

BRITISH
MUSIC
RIGHTS:



CONTENT ONLINE BMR SUBMISSION

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British Music Rights¹ represents over 50,000 composers, songwriters, music publishers and their UK collecting societies (MCPS-PRS) and welcomes this opportunity to respond to your public consultation on *Content Online in the Single Market*. In addition to our comments below, we fully support the cross industry submission drafted by Intellect on behalf of the UK Broadband Stakeholders Group.

Executive Summary:

Our constituency of music writers and publishers has a proactive approach to music licensing which was born out of the radical changes to the music publishing business in the early to mid 20th century when recorded music overtook sheet music as the predominant way people consumed music. At that time, the music publishing business shifted from being an industry that sold units (of sheet music) to one that licensed the use of music in any and every legitimate way in which users wished to use it (e.g. in recorded music, in films, adverts, broadcasts and live performance). As a result, the music publishing business has had the licensing mindset which is so crucial to the digital world for decades and is therefore well placed to exploit the opportunities and new revenue streams generated by digital technology. The rewards of this approach are already becoming clear (see main submission for online and mobile figures).

Recommendations:

We believe that there is little need for intervention in an embryonic yet fast growing content online market. To the extent that intervention might be required, we believe that it is well covered by existing or planned initiatives at European level, in particular those relating to copyright and E-commerce¹, as well as other initiatives at national level. In addition, the constant surveillance of the market by European and national competition authorities is vital.

We would therefore urge the European Commission to:

- Uphold the *Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services* as the best framework to promote right holder choice which is already giving rise to a competitive environment in which the most efficient, transparent and well-governed collecting societies will be engaged to manage rights for cross border online use. This promises to stimulate growth in the entire online market by creating greater efficiency for both rights owners and users.
- Conduct a full reassessment of *Articles 12-14 of the E-Commerce Directive* on liability of internet intermediaries. Tightening safe harbours would force a closer partnership between rights owners and digital intermediaries and lead ultimately to more legitimate services – including P2P services. This would yield more diversity in legal music services for consumers and ensure that creators are remunerated for the distribution and copying of their works.

¹ Current and planned initiatives of relevance include: Commission recommendation on collective cross-border management of copyright and related rights for legitimate online music services, Consultation on levies, Review of the Television without Frontiers Directive, Review of the EU Regulatory Framework for electronic communications networks and services, Review of the copyright acquis, Review of the E-Commerce Directive, Review of the eCommerce Directive, Potential review of Satellite and Cable Directive.

- Build on initiatives such as the Film Online Charter to promote *dialogue* across the value chain. In a dynamic and fast changing environment, dialogue is of utmost importance, especially when different sectors within a new value chain have both shared and conflicting business goals.





Introduction

Music has been at the sharp end of online developments for nearly a decade. Despite an inauspicious start (the online market was initially 100% pirate), over 5 million UK consumers are expected to be paying for digital music online by 2009, whether via an iTunes style pay-per-download model or through subscription services such as Napster and HMV Digital – a five fold increase on 2004 numbers. Music is also set to account for nearly 30% of total UK spend on online content and services by 2009 – well beyond other services.

