of music players, both as separate devices or as incorporated in other technologies such as in mobile phones or personal computers.

The record industry was now faced with a series of converging technologies. A significant number of digital files held by users on CD's, a compression technology that reduced the size of music files by 90% without any obvious loss of quality and a burgeoning communications technology, the internet. These then spurned at the end of the 20th Century file sharing and peer to peer systems (P2P). The first and most successful P2P system was Napster. Within months Napster had upwards of over 20 million users. The industry again went against the provider of the facility rather than the user. In *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (Ninth Circuit, 2001) it was held that the Napster service was liable for contributory copyright infringement. Napster's centralised file sharing technology provided it with control over the infringing nature of its use. Unlike the VCR that ceased to be under the control of the manufacturer when it was sold to a user, Napster not only maintained control of its server but also could see the use to which is system was being put. As such it had a continuing obligation to prevent infringement. The decision was fatal to Napster that was forced to close in its non subscription form. This was to be first battle in a longer war. Latter systems attempted to bypass this ruling by moving to decentralised servers, however in *MGM Studios, Inc. v. Grokster, Ltd.* (2005) 545 U.S. 913, the US Supreme Court held that the P2P file sharing service could be held liable for copyright infringement despite it utilising a decentralised system and therefore unable to monitor or see the activity of its users. The decision found liability by introducing a new form of secondary copyright infringement where a party (in this case Grokster) takes positive and affirmative steps to foster copyright infringement by others. Grokster although operating a decentralized system had indicated sufficient affirmative a steps to encourage its users to use its system for copyright infringement.

Although there has been a significant reduction in file sharing there still remains a significant number of users of these and the more modern variant, Torrent. It wasn't until 2009 that litigation against Pirate Bay and 2010 against the most stubborn of P2P networks, LimeWire, was successful.

Rights holders didn't only rely on litigation but also developed an armoury of technology measures referred to as digital rights management system. Following the failed effort to develop copy protection for digital music with the Strategic Digital Music Initiative (SDMI), the film studios had been successful in imposing encryption systems (CSS) onto DVDs. Unlike the record industry that was faced with millions of DRM free digital music files being

held by users on CD's, the film industry was able to delay the launch of their film catalogues on DVD until after they had established the DRM technology. The record industry has tried several DRM systems with mixed success and with one abject failure. The industry has been more successful in introducing such systems on music downloads.

DRM changes the relationship between the rights holder and user, often reducing the previous rights of the user. This change had to be regularised by legislation. In the United States Digital Millennium Copyright Act (DMCA) 1998 builds upon the foundations of the AHRA and prohibits the circumvention of digital rights management (DRM), despite arguments that such provisions inhibit the legal doctrines of 'first sale' and 'fair use'. Litigation in *Universal v. Reimerdes* (2000) 111 F. Supp. 2d 346 (S.D.N.*Y. 2000)* upheld the validly of such systems despite claims that doing so contravened the First Amendment. Although the decision in *Skylink v Chamberlain* 381 F.3d 1178 (Fed. Cir. 2004) went someway to redressing the burden on users and places the burden of proof in relation to circumvention on the claimant

The DMCA attempts to provide some balance in its provisions by providing additional remedies in relation to circumvention of access control systems and leaving the circumvention of rights controls to existing copyright provisions. It has however been argued by Reese (2003) that this balance is challenged when rights holders use merged systems (that is merging access and rights controls) and courts considering such systems to be both access controlled and rights controlled systems.

The measures in the DMCA was in large part mirrored by the EU Directive on Copyright in the Information Society (2001/29/EC). DRM systems being legalised by Article 6. Although implementation of these pro DRM measures has lacked consistency and has prompted Hugenholtz (2000) to claim that the Directive is 'unimportant, and possibly invalid', so for example case law on the chipping of Play Station 2 computer games consoles including *Sony Computer Entertainment Inc v Ball (Application for Summary Judgment)* [2004] EWHC 1738 has shown different resort in different EU states. A compensation scheme for home copying (format shifting) was allowed under Article 5(2) (b) and schemes have been implemented in France, Spain and Germany but not in the UK. The Spanish scheme has recently been challenged in Case C-467/08 *Sociedad General de Autores y Editores (SGAE) v Padawan S.L* where the indiscriminate application of a levy on digital reproduction equipment contravenes the required balance between the rights' holder (benefiting from the levy) and those liable to pay the levy.

