

MEDIA POLICY BRIEF 9

Copyright & Creation

A Case for Promoting Inclusive Online Sharing

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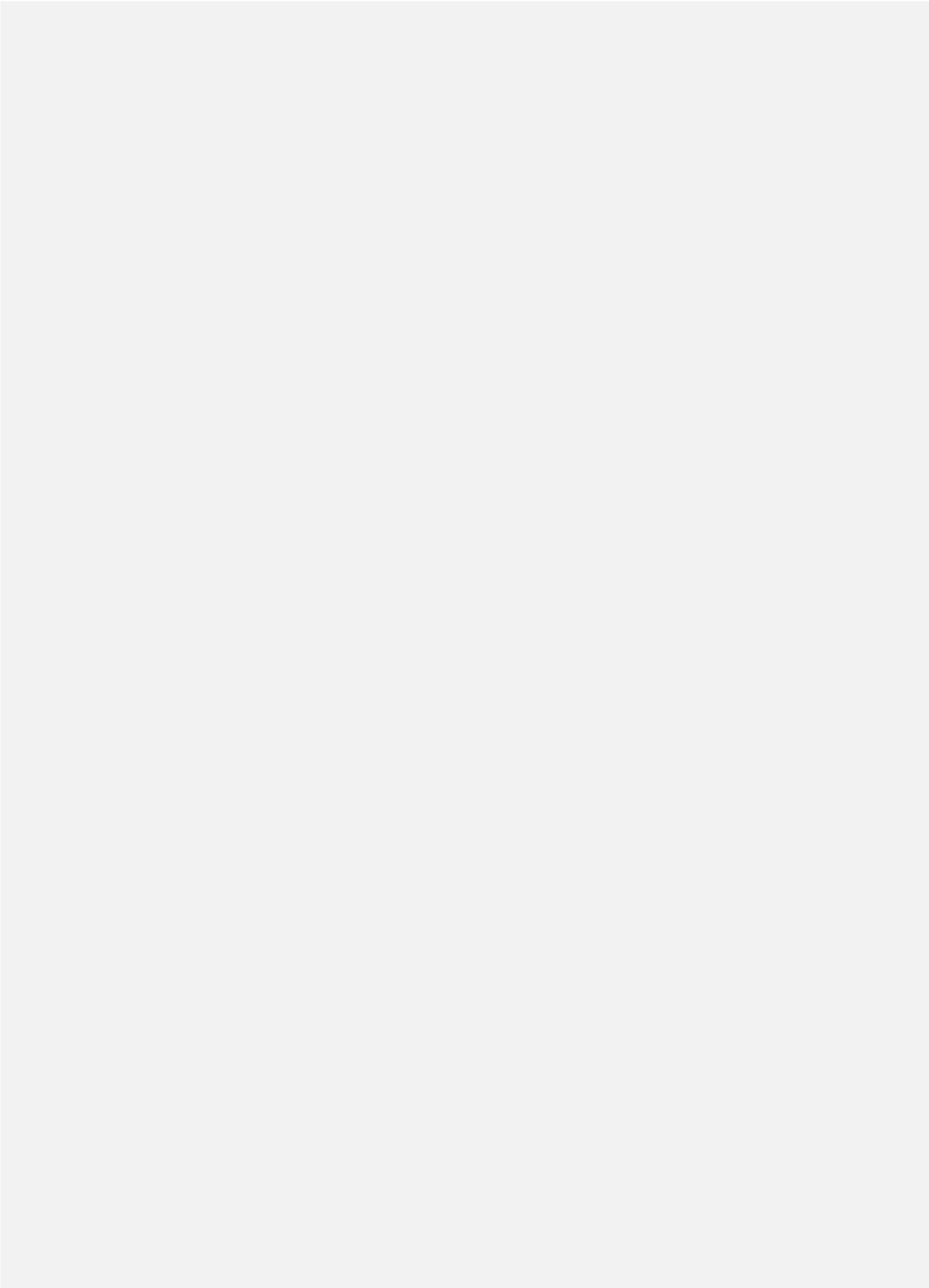
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KEY MESSAGES

- The creative industries are innovating to adapt to a changing digital culture and evidence does not support claims about overall revenue reduction due to individual copyright infringement.
- The experiences of other countries that have implemented punitive measures against individual online copyright infringers indicate that the approach does not have the impacts claimed by some in the creative industries.
- A review of the UK Digital Economy Act 2010 is needed based on independent analysis of the social, cultural and political impacts of punitive copyright infringement measures against citizens, and the overall experience of the creative industries.



