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Digitalisation, Music and Copyright

David Hesmondhalgh

CRESC, Open University

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For further information:

Centre for Research on Socio-Cultural Change (CRESC)
Faculty of Social Sciences, The Open University,
Walton Hall, Milton Keynes, MK7 6AA, UK
Tel: +44 (0)1908 654458 Fax: +44 (0)1908 654488

Email: cresc@manchester.ac.uk *or* cresc@open.ac.uk

Web: www.cresc.ac.uk

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Abstract

Recent problems have led many commentators to discuss the decline or even the death of the music business as we have known it. Such discussion has been accompanied by speculation that a new era of greater abundance and diversity for consumers might emerge from the mess. My perspective in this paper is somewhat different. I accept that digitalisation is bringing about major changes in the way that recorded music is disseminated, but my claim is that certain familiar features of the global recorded music industry – notably the dominance of oligopolies of vertically integrated corporations, based on systems of copyright ownership and exploitation – are likely to remain intact. Against those journalistic accounts that emphasise short-term transformation, I look at the events of the first decade of the twenty-first century in the context of a long-term analysis of the recording industry, and of the cultural industries as a whole. However, this does not imply pessimistic resignation to the inevitability of corporate power. I suggest that the digitalisation of music has helped to expose contradictions in the strategies of the recording industry, an exposure which can pave the way for forms of criticism and activism which recognize the central importance of copyright in contemporary culture.

Key words

Music industries, cultural industries, digitalisation, copyright.

The author

David Hesmondhalgh is Senior Lecturer in Sociology and Media Studies at the Open University. From April 2007, he will be Professor of Media and Music Industries at the University of Leeds. His publications include *The Cultural Industries* (2nd edition, 2007), and four edited volumes: *Media Production* (2006), *Understanding Media: Inside Celebrity* (with Jessica Evans, 2005), *Popular Music Studies* (with Keith Negus, 2002) and *Western Music and its Others* (with Georgina Born, 2000).

Digitalisation, Music and Copyright

The early twenty first century has been a very difficult time for some elements of the music business. The problems began in the mid-1990s, when CD player ownership in advanced industrial countries hit saturation point. From the mid-1980s up until the mid-1990s, global record industry revenues had shown impressive, even remarkable, year-on-year growth (and this was one of the reasons for a flurry of takeover activity in the recording industry during this period). The years from 1994 to 1999 showed declining growth rates, but more profound anxieties on the part of investors and executives developed from 1999 onwards, with declines in global revenues. By 2003, the worldwide value of recording sales was in freefall. Business analysts cited a number of factors, all of them related to digitalisation: the longstanding problem of piracy, especially the mass manufacture of illegally made CDs in China and Eastern Europe; competition from other leisure industries, including computer games and domestic sales of DVDs; and, more than any other factor, the use of peer-to-peer software to share digital files of recordings. One consultancy source quoted by music industry newsletter *Music and Copyright* (30 April 2003) estimated that this was responsible for 40 per cent of the 2002 decline in global sales.

The response of the trade associations that represent the interests of the largest music recording companies and publishers was a public relations disaster. In a series of actions in 2003-5, hundreds of cases were brought by these trade associations against private individuals who had downloaded music from such peer-to-peer sites. Most famously, in September 2003, the Recording Industry Association of America (the RIAA) settled a copyright infringement lawsuit against a 12-year-old New York girl for \$2,000. The same wave of lawsuits included a Yale University photography professor and a 71-year-old Texan grandfather (*The Guardian*, 11 September 2003). An industry suing its own customers: you don't have to be a business consultant to work out that things haven't been going well for the major record companies. Such problems have led many commentators to discuss the decline or even the death of the music industry (for example, Mann, 2000; Barfe, 2003). A widely-read book on the impact of digitalisation on music was typical in portraying the music majors as flat-footed bureaucratic behemoths, 'an industry struggling to maintain control and remain relevant', and in celebrating the supposedly more nimble entrepreneurs of web-based music (Alderman, 2001, pp. 1-2). Mingled with such speculation, especially on the part of exponents of techno-capitalism such as *Wired* magazine, was a certain market utopianism, a sense that the problems of the music industry reflected a shift to greater abundance and choice for consumers. Those on the left had their own versions of such hopes. It was common for left-leaning musicians in the early 2000s, for example, to speak of a more democratized set of production relations emerging from the mess, where artists might be able to market and sell their products directly to audiences via the web, without the need for multinational entertainment corporations.