Copyright twinned with DRM has therefore become the most frequently employed means of protection of rights in the recorded entertainment (music, film, TV broadcasting), video games and software industry. But the result has often been the industry in conflict with its customers. Litigation against individual file sharers has often resulted in significant adverse publicity for the industry and DRM goes ' *against the way people experience, share and gift music, but, due to the contractual restrictions on use imposed by them, it has also been said that DRMs limit 'fair use' and 'personal use' of downloaded material* ' (Jackson et. al ,2005) The development and legitimating of DRM and the constant chasing of technology has raised concerns that rather than providing a coherent and balanced copyright regime, it has instead shifted the balance firmly in favour of the content owners, ushering in a cavalier attitude to user rights. It is now appropriate to turn in more detail to

the issue of balance.

Copyright should stimulate investment and innovation, exceptions to copyright should create a fair and balanced system enabling follow on innovators and encouraging competition. Reformed copyrights no longer merely exist to '*promote science and useful art*' (*Feist Publications Inc v. Rural Tel. Serv. Co* 499 U.S. 340, 18 U.S.P.Q.2d (BNA) 1275 (1991) (referring toArticle I, Section 8, of the United States Constitution) but have been extended to encompass the ability to control the use of content, thereby affecting follow on innovators. The move in copyright from a regime concerned only with the prevention of literal copying to one that controls content and so preventing derivative and transformative use has had significant impacts. The introduction of the DMCA and EUCD protects the interests of rights holders at the expense of consumers and other creators. Technological through DRM and its legislative backing, and case law developments have imposed crippling levels of protection on creative content, preventing present day artists access to this creative content therefore stifling innovation and creativity. The technology that had facilitated new forms of creativity has been turned to be used against innovation. As Vaidhyanathan (2003) concludes, techniques such as sampling, despite being used by many groundbreaking artists such as Led Zeppelin, Eric Clapton, the Rolling Stones, Bonni Raitt and Elvis Presley, are now prevented as a result of case law such as *Grand Upright Music Ltd v Warner Bros Records Inc* (1991) 780 F.Supp. 182 (S.D.N.Y.) and *Bridgeport Music Inc. v Dimension Films* (2002) 230 F.Supp2d 830, 841 (M.D. Tenn.) Gowers (Box 4.6) in addition attributes the death of the musical genre 'Hip Hop' to this series of cases.

Although the protection of intellectual property is undisputedly important in rewarding authors and creators for their creations, the increase of such rights has resulted in a significant imbalance and perpetual drift from economic efficiency within the industry, (Landes and Posner, 1989), so by way of example by delivering a crushing blow to the hip hop music scene. Case law serves to demonstrate that in a musical context the most significant drawback of the present copyright model is that all genres are assessed against the same tests of originality rather than acknowledgment of their contribution to music in an artistic sense.

4. Copyright Balance

This imbalance in copyright is the result of conflict between two very different perspectives on copyright and its role in creativity (Selfe, 2002). Copyright derived from a print culture preventing copying, giving individual rights and commodifying content, and music cultures emphasizing sharing, development and communal ownership and development**.** Lessig (2004) refers to this process is as the locking down and appropriation of culture, a process that will lead to a lack of diversity and choice.

The current reform agendas continue to reinforce this imbalance. Despite the UK Gowers Review aiming for a system of copyright that is fair and balanced and this aim being subsequently repeated by SABIP in *© the Way ahead. Copyright in the Digital Age (*SABIP, 2009) reform activity has resulted in legislation that is anything but balanced. Despite Gowers suggesting there was little or no evidence to justify increasing the copyright on sound recordings the European Parliament voted in April 2009 to extend this copyright by 20 years. The industry based report arguing that increased revenue would be ploughed

back to create new music http://www.ifpi.org/content/library/legc-study.pdf (LECG, 2007)