INTRODUCTION

The implementation of the Digital Economy Act (DEA) 2010 is not expected before 2015, a lengthy delay. The September 2013 report of the House of Commons Culture Media and Sport Committee fervently advocates quick implementation, despite evidence of controversy.¹ This policy brief contributes to debate about the DEA's measures for copyright enforcement by examining evidence on the way a changing digital culture is affecting the creative industries and on the potential impact of the DEA's copyright enforcement measures.

The DEA introduced a graduated response to online copyright infringement, i.e. Internet Service Providers send warning notices to individuals who are suspected of infringing and pass anonymous lists of suspected infringers to the rights holders. The rights holders can go to court to request the identities of infringers in order to take action against citizens. If this approach is ineffective in suppressing online infringement, technical measures could be used such as limiting internet access.²

We published a policy brief on '[Creative Destruction and Copyright Protection: Regulatory Responses to File-Sharing](#)' in 2011 that examined online copyright infringement, practices of file sharing and its consequences for the music industry. Our key observations were:

- 1. Data provided by the music industry were misleading; contrary to what lobbying organisations were claiming, the music industry was doing reasonably well.*
- 2. Declining sales of recorded music (mainly CDs) could also be explained by factors such as a squeeze on household expenditure on leisure goods and changing patterns of music consumption.*
- 3. Declining sales of recorded music were offset by increasing revenue from live performances and growing digital revenues, including streaming services.*
- 4. Intervention to enforce copyright infringement legislation on individual file sharers risks stifling innovation and criminalises a thriving online participatory culture.*

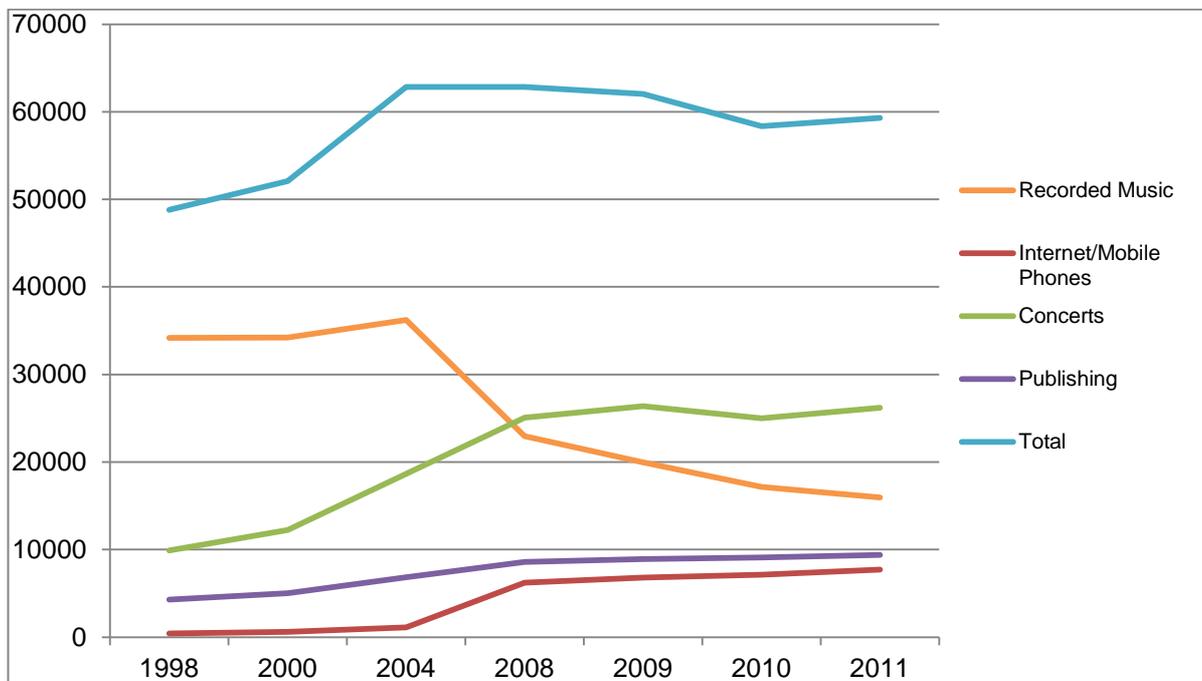
This policy brief provides additional evidence that counters claims that the creative industries are suffering overall revenue decline. We show that new business models are enabling the industry to gain advantage by building on a digital culture based on sharing and co-creating. We find that the experience of France and countries that have started to implement graduated response measures targeting citizens is mixed. We conclude the DEA should not be implemented and that the measures should be reconsidered based on an independent assessment of the social, cultural, and political impact of punitive measures against citizens, and the risk that incentives for innovation and growth will be weakened.