Exhibit 1: Number of UK buyers of online content (000's)²

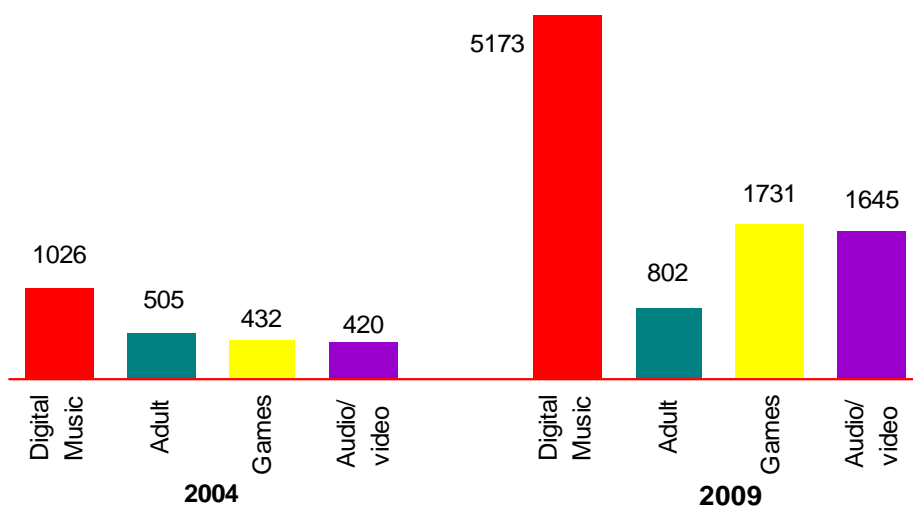
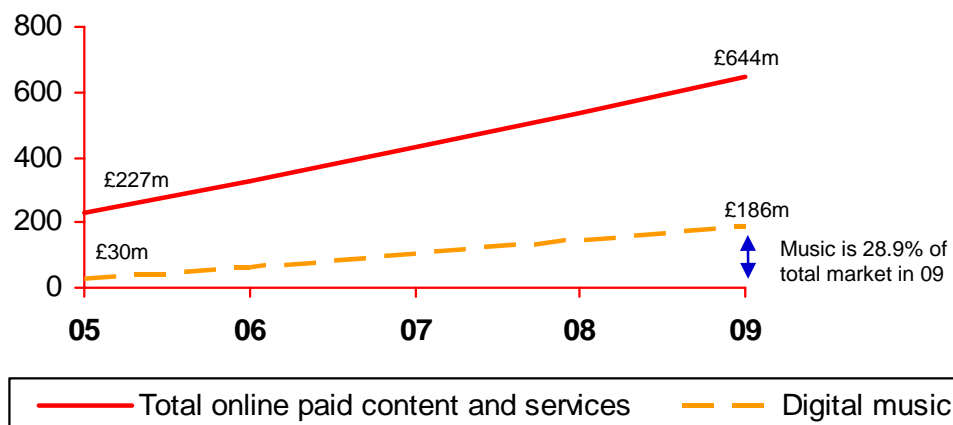


Exhibit 2: Growth in UK paid online content and services £m (2005 – 2009)³



² Jupiter, European Paid Internet Content and Service Revenues report February '05, Spectrum analysis

³ Jupiter, European Paid Internet Content and Service Revenues to 2009 Feb 2005, Screen Digest Sept 2005, Spectrum analysis

In addition, new and innovative services are emerging which employ P2P technology to build fully authorised music sharing services free of the viruses and spyware associated with illegal P2P networks. These include the following:



Q.1. Do you offer creative content and services online?

Q. 8-11 New Business Models and the transition of old ones into the Digital World.

Our constituency of composers, songwriters, music publishers and the MCPS-PRS Alliance (collecting society) has been instrumental in driving growth in the online music market. As early as 1997 they developed the first licences for online exploitation. In 2002 they then created a much simplified licence – the Joint Online Licence (JOL) - which offered music users both the mechanical licence and the performing licence in one single step⁴. And with the societies' links to their sister societies in the EU and beyond, the licence is able to offer the user global repertoire for use within the UK territory. The broad terms of the JOL licence also gives users the flexibility to experiment with a variety of different business models under the same licence without having to renegotiate each time.

Via the JOL and other licences, our members have authorised the use of their music in a range of different services covering: downloads, streaming services, legal P2P, podcasts, virtual internet worlds (i.e. computer simulated environments) and various mobile uses. See Annex 1 for a list of online services licensed by MCPS/PRS. The MCPS-PRS is currently in licensing discussions with the advertising driven free music service, Spiral Frog, as well as “community” websites such as MySpace and Youtube which have become a hunting ground for A&R executives looking for new talented music writers and artists. The licensing of these sites will ensure that established creators are paid when their work is used, shared or sampled – and will

⁴ In the offline world there are two main ways of licensing music:

(i) The performance right, including the communication of the work to the public by TV/ Radio broadcast or making available on the Internet (administered by the Performing Rights Society); (ii) The mechanical copying of a work, its reproduction on a physical device such as a CD (the mechanical right administered by the relevant collecting society the Mechanical Copyright Protection Society).