With regard to non internet copyright infringement, Gowers has made a number of recommendations to maintain balance and flexibility with intellectual property with particular reference to the creative (music) business. At the forefront was Recommendation 8, to introduce a limited private copying exception by 2008 for format shifting - no accompanying levies for consumers. The recently implemented UK Copyright (Permitted Acts) (Amendment) Regulations 2010 whilst introducing a number of welcome exceptions for educational institutions and libraries steadfastly ignores recommendations 8 on format shifting. The music industry exerted significant lobbying to prevent this exception being implemented. The result is millions of users are enabled by software supplied with MP3 players to format shift from their CD's to MP3 players, an activity most users believe to be legal but isn't. To have such a mismatch between the public perception and the actuality of copyright must be undesirable but unfortunately illustrates the inherent conservatism of the industry that may be its downfall. As Rick Rubin (2007) comments:

> *The future technology companies will either wait for the record companies to smarten up, or they'll let them sink until they can buy them for 10 cents on the dollar and own the whole thing.'*

Reform in relation to online copyright infringement fairs no better. The French National Assembly adopted the so called three strikes law that could lead to suspension of internet connections. A compromise was finally hammered out in December 2009 in Telecoms Reforms. [3] The Irish High Court in *EMI (Ireland) Ltd and Ors v. Eircom Ltd* [2010] IEHC 108, waved away objections to a private settlement reached between Eircom (the principal Irish Internet Service Provider) and four record companies which provides that Eircom will adopt a 'Three Strikes Policy' against its internet subscribers. Charleton J. held that the agreement did not contravene any relevant data protection law. The judgment champions the rights of the copyright holder and unfortunately continues the use of intemperate language describing the act of copyright infringement as 'theft', 'stealing', 'filching', and refers to the data subjects as 'copyright thieves'.

Finally the UK Parliament passed into law the Digital Economy Act 2010 with provisions designed to deal with P2P file sharing. The process has been somewhat tortuous with a bipartite consultation on legislation to address illicit P2P file-sharing by the Department for Business Innovation and Skills Several months of feverish activity led up to the announcement of the General Election in May 2010. The debate lacked balance with those opposing the legislation unable to counter the massive resources of the vested interests of the media industry. Even those who would have to bear much of the responsibility of monitoring and communicating with users, the ISP's were strangely ambivalent. Whilst the trade organisation the Internet Services Providers' Association (ISPA UK) echoed the familiar view that the Act was unworkable and that the music industry needed to look to more innovative business models individual ISP's with heavy media interests, and hence a foot in both camps such as BSkyB, were unwilling to be openly critical.

5. Digital Economy Act 2010

The Digital Economy Act 2010 received Royal Assent on 8 April 2010 through the 'wash-up', a process through which the government agrees with the opposition how to conclude business before Parliament is dissolved. Further regulations will be required before technical measures can be applied in cases of copyright infringements via peer-to-peer file sharing, or before a copyright owner can apply for a court order to block an infringing website.

Whilst avoiding the issue of orphan works (an amendment that would do a something to redress the balance in copyright) the Act contains powers to order internet service providers to take technical measures against subscribers (the obvious one being suspension of online access) in order to tackle online copyright infringement.

The Digital Economy Act 2010 now contains provisions for suspension of accounts. The Act itself requires ISPs (now clarified by sections 3.14 - 3.15.5 of the draft consultation code to be fixed ISPs with more than 400,000 subscribers, OFCOM 2010) to notify their subscribers if their internet protocol addresses are reported by copyright owners, in a copyright infringement report (CIR). ISPs will also have to furnish copyright owners with anonymised copyright infringement lists concerning subscribers whose CIRs exceed the threshold of illicit permissibility. In Online Infringement of Copyright and the Digital Economy Act 2010: Draft Initial Obligations Code issued in May 2010 OFCOM (the UK Communications Regulator) (OFCOM, 2010) proposes that notifications be sent to subscribers on receipt of the first CIR, on receipt of a second CIR a month or more later, then on receipt of a third CIR received a month or more after the second (the 'three strikes'). An ISP will then be required to keep track of the number of reports about each subscriber and compile, on an anonymous basis, a list (Copyright Infringement List, CIL) of those relevant subscribers who have received three notifications within a year. The copyright owner can acquire the CIL and after obtaining a court order to release the personal information of the subscriber can then commence proceedings against them. Any subscriber will be able to appeal to an independent body, which Ofcom is required to establish.