CREATIVE INDUSTRIES & COPYRIGHT

Creative Industry Revenues are not Declining Overall

Taking total revenues of the music industry into account - i.e. including revenues from concerts and publishing rights, these revenues have not declined as dramatically has been suggested; they have increased considerably from 1998 to the 2000s. These revenues have stagnated in the last few years, but the claims of many in the music industry about a dramatic decline in revenue apply specifically to the sale of CDs and vinyl. As Figure 1 shows, overall revenue of the industry in 2011 was almost USD 60 bn, and revenues from live performances and publishing rights largely offset the revenue decline associated with sales of CDs and vinyl.

Figure 1: Trends in Total Revenue of the Music Industry, USD Million



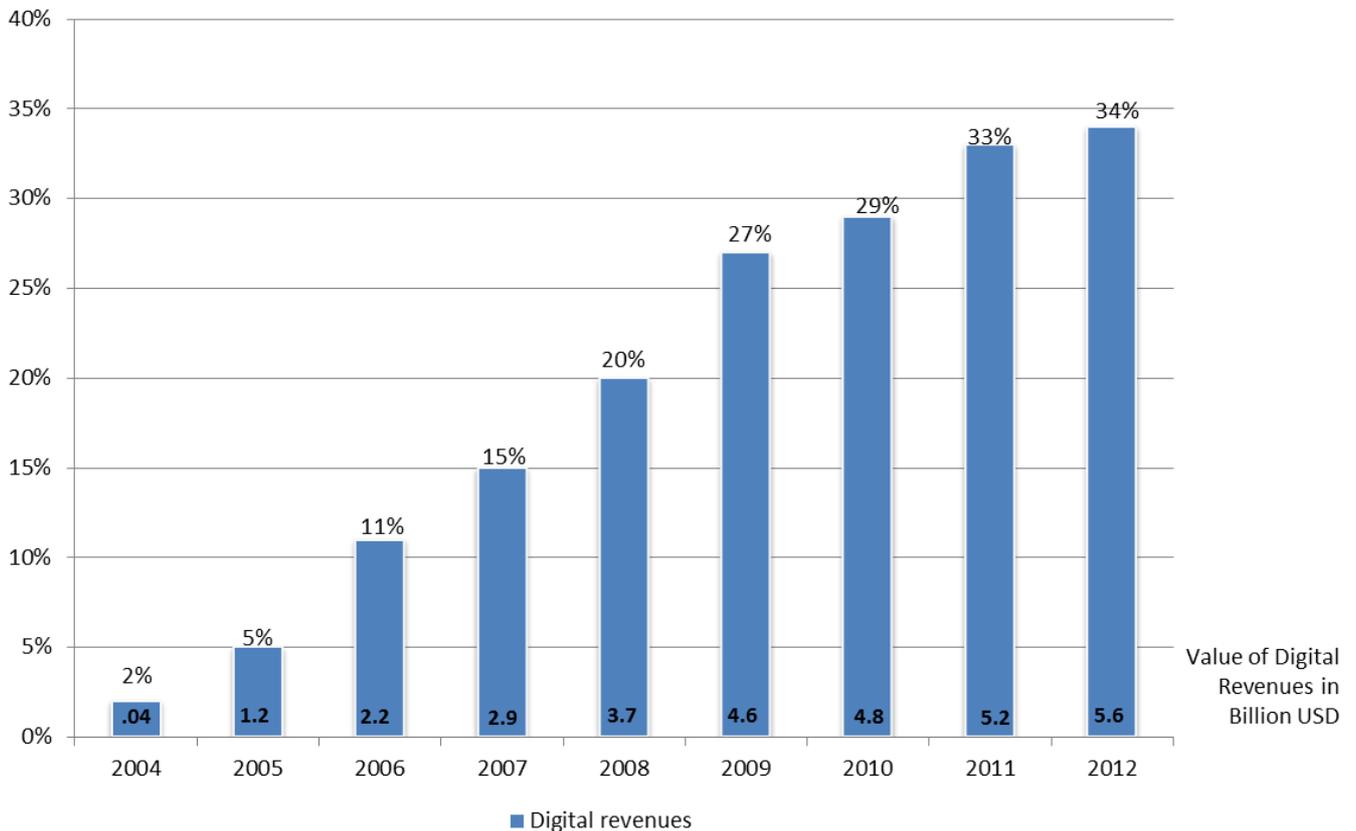
Sources: Recorded Music and Internet Mobile from PWC, 2012, Global Entertainment and Media Outlook, 2012 - 2016 (plus previous years). Concerts from 2008 onward from PWC and earlier from IDate 2009 and DigiWorld 2009; publishing revenues from [emarketer](#).³