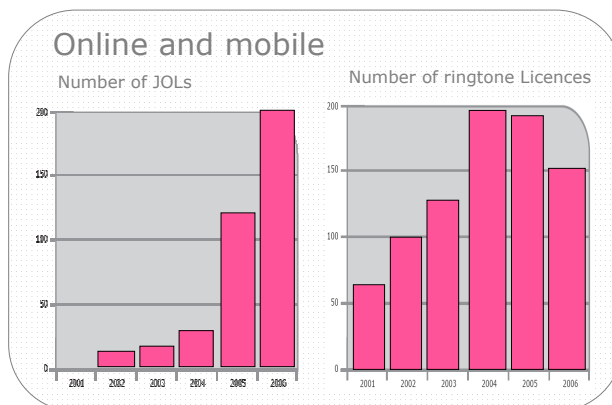
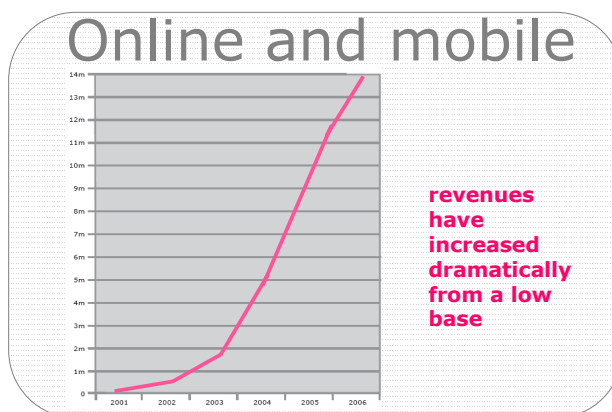
In the online world, the downloading or streaming of music for a Music Service Providers involves both rights - the performance right when the work is communicated to the public and the mechanical when it is copied onto a hard drive or mp3 player.

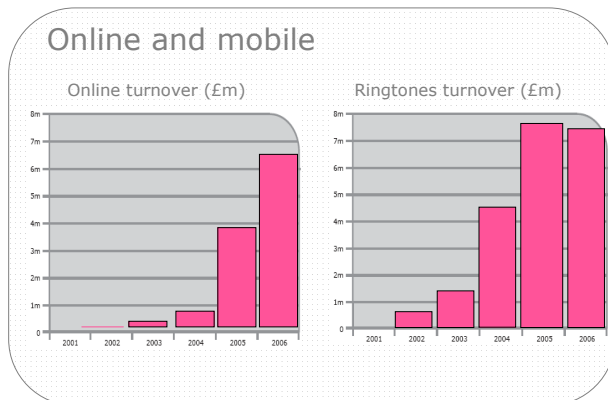


also help emerging creators earn royalty income at the very earliest stage in their careers.

This proactive approach to licensing was born out of the radical changes to the music publishing business in the early to mid 20th century when recorded music overtook sheet music as the predominant way people consumed music. At that time, the music publishing business shifted from being an industry that sold units (of sheet music) to one that licensed the use of music in any and every legitimate way in which users wished to use it (e.g. in recorded music, in films, adverts, broadcasts and live performance). As a result, the music publishing business has had the licensing mindset which is so crucial to the digital world for decades and is therefore well placed to exploit the opportunities and new revenue streams generated by digital technology.

This has brought considerable rewards to music writers and publishers as demonstrated by the graphs below:





Q.14-16 Licensing, rights clearance, right holders remuneration

Our constituency is now innovating further by developing new approaches to licensing music for use in multiple territories in Europe when these are requested by music users⁵.

We fully support and welcome the EC's October 2005 Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services (the Recommendation) because it empowers rights owners to exercise choice in how their rights are managed across the EU. In exercising that choice, they create a competitive environment in which the most efficient, transparent and well governed collecting societies will be engaged to manage rights and collecting royalties for cross border online use. This approach promises to stimulate growth in the entire online market by creating greater efficiency for both rights owners and users.