The proposed suspension or termination of subscriber accounts of accounts is fraught with danger. The lack of evidence (we have to make do with statements such as 'some stakeholders have argued strongly that none of the technical measures is powerful enough') means there is no justification in refusing to endorse and carry forward the recommendations contained in the Digital Britain Final Report. Further the suspension of accounts will lead to an increasing alienation between rights holders (and their performers and creators) and their users/consumers. Few industries would wish to adopt a business model that places them in conflict with their consumers. The suspension of accounts would also appear to be contradictory to the government approach of the last decade to develop and to enable citizens to participate in digital economy. Technological measures exist, and will continue to be developed and refined, that will make it difficult to isolate the real infringer, leading to the possibility of innocent users and families having their accounts suspended. The evidence from the previous two decades is that no matter how sophisticated the legislative, administrative and technical measures taken, resistance from consumers will result in leap frogging technologies being developed and utilised.

A suspension would not deter the determined user from accessing the internet; they may be able to access through the account of others, including Wi-Fi hot spots, friends and hosts of others who may have open access or insecure networks. As to the availability of such networks section 3.23 of the OFCOM 2010 consultation (OFCOM 2010) states that where a Wi-Fi network is provided in conjunction with other goods or services to a customer, such as a café, a hotel or a library, they are *likely* to be considered as 'qualifying ISPs'. This may have the effect of encouraging such providers to significantly increase security or reducing the availability of these networks to avoid potential liability.

The suspension of accounts and the consequent loss of freedom of expression continue a process of criminalising the infringement of intellectual property rights that has characterised the approach to copyright infringement in the digital age. This is unfortunate as it leads to calls for disproportionate remedies for such infringements. Criminalising ordinary people for illegally downloading music is counter-productive.

The Act fails to embody either of the above principles of being technology neutral and balanced as set out for copyright reform. Expectations that the Digital Economy Act will stop piracy, thereby saving the Creative Industry, may be short lived. A suspension of online services is easy to circumvent for an infringer and technology leap frogging will be inevitable and whilst pandering to the wishes of the rights holders it does nothing to maintain a balance in copyright through the obvious extension of copyright exceptions to format shifting and the use of orphan works. An understanding of history can and should inform new policy development. The unreported case *Tonson v. Baker* C9/371/41 (Ch. 1710) and the Betamax saga on *Sony v Universal* (1984) shows that legislation on copyright should not chase technology and attempted expansion of copyright may be harmful to rights holders. Technology should not be viewed as threat to rights or simply as a justification for continued copyright expansion. Technology provides innovative opportunities not only for users but for rights holders, the video cassette is now viewed as providing a much need alternative income stream to the movie industry.

Several European countries have also legislated a three strikes scheme and on the horizon is the 'super secret' International Anti Counterfeiting Trade Agreement (ACTA) containing proposals for the reduction in band speed and suspension (disconnection) of persistent file sharers. A draft of the ACTA proposes:

> *'that Parties should provide limitations on a service provider's liability for infringing activities provided that the service provider: a policy to address the unauthorized storage or transmission of materials protected by copyright or related rights* .'

The only example of such a policy given is

> *'the termination in appropriate circumstances of subscriptions and accounts in the service provider's system or network of repeater infringers.'*

What has been lost sight of is that copyright is not purely a private matter between individuals but also involves a public interest role, the origins of modern copyright are after all based on a requirement that copyright should have at its heart 'the encouragement of learning.'

6. Innovation

Intellectual property rights have increased in scope (the matter covered), size (length or nature of protection and reach (to derivative rights and reduction in fair use via DRM) driven by a need to combat technological developments. Technology has not however been the only driver for copyright expansion. Claims that enhanced intellectual property rights will encourage greater innovation have also been to the fore. For some the relationship between intellectual property regimes and economic progress and innovation is clear. Innovation drives economic progress, the utilitarian argument that intellectual property induces innovation and development abounds in the literature although it often is only part of a raft of justifications and as part of a wider debate on the scope of such rights. Zemer (2006) argues that theory and practice must not be isolated when considering any system of property rights; that theory must be considered more often if cultural and social aspects are to be correctly addressed.