My perspective in this paper is somewhat different. Digitalisation is bringing about major changes in the way that recorded music is disseminated, but certain familiar features of the global recorded music industry – notably the dominance of oligopolies of vertically integrated corporations, based on systems of copyright ownership and exploitation – are likely to remain intact. And the rise of digitalisation is unlikely to lead to any profound democratisation of musical production and consumption. Against those journalistic accounts that emphasise short-term transformation, I look at the events of the first decade of the twenty first century in the context of a long-term analysis of the recording industry, and of the cultural industries as a whole. Although my emphasis is on continuity, against the hype of journalism and some business analysis, this does not imply pessimistic resignation to the inevitability of corporate power. On the contrary, I suggest that the digitalisation of music has helped to expose contradictions in the strategies of the recording industry, an exposure which could pave the way for criticism and activism which recognize the central importance of copyright in contemporary culture.

These arguments should be of relevance not only to those with an interest in music, but also to anyone concerned with questions of innovation and creativity in contemporary culture. The music business is the first major sector of cultural production to confront the challenges and opportunities offered by the internet. The music industries have their own distinctive dynamics, but we are currently witnessing specific manifestations of more general phenomena, as transnational media corporations come to terms with digitalisation. And as I outline below, the issue of copyright is central to developments in the music industries and in the cultural industries more generally. The main aim of this paper then is to examine the implications of digitalisation for musical production, distribution and consumption, as a particular and distinct case of the dynamics of digitalisation in the cultural industries.

A brief note on terminology. I use the term ‘music industries’ here to differentiate between different industries centred on the cultural form that is music. These industries are principally those based on recording, publishing, live entertainment and musical instruments and software. Distinguishing between the first two of these is, as we shall see, particularly important in the present context. At times I use the term ‘music business’ to refer to these industries collectively – especially the first two.

Meeting the digital challenge: copying, file-sharing and DRM systems

The major challenge afforded by digital distribution to the recording industry stems from the relative accuracy and ease with which digital recordings can be copied. Profit-making in the cultural industries depends on, amongst other factors, the production of artificial scarcity. Digitalisation makes copying of any information relatively easy, thus threatening that scarcity. Music takes up less disk space and bandwidth than other non-print media, and can be experienced via computer without too much discomfort (unlike print). This is why, as mentioned above, the recording industry has been the first to face head-on the threat posed by digitalisation.

In all cultural industries, the spread of the personal computer and the internet have made digitalisation a major issue. But beyond this, four inter-related technological innovations have been involved in shaping the particular forms that digitalisation has taken in the recording industry, as Bakker (2005) shows:

- The development of the MP3 compression standard in the late 1980s and early 1990s, which allowed the vast amounts of digital audio information to be compressed into manageable sizes.
- The spread of flat rate, high bandwidth connections, such as ISDN, ADSL and cable. Even where such connections were not available domestically in the late 1990s and early 2000s, they were available via workplaces, places of study etc.
- The introduction of multi-media computers with increased storage capacity, soundcards, CD players and speakers.
- The development of usually free and relatively easy-to-use software that could ‘rip’ CDs into MP3 and other digital files and that could find and download these files.

These technologies have been driven by the telecommunications and software industries. While the entertainment industries would have liked serious restrictions to be placed upon the facilitation of copying on computers, the might of the US software and telecommunications industries was always going to make such measures unlikely. There are two major problems that face the record companies as a result of these developments: file-sharing; and finding a means to make money out of ‘legitimate’ digital distribution. I will deal with each of them in turn.