It is important to note however that national societies will still be needed for the traditional role of licensing excluding cross-border uses. In fact they may also have an ongoing role as local agents for cross-border online licensing. Concerns that the role of national societies will be diminished are therefore overstated.

Following the Recommendation, our members are developing a variety of new licensing models. Examples include:

- Warner/Chappell will designate several European collecting societies as its non-exclusive licensing agent and will authorize each of the designees to grant pan-European digital licenses in Warner/Chappell's Anglo-American repertoire. Digital music services will benefit as they will be able to go to any of the collecting societies designated by Warner/Chappell to obtain these multi-territory digital licenses. Warner Chappell's music writers will also benefit as a result of the strict set of common standards that the designated societies will have to meet. These are intended to ensure transparency, efficiency and accountability and that writers will be compensated appropriately and accurately for their work.

⁵ Demand for pan EU licences can be overstated – we expect that many licensees will continue to launch services which are tailored to the national market - i.e. which provide diverse local repertoire.



- EMI Music Publishing is developing a joint venture between MCPS/PRS (UK) and GEMA (Germany). The new joint venture company will be charged with licensing EMI catalogue for pan EU online licensing.
- UK independent publishers, through their trade association, are also exploring the various options that the flexibility of the EU Recommendation permits with respect to pan-EU licensing and are in discussions with a number of existing collecting societies.
- MCPS/PRS is developing a new technology platform in cooperation with the Spanish society, SGAE eLos, to facilitate online licensing. MCPS/PRS is also forging pan-EU licensing deals – most recently in a deal with Skype for ring tones.

The implementation of these new models involves restructuring sub-publishing arrangements, negotiating the early withdrawal of online rights from society membership agreements (which some societies are resisting) and negotiations with chosen societies for the creation of on-line rights hubs. These discussions take time so we would urge the Commission to allow them to take place within the clear framework of the Recommendation – and conduct a full market impact assessment of the Recommendation in one year's time - before considering whether further initiatives might be necessary in this area.⁶

As regards the market impact assessment, we would point out that some of our individual songwriter members are wary that competition for members may induce collecting societies to offer reduced administration fees to major publishers in order to win their online licensing business. They are concerned that smaller members of societies (i.e. independent publishers and individual music writers) may end up paying higher administration fees as societies seek to offset the reduced admin charges offered to the larger players. We would therefore expect the EC to monitor the impact of the Recommendation with particular attention to the provision that clearly stipulates against discriminatory treatment between the members of a society.

Q. 6 How far is cultural diversity self sustaining online?

Cultural diversity has never been better served than by the “long tail” effect of digital technology. With no shelf space limits, and a thriving new creative force of user-generated content, there is no shortage of diverse content online. The challenge is how to remunerate both established and emerging creative people by establishing sophisticated and innovative systems of licensing services and monitoring usage.

In the context of the EU Recommendation, we would challenge the widespread assumption that collecting societies are – or should be - the custodians of cultural diversity. To the extent that subsidy or support is required, it should come from the tax payer's pocket and/or the patronage of public institutions such as public broadcasters, and not from royalty income (unless rights owners freely consent to deductions being made for cultural purposes from their royalties – which many do).

Q 20 Networks

We are monitoring the US debate on network neutrality with interest. Our initial conclusions are that the debate will be somewhat different in the EU owing to the

⁶ For more information on specific initiative pls see our recent response on the management of online rights in musical work at our website (<http://www.bmr.org/html/issues.html>)



competitive broadband infrastructure (e.g. via the unbundling of the local loop) and the highly differentiated services that already exist in the EU.

Q 21-23 Piracy and unauthorised uploading and downloading of copyright protected works

Legitimate online music use is gathering pace with the volume of legal digital downloads experiencing exponential growth - 26 million tracks were downloaded legally in the UK in 2005, a four-fold increase on 2004⁷. However, despite the rise in legitimate consumption, music remains the main driver of illegal Peer to Peer activity to date. According to Cache Logic, 60% of all internet traffic by data volume is Peer to Peer filesharing with a significant number of unauthorised music files being exchanged over unlicensed Peer to Peer systems.⁸ The resulting losses to the music sector are substantial.⁹

The European Union has already taken action in this area in adopting the 2004 EU Enforcement Directive. However, enforcement is only one part of the solution to the problem of online piracy.