The music industry may be stagnating, but the drastic decline in revenues warned of by the lobby associations of record labels is not in evidence.

The music industry has experienced overall revenue growth in recent times. In 2013, for the first time, UK revenues from online music were higher than revenues from CDs and vinyl combined (55% for online and 45% for CDs and vinyl of total revenues from sales of recorded music).⁴ In

2012 some 34% of revenue globally (excluding revenue from live performances) was generated by digital channels including streaming and downloads, up from 27% three years earlier (see Figure 2). In addition, worldwide sales of recorded music increased in 2012 for the first time since 1999.⁵

Figure 2: Digital Revenues as a Percentage of Total Revenues from Recorded Music in Absolute Values, USD Billion



Source: IFPI digital music reports

The data on changing sources of revenue show that new business models such as streaming and subscriptions are growth areas. They are bringing in increased income for the industry. This suggests that had the music industry started to adapt to the digital environment earlier, rather than trying to fit the new digital culture into their old business model, the record companies could have witnessed growth much earlier.

Revenue from online sources including recorded music sales, streaming, online radio, subscriptions and other is increasing, both absolutely and as a percentage of overall revenue.

Other segments of the creative industries have adapted more quickly. Despite the Motion Picture Association of America’s (MPAA) claim that online piracy is devastating the movie industry, Hollywood achieved record-breaking global box office revenues of USD 35 bn in 2012,

a 6% increase over 2011.⁶ While US film industry revenues from the sale and rentals of DVDs have decreased by 10% (USD 4.7 bn) from 2001 to 2010, total global revenues for the US industry increased by 5% or USD 4.5 bn over the same period. The US film industry was worth an estimated USD 93.7 bn⁷.

The digital gaming industry is also thriving and introducing innovative ways of generating revenue. It is working with the online participatory culture, rather than against it. The gaming industry has been generating new income streams very successfully by developing combinations of free advertising models, in-apps buying and micro pricing. It is projected to grow at 6.5%, with estimated total revenues of USD 87 bn in 2017, up from 63 bn in 2012.⁸

Similarly, the publishing industry is performing relatively well with a strong capacity for innovation and with a record of revenue stabilisation.⁹ In 2013, the global book publishing industry was worth some USD 102 bn, larger than the film, music or video games industries. Although revenues from print book sales have declined, this has been offset by increases in sales of eBooks and the rate of growth is not declining despite reports lamenting the 'end of the book'.¹⁰

Some segments of the creative industries – film, gaming and even publishing – are growing and their revenues are increasing.

An Inclusive Collaborative Digital Culture has Emerged

Many ways of producing and distributing content via digital networks do not rely on exclusive ownership of creative works. Studies show that in the case of crowdsourcing and crowdfunding of creative projects, for example, financial compensation is not always the primary reason that people participate in cultural production.¹¹ Exclusive ownership of intellectual works is not the only incentive that sustains their production.

SoundCloud allows artists to choose to retain copyright or use Creative Commons licenses which let others add on, re-mix and co-create with them.

Creative Commons (CC) licenses are increasingly in use to facilitate easier and non-exclusive sharing of creative works. The use of CC licenses grew from 50 million in 2006 to over 450 million in 2011.¹² The German based [SoundCloud](#) site enables artists to share their own music productions or live mixes and to decide which type of license to use: for instance, to retain all their rights or to release their music under a CC license.

SoundCloud is free to use, but it also offers premium service. Founded in 2007, SoundCloud grew to 10 million users by 2012.¹³ Sites such as this demonstrate that sharing music can stimulate music creation. Indaba, for instance, is an online community for musicians that enables its users to make remixes from material posted under a CC license by others, thereby stimulating collaborations among musicians.¹⁴ The increasing variety of online creative practices means that some representatives of the creative industries are becoming less concerned about copyright infringement through individual file sharing. Many musicians share their music and are very happy for their fans to download their music, envisaging future sales.