Yet too often theory and reality never meet, intellectual property has been categorised as 'an evidence free zone' with little clear evidence of the impact of intellectual property on innovation. Intellectual property expansion is often 'faith based', irrational and self legitimating. Only now is there an effort to quantify the economic aspects of intellectual property (SABIP, 2009c and 2010). In reality other policies and incentives may give greater incentives to innovate. Landes and Posner in the context of the expansion of copyright into more and more derivative works conclude stronger copyright requires new authors to licence an increasing amount of copyright material, thereby raising the cost of new works and/or reducing their number. Similar economics apply to the cost of extending the copyright term which simply increase licence fees and do little to encourage the production of ideas. In summary, the link between intellectual property and innovation is neither obvious nor clear, increased intellectual property regimes may in some circumstances enhance creativity but not in all. A cursory look at the record industry illustrates this. Whilst records, perforated rolls and sound recordings gained protection in the UK, lack of intellectual property protection in the USA for sound recordings appeared not to prevent the development of a vibrant and profitable industry, clearly others factors were incentivising composers and publishers. Recently it was argued by EMI and Phonographic Performance Limited (a collecting society for performers) before the UK Gowers Review on Intellectual Property that an extension of the copyright term (and a consequential revival of copyright in past performances) for performers' rights was required as an incentive to the creative process. It is difficult to see the strength in this argument given that performers' economic rights, at least in their modern form, did not exist until their introduction in 1996 (Copyright and Related Rights Regulations 1996) and there appeared to be no impediment to development before then. Gowers was equally sceptical and rejected the claim.

Some writers have suggested that the rate of innovation is falling despite enhanced intellectual property regimes. Huebner (2005, pp 980-986) argues that innovation was highest in 1873 a date before international convention on intellectual property and times of generally weaker and smaller rights. However a report into copyright extension for sound recordings for the International Federation of the Phonographic Industry argued that increased revenue generated through such an extension would be ploughed back into

making more recordings, thereby increasing innovation (LECG, (2007). Most recently SABIP have posed the question *'Does stronger or weaker IP protection result in more or less innovation? Does this translate into stronger or better economies?* (SABIP, 2009c). A willingness to engage with the fundamental rational of intellectual property and attempt to gather evidence is to be applauded. Yet despite this obvious lack of evidence the industry has demanded ever larger intellectual property regimes on the back of claims that intellectual property encourages innovation and creativity. What evidence there is is inconclusive and contradictory and would appear to point to there being many motivations for such regimes creating a multi-tiered system for intellectual property theory that develops new themes. Intellectual property may encourage development and innovation in some situations but not all. Within the fast evolving internet environment enhanced intellectual property and enforcement rights are likely to stifle new business opportunities and decrease creativity. In a developing country that lacks the ability to innovate, intellectual property has little impact other than the effect of raising costs. The case for continued expansion of copyright is not made out and considerable efforts have been made to reduce copyright expansion and reduce its scope, (Lessig, 2004).

7. Record Labels - A Future?

There is no shortage of people queuing up to acknowledge the death of the label (G. Philipson, 2008 and M, Galliford, 2009). Artistes now have direct access to their fans. Social networks facilitate word-of-mouth marketing ensuring the best artists rise to the top and simple payment and download software enables anyone to sell their music directly.

However the converging technologies of digital music files, compression software, SNS and the internet provide new business opportunities for the record industry. It is unlikely that commercial uses of music, such as radio stations would be interested in dealing individually with every creator or rights holder. Releasing an album has many levels of complication, generating distribution, endorsement deals, touring, and marketing probably beyond the scope of many artistes meaning that labels still have a role.