While the ability to enforce rights is vitally important, we firmly believe that best way to counter online piracy is to make music and other content available legitimately, at a reasonable price, in as many different ways as possible. With well over 200 legitimate music services now operational in the EU¹⁰, the music industry and music service providers have made significant progress in this area. And our members' proactive licensing policy has been crucial to this success.

However, in some cases, overly broadly drafted safe harbours¹¹ for digital intermediaries has had the effect of obstructing rights owners ability to either license (and thereby legitimise) unlicensed services, or enforce rights against them.

Unauthorised services such as KaZaA, Grokster and eDonkey actively promote the use of Peer 2 Peer technology for copyright infringement and sell advertising on the back of it. Despite this blatant profiteering, the law is unclear on whether such Peer 2 Peer service providers are liable for authorising copyright infringement.

Some countries around the world are recognising that Internet intermediaries which are building their businesses around the authorisation of copyright infringement via their networks should be made liable for such infringements and are reacting by introducing or clarifying provisions on authorising copyright infringement either in case law¹² or legislation¹³.

Most notably, the US Supreme Court decided unanimously on 27th June 2005 in MGM Inc et al vs. Grokster Ltd et al that someone "who distributes a device with the

⁷ IFPI Digital Music Report 2006

⁸ And at least ten times as many music files are shared as video files. Source: CacheLogic research

⁹ TNS Worldpanel estimate the cost to British music in 2005 of people illegally file-sharing rather than paying for music was £414m; and the cost to British music of illegal filesharing reached £1.1bn in the three years to 2005. See BPI press release April 2006 http://www.bpi.co.uk/index.asp?Page=news/legal/news_content_file_984.shtml

¹⁰ <http://www.pro-music.org/musiconline/tracker-region-europe.htm>

¹¹ in the E-Commerce Directive arts 12-14

¹² E.g. Taiwan, Korea, Australia and most notably the US decision over Grokster in 2005.

¹³ E.g. Australian Copyright Act (section 36 (subsection 1A))



object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.”

Recommendation: We look to the 2007 Review of the Copyright Acquis and the E-Commerce Directive for a full reassessment of provisions on liability of internet intermediaries. Tightening safe harbours would force a closer partnership between rights owners and digital intermediaries and lead ultimately to more legitimate services – including P2P services. This would yield more diversity in legal music services for consumers and ensure that creators are remunerated for the distribution and copying of their works.

Greater awareness and education - among businesses, in schools and universities and among consumers - of the role that copyright plays in remunerating creators and maintaining a virtuous cycle of return and investment in creativity is also key. See our response to Q.22 below for British Music Rights’ activities in this area.

Q. 22 Do you have specific proposals in relation to copyright education and awareness raising campaigns?

The need for education and awareness-raising campaigns

Every young person should leave formal education with a mature understanding of intellectual property (IP), what it is, how it drives innovation, how it creates wealth, and how it is traded, protected, licensed and exploited. Every teacher should have the training and resources to enable them to effectively impart this understanding to young people. This is important *not* merely in terms of anti-piracy. It is imperative as we move towards an economy based on intangibles that our business leaders and workforce know how to exploit IP in their own businesses and creative output.

Yet evidence suggests that the next generation is growing up with an insufficient grasp of IP, yet this is the generation that has most to gain – or lose – according to its level of mastery in understanding and exploiting IP.

A recent survey published by Ofcom¹⁴ showed that 65% of young people age 12-15 use the internet at home. Of those, 42% use the internet for downloading music.

However, the same survey showed that 24% of young people age 12-15 were not aware that there are illegal as well as legal ways to access music. Further analysis shows great variation in awareness by region and by ethnicity. For example, 42% of young people in Northern Ireland were unaware, and 65% from minority ethnic groups were unaware. For those respondents who were aware of illegal downloading, 48% thought that it should be legal.