Insisting that people will only produce creative works when they can claim exclusive ownership rights ignores the spread of practices that depend on sharing and co-creation and easy access to creative works; this insistence privileges copyright owners over these creators.

The marketing benefits and sales boosts arising from the sharing of films online are starting to be seen as compensating for losses in revenue due to infringing sharing,¹⁵ and the digital world is thriving on ubiquitous digital content sharing.¹⁶ For instance, the 10 million user generated videos of Gangnam Style by South-Korean musician PSY on YouTube demonstrate how attractive and vibrant the online sharing culture has become.¹⁷ There are many less well known examples across the web. An IPO report on parody also confirms that such participatory online practices are gaining favour and benefiting those who are able to build a global brand.¹⁸

Ofcom's consumer tracking study found evidence of increasing use of legal music streaming services with growth in the availability of mixed 'paid and free' services. This study indicated that awareness of the availability of streaming services is growing, but that there have been no significant changes in attitudes towards online legal and infringing online consumption.¹⁹ In fact, file sharers in the UK were found to spend more on content than those who only consumed legal content, demonstrating the potential boost to legal digital content sales as a result of content sampling. There were differences in the level of infringement across content types, with music and TV programs being the highest, followed by films, video games and, considerably lower, computer software and books, indicating that some segments of the creative industries are adapting to the digital culture faster than others.

Within the creative industries there is a variety of views on the best way to benefit from online sharing practices, and how to innovate to generate revenue streams in ways that do not fit within the existing copyright enforcement regime.

Lessons from Enforcement Measures against Individual Infringers

The DEA targets its copyright enforcement measures at blocking web sites identified as being involved in copyright infringement and at cautioning and penalising individuals identified as copyright infringers.

In France the 2009 HADOPI law adopted a similar graduated response to individual online copyright infringers. By mid 2013 the implementation of the HADOPI law had resulted in some one million first warning letters being sent to those suspected of infringing with further letters to some 100,000 Internet Service Provider subscribers. Approximately 300 case files were being reviewed for possible referral to the public prosecutor and there had been no suspensions of internet access.²⁰ A survey by the HADOPI agency created to administer the Law showed an increase in legal content consumption and a decrease in illegal consumption of around 5% in 2012, two years after implementation. Directing media users to legal platforms also seemed to be effective in boosting legal sales with iTunes sales increasing by 23 to 25% after HADOPI's implementation.²¹

The evidence was that the increased sales observed were more strongly related to the education component of HADOPI than to the enforcement component of the implementation measures.²² In 2012 the French Minister of Culture criticised the agency suggesting that its €12 million annual cost could have been invested better in developing legal platforms.²³ In May 2013, a government-commissioned report recommended that HADOPI be abolished.²⁴ The Government decided to temper the HADOPI sanctions against individuals, removing the option of banning infringers from using the internet and imposing relatively small fines instead.

A 2013 report by the European Commission's Joint Research Centre on online music consumption in France, Germany, Italy, Spain and the UK looked at clicks and visits to legal and illegal services. It showed that digital music 'piracy' did not displace legal music purchases in digital format and that the majority of music consumed illegally would not have been consumed if it was not freely available. It observed that, in France, HADOPI may have affected consumer choices and also that France had the highest content streaming rates compared with other countries, indicating the fast pace of changes in technology and online digital content services.

The response to this study by the International Federation of the Phonographic Industry (IFPI) was swift. It criticised the methodology for relying on clicks and visits rather than on transactions leading to purchases or illegal downloads. It found fault with the lack of distinction between

categories of music, e.g. singles vs. albums, and claimed there was no evidence of cause and effect relationships. It also said that

*“the findings seem disconnected from commercial reality, are based on a limited view of the market and are contradicted by a large volume of alternative third party research that confirms the negative impact of piracy on the legitimate music business”.*²⁵

This highlights a major problem with the claims and counter-claims about the impact of online copyright infringement by individual users. The large companies and their lobbyists in the creative industries refer to studies that they commission; while opponents cite alternative studies. The opponents have little or no access to the methodologies and assumptions built into the studies commissioned by these large players. Unfortunately, governments have little alternative but to rely on the studies commissioned by those in the creative industries who claim drastic revenue reduction and are forced to take the results as the best ‘facts’ available.²⁶

In the Judicial Review of the DEA in 2011 sought by two of the largest ISPs in the country, BT and TalkTalk, the judge said that he was willing to accept that implementation of the Act could have a chilling effect on internet use – despite the Government’s claims about promoting innovation.