What may emerge will be a recording industry conscious that artists are able in part to self promote through technology but recognising that they need to be in some relationship with a label that is able to provide their round support. Models such as the 'multiple-rights deal', or as it is more commonly known, the '360° deal' where labels still acquire their standard cut of CD and digital download sales, but they also receive a percentage of almost every revenue-generating venture the artist inks, including merchandise sales, endorsement deals, touring and advertising. Not only does this transform record labels into full-service entertainment companies, but it also transforms artists into brands.

Additionally labels must embrace the technology and consider the many alternative revenue streams available, music subscriptions bundled with the price of internet access and services like Nokia Corp.'s *'Comes with Music'*, which gives users of select mobile phones a year's worth of unlimited access to music, for no extra charge. Significant revenue streams exist for record labels has come from alternative licensing schemes. These include, 'Synch Licensing' 'Product Licensing' and 'Digital Licensing' via Apples, 'iTunes' a proprietary digital media player application, used for playing and organizing digital music and video files.

Alternative business models are also being tried (Lindvall, 2009). 'Spotify', the online music streaming service has been providing record labels with a significant amount of revenue since it was launched back in October 2008. Sony Music Entertainment and YouTube. The two companies brokered a deal in which Sony provided music videos for the video streaming website and in return, they received a large upfront payment. The 'Choruss licensing project'. Proposed by digital music strategist Jim Griffin on behalf of Warner Music Group, Choruss has been incubating since March 2008 and if introduced would build a small music-royalty fee into the tuition payments U.S universities receive from students. These payments would then be distributed to all relevant copyright holders including record labels. There is contrary evidence as to the market penetration of the new business models. Consumer Focus, the UK's consumer watchdog, says that nine out of ten consumers who are aware of online music services, have only heard of two established brands - iTunes and Amazon and Consumer. However BPI's Harris Interactive research of 3,442 respondents in November 2009 showed 96% had awareness of iTunes/Amazon/7 Digital/HMV (etc); that 87% had awareness of subscription services like Napster, eMusic (etc); that 87% had awareness of music direct from artists sites; that 86% had awareness of being able to obtain music via mobile handsets; and on streaming services, 55% had awareness of Spotify, 52% had awareness of last.fm and 31% had awareness of We7. [4]

8. Conclusion

The record industry has succeeded in lobbying for the increase in copyrights reach, backed by arguments as to loss of revenue. It must however take some responsibility for the decline in revenues. Instead of monetizing and embracing the new technologies brought about by the digital revolution, labels resisted the changes, lobbied for increasingly draconian laws to protect their interests and served law-suits on those who downloaded and shared music illegally. It has been argued that rather than suing Napster, labels should instead have brokered a deal. At its peak, Napster had 26.4 million users, representing a major opportunity for the labels to monetize file sharing in a manner similar to the way performance royalties are collected from restaurants or radio stations and avoid alienating their customers by hauling them into court. Whilst the industry was busy trying to close Napster and legalise its restrictive DRM systems millions of its users were migrating to new P2P platforms and providers.

Intellectual property regimes do not exist solely for the benefit of rights holders, copyright should be balanced. Extensions to copyright and its enforcement should be justified on the basis of the interests of consumers and users and not just rights holders. Perceived threats from technology have driven copyrights expansion, but the evidence base upon which the actual or future losses for the creative industries is based is flawed and unreliable. The hysterical language used in *Copycats? Digital Consumers in the Online Age* (SABIP, 2009a) has not aided the process of determining loss (if any) and any corresponding benefits.

The resultant intellectual property regimes fail to provide a sufficiently clear and efficient regime of ownership and transfer of rights, and fail to provide a balance between the rights claimers, users, innovators and the public interest. The consequence to the record industry is that it fails to provide variety, diversity and choice at a time when interest and usage in music is increasing. The industry now fails to provide clarity in vision for its users

with conflicting strategies designed either to win them back or to alienate them, branding users as thieves and pirates.

Outside the sightline of the 'major' creative industry players there exists a vibrant set of minority of genres where a system of rights focusing on exclusive, monopolistic and long-lasting ownership rights has little or no bearing. Minority musical genres (such as Hip Hop) have been stifled by the continued growth in intellectual property rights and enforcement. Adopting these punitive measures in relation to P2P will further bear down on minority musical genres (such as folk and world music), music that depends for its development on it being actively shared and developed.

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