In addition to IP awareness and copyright education, young people need to be empowered to make the most of their ideas and creative capabilities. Recent studies into the UK’s current and future skills requirements¹⁵ show that poor business skills are holding individuals and businesses back. The connectivity between creativity and commerce must be strengthened if we are to reverse the current situation. Our

¹⁴ Media Literacy Audit: Report on media literacy amongst children, published 2 May 2006 by the Office of Communications, London.

¹⁵ HMT: Leitch Review of Skills; HMT: Cox Review of Creativity in Business; DCMS: SME Music Businesses: Business Growth and Access to Finance



education system should seek to normalise an entrepreneurial outlook at the earliest possible opportunity.

The demand for resources

Teacher demand for resources to help them teach about copyright is high. British Music Rights launched “Respect the Value of Music” Lesson Plans in 2004. The lesson plans are available freely and have so far been distributed to more than 1700 music teachers in the UK. The pack aims to give young people a better understanding of how the music industry works, what it means to be a creator and how they might earn a living from their creativity.

The UK’s Patent Office launched the Think Kit® in 2005, a free educational resource that highlights all aspects of intellectual property using case studies of well known individuals and organisations. The Think Kit is currently being used in over 80% of secondary schools in the UK. According to feedback from education specialists, the Think Kit is the most successful resource produced by central government that they have worked with.

Specific proposals for educational resources for the future:

British Music Rights is bringing together both the enterprise education and IP awareness imperative in an exciting and innovative new resource for secondary schools.¹⁶ We are working in partnership with Young Enterprise and NuMu¹⁷ to create The QuickStart Music Programme™ – a new resource for secondary schools. The programme will harness young people’s natural passion for music in order to help them develop practical skills and a sophisticated understanding of enterprise and the role of intellectual property in a knowledge-based economy.

Through the programme, pupils will establish their own mini music enterprise in school, source and negotiate with ‘the talent’ from an online schools music network, in competition with other school music businesses, raise finance and accrue value from the positive exploitation of their copyright, and take their ‘product’ to market – by putting on a concert or selling CDs, etc.

The options available to pupils will directly reflect the current roles within the music sector. The pupils can work together as a vertically integrated company or they can work as individual micro-enterprises just trading in one or two areas.

Through the programme, pupils will gain real business experience and enterprise skills, along with an understanding of IP, the value of copyright, and how it can be positively exploited to generate income and sustain viable careers in the music industry in the future. The programme will be piloted in the 2006/2007 academic year; and launched nationwide thereafter providing that sufficient funding is secured.

¹⁶ See appendix for more information on the Young Enterprise Quickstart Music project.

¹⁷ Young Enterprise is the leading education charity that specialises in ‘learning by doing’ projects that foster entrepreneurial skills. Numu is like “My Space” for schools, giving young musicians a public platform for their music, and producing weekly music charts.



Q 25-29 Digital Rights Management Systems (DRMs)

Digital Rights Management is probably the most used and most confused catchword in discussions concerning the Information Society.

A clear definition is needed to distinguish the different elements within the umbrella term, DRM:

- Technology that allows services to function (a cashpoint machine contains DRM)
- Rights management information to offer commercial users/ individual consumers access and use of material in a convenient, easy to use way and according to their individual choice; not controversial and value re admin of digital music distribution
- Technological protection measures (TPM) to protect right holders against unauthorised copying

All of these functions serve the development of economically viable new business models which deliver music to commercial users and individual consumers according to their choice and preferences, e.g. a la carte downloads or subscription streaming models. Some DRMs contain all these functions while others might perform only the first, or the first two functions – i.e. DRM with no TPM. The use of TPM is matter of right holder choice and in fact, many rights owners choose not to insist on TPMs as part of the services they license. For example, recently launched music service emusic operates a TPM free music service and has obtained licences from the all music industry, except the major record labels.