*“I accept that the chilling effect is now a well-documented phenomenon, and I acknowledge that the concerns of the Interveners are genuine and that there is in the present context a risk of some chilling effect. The difficulty again is to assess, at this stage, the likely magnitude of such an effect”.*²⁷

But without evidence from the Act’s implementation, he argued it would be premature to conclude that any chilling effect will outweigh the benefits of suppressing infringing file sharing and enhanced copyright protection. He found that the evaluations presented by the government, the creative industries and the Internet Service Providers were not of “scientific evidence, but of competing economic arguments” and conflicting interests:

“How these competing and conflicting interests should be accommodated and balanced appears to me to be a classic legislative task, and the court should be cautious indeed before striking down as disproportionate the specific balance that Parliament has legislated”.

Targeting individual internet users is not likely to reverse the trend toward an online sharing culture, and there is an urgent need for independent verification of claims of harm to the creative industries as a result of individual copyright.

RECOMMENDATIONS

Disputes focused principally on revenue impacts neglect the fact that the online world is changing. Revenue streams are proxies, and inadequate ones at best, for the massive changes in the online sharing culture that lets citizens and consumers enjoy many new opportunities for creative production, a growing number of which are inconsistent with the balance established by current legislation between their interests and those of the creative industries.

The implementation of the DEA has stalled. The implementation date has been pushed out to 2015, after the General Election.²⁸ In 2010 it was claimed that implementation would generate a 70% reduction in online copyright infringement (using file sharing). This seems increasingly unrealistic given the evidence presented here. It is time to re-evaluate the DEA legislation.

We recommend a review of the DEA copyright enforcement measures in the light of the experience of France and countries that implemented a graduated response approach based on independent analysis of the social, cultural and political impacts of punitive copyright infringement enforcement targeting individuals.

Analysis could draw on independent evidence of the impact of the implementation of the voluntary memorandum of agreement for a Copyright Alert Systems between leading ISPs and rights holders and the Center for Copyright Information in the US.²⁹ It could draw on the work of European Observatory on Infringements of Intellectual Property,³⁰ which is guided by the largest creative industry firms, the European Consumer Association and business associations representing small and medium sized enterprises. Their diverse interests might yield an independent evidence base since the Observatory is mandated to deliver independent data and assessments that are lacking so far.

'Digital rights' or internet-related human rights are becoming more prominent on the political agenda. The growing use of streaming, cloud computing and digital lockers full of infringing content,³¹ is attracting the attention of the creative industry, suggesting that claimed revenue damage from citizen file sharing will soon become a secondary concern and that these new developments will spur them on to launching more legal services for internet users.

The court may be "cautious indeed before striking down as disproportionate the specific balance that Parliament has legislated"³² with respect to copyright enforcement, better legislation,

carefully conceived and based on robust empirical evidence, would have a better chance of responding proportionately to both the sharing digital culture and the economic interests of the creative industries.

We recommend a review of the DEA and related legislation that strikes a healthy balance among the interests of a range of stakeholders including those in the creative industries, Internet Service Providers and internet users. Fitting the digital sharing culture and new forms of cultural production into a copyright enforcement model that is out of touch with today's online culture will only suppress innovation and dampen growth.

Policy actors throughout Europe are seeking new means of balancing citizen's rights and other stakeholder interests in online digital content. It is not necessary to abandon copyright law to extend citizen online freedoms, civil liberties and privacy rights.

Broader 'fair use/fair dealing' provisions, proposals for private copying exceptions and aiming copyright enforcement and prosecution at infringing businesses instead of at citizens who share online is likely to have the desired effect of balancing the interests of the creative industries **and** citizens. When both can exploit the full potential of the internet, this will maximise innovative content creation for the benefit of all stakeholders.

Evidence-based legislation on copyright enforcement is needed that independently assesses the claims of the dominant creative industry firms and the impacts on users in the light of today's digital culture.

NOTES

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LSE MEDIA POLICY PROJECT

ABOUT:

The Media Policy Project aims to establish a deliberative relationship between policy makers, civil society actors, media professionals and relevant media research. We want policy makers to have timely access to the best policy-relevant research and better access to the views of civil society. We also hope to engage the policy community with research on the policy making process itself. We plan to examine how policy issues emerge on the agenda and how networked communications may aid stakeholder consultation.

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