Q. 16 Levies

On the separate but related issue of levies we welcome DG Internal Market's consultation. The UK has neither a private copying exception nor levies. Nevertheless, we challenge the assumption that DRMs are sufficiently developed (in terms of either security or consumer acceptance) to warrant a phasing out of levies at this stage.

Basic arithmetic demonstrates that if 50 million iPods have been sold compared to just 1 billion iTunes sold (Source: Apple) – there are on average only 20 iTunes on each iPod. ICM research has shown from which sources the remaining capacity is filled:

Source of MP3 player content in the UK (Source ICM research, Dec 05)

- 65% Ripped or copied from own CDs
- 11% Copied from friends
- 18% P2P downloads
- 6% Paid for downloads

The pace and extent of private copying is likely to accelerate rather than decelerate as prices for broadband access fall and storage capacity (eg on mp3 players) increases. So it would seem *not* to be the time to phase out compensation for private copying. Rather we should be looking for new ways to license music both via network operators and device manufacturers that properly captures the role of music within



each business model (e.g. apple launched itunes to sell ipods not music) and remunerates creators for the unfettered copying that the digital age will increasingly enable.

We would however support EU harmonisation of rules regarding the administration of levies as well as guidelines to promote the fair and equitable distribution of levy income including to international creators to compensate them for private copies of their works made in territories in which levies are in place. For more on this see our position paper dated 14 July 2006 at www.bmr.org .

Q. 32-33 What role for public authorities?

Music is not only a digital success story in its own right. It also plays an integral role as an engine driving the digital economy. The strong emotional qualities of music enable third parties selling telecommunications services to build brands and attract subscribers by association. In this way, music contributes significantly to the take up and profitability of digital operators' products and services - as borne out by the emphasis on access to music in adverts for broadband, mobile handsets, and hardware.

AOL advertisement: "At AOL no-one counts how many songs you download"

AOL unlimited broadband

First month free

Unlimited music

It doesn't matter if it's rock 'n' roll that gets you going, or any other kind of music, at AOL no-one counts how many songs you download. You are free to listen to and download as much music as you like, whenever you like, whatever your taste. There are no caps, or download limits. With AOL unlimited broadband, the music never has to stop. Also, exclusively with AOL Gold and AOL Platinum, you'll get privileged access to a collection of very special top artists' online sessions, concerts and in-depth interviews to add to your AOL online music experience.

BT / Apple advertising campaign

Broadband from BT with iTunes

BT

Collect the **soundtrack to your life**

BT and iTunes bring you an exciting offer. Sign up to Broadband from BT today and get:

- up to 40 of your favourite songs FREE from iTunes!
- £15 off an iPod² so you can listen on the move

Play again >>





Telewest broadband marketing

With broadband, you can download a 1Mb MP3 (music) file in just 22 seconds, compared with 3.5 minutes using a standard dial-up connection.

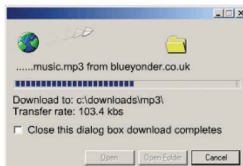


Dial up connection with a typical 56K modem



Broadband connection with a 512K cable

And, if standard broadband isn't fast enough for you, our new 1Mb service lets you download music 20 times faster!



Broadband connection with a 1 Megabit cable

play again

Handset players launch high-end MP3 phones in 2005/2006

Motorola ROKR
with iTunes

Sony Ericsson
Walkman W800i

Nokia N91
Mobile Jukebox



We believe that a closer partnership between content sectors and telecommunications sectors could be of great benefit to both – offering greater opportunities for network operators to harness the power of music in developing their brands and attracting subscribers via unique and diverse content offerings – and offering increased opportunities to content owners to distribute their content in new ways to the network operators' subscriber base.

A better partnership would lead to even more diverse legitimate ways to access music and other content, potentially marginalising in the eyes of the consumer the far inferior and less secure services provided by unauthorised P2P operators.

Recommendation: Public authorities have a key role in brokering such partnerships by promoting dialogue across the digital value chain. Helpful initiatives so far include the EU Film Online Charter and discussion groups such as the European Internet Foundation at EU level and the IP Forum for the Creative Industries (now the IP Stakeholders Group) and Broadband Stakeholders Group at UK level.