File-sharing

By 2000, users were sharing digital music files over peer-to-peer (P2P) networks, the most famous and widely-used of which was Napster. Napster was soon closed down by a lawsuit brought by various US record companies, but was supplanted by other P2P networks which in effect merely provided software which allowed networks of users to search each other's computers for musical files (and which therefore made prosecution more difficult). The most notable of these were Grokster and Kazaa. These networks were commercial enterprises, supported by advertising, and heavily backed by venture capital. But file-sharing also takes place via other means, such as lodging copies of recordings in chat rooms to make them available for recording, and also local area network sharing – especially common in universities and businesses. For users of these networks, a kind of gift economy is at work (Leyshon, 2003). Files are exchanged for free, and reciprocation is understood to be an important part of appropriate behaviour. Underlying file-sharing, in many cases, is an ethic which Don Slater, in an analysis of some of the internet relay chat networks that preceded such sites, has characterized as employing 'a version of freedom located in an anti-commercial anarchism of the "property is theft" variety' (Slater, 2000, p. 128).

The recording industry was quick to take action in the early 2000s, in an attempt to limit the effects of such developments. After successfully closing down Napster (though this then became the name of a 'legal' downloading site, providing files to subscribers), recording industry associations and their allies in other cultural industries pursued litigation against the second-generation file-sharing companies operating such services, and began the lawsuits against individual downloaders of music referred to earlier. In June 2005, the US Supreme Court delivered its verdict on the case brought by MGM and twenty seven other major entertainment companies against the developers of file-sharing software products, including Grokster and Morpheus. The unanimous verdict was widely reported as a crucial victory for Hollywood and the music industries, but of course this in no way signalled the end of file-sharing. The internet after all makes exchange of files and information very easy. But we should not make the leap from this to assume that these developments represent some kind of terminal crisis for the oligopoly of corporations that dominate global music circulation and rights ownership. In the medium term, it is likely that file-sharing will be the preserve of a committed niche of users (see Bakker, 2005) – a very significant and growing niche, but one that will grow too slowly to bring about a revolutionary transformation in musical production. At least for a few years to come, the view of the majority of music consumers may well echo the novelist John Lanchester's pithy summary of his reasons for not using the file-sharing sites: 'because I don't quite trust them to work or to be uncontaminated by viruses; because I feel shifty about taking things without paying for them; and because I can't be arsed' (Lanchester, 2002, p.5).

'Illegal' file-sharing is no doubt here to stay and is spreading fast to other cultural forms such as film and television, most notably through the YouTube phenomenon and various other sites using BitTorrent technology. But it is important to realize that the music business has always had to fight over the boundaries between 'legitimate' forms of musical consumption – those involving income flows to them – and 'illegitimate' ones. The rise of copying technologies has made this battle more intense, but file-sharing is extremely unlikely to lead to a collapse of the global recorded music market, or even to major structural transformations in the way that the major record companies go about their business. In general, across the world over the last hundred years, there have been steady increases in the amounts of time and money that consumers spend on entertainment and leisure goods such as music (Hesmondhalgh, 2007). So while global recorded music sales have certainly suffered over the last few years, the long-term prospects for music as a cultural industry are not nearly as bleak as one would believe from some of the more excitable journalistic commentary. Rather than outright collapse, the big issue facing the major music corporations over the next decade is how best to achieve the shift to 'legitimate' forms of digital distribution.

The search for ‘legitimate’ digital distribution

As well as the problems caused by file-sharing networks, the digital downloading of music offers considerable opportunities to the multinational entertainment corporations that dominate the music business. Collectively, the companies involved in the sale of recordings would welcome new platforms on which to sell music. An ideal medium-term future for the major recording companies over the next ten years would involve consumers purchasing tangible recorded-music commodities such as the CD (or some future format) *and* digital files. The record companies have in the past done extremely well out of selling music to consumers in parallel formats: the single and the LP in the 1960s and 1970s, the CD and the audio-cassette (and vinyl too for many customers) in the 1980s and 1990s. In addition, digital distribution offers the chance to monitor the tastes and preferences of consumers, in order to gain market information which, however problematic its reliability and validity, can be sold on to other agents.

It is true that the quest for a ‘legitimate’ digital distribution market offers considerable challenges too. There are two main ones at present: finding a way to prevent customers from simply reproducing infinite copies of digital files of music; and finding a method of payment that consumers feel happy with. But all industries under capitalism face rapidly changing conditions, and have to be engaged in a constant process of readjustment – often resulting in immiseration for workers. How are the music industries confronting the challenges of creating new digital markets?

The prevention of easy copying relies on the successful development of digital rights management (DRM) systems: security measures that are embedded in computers, electronic devices and digital files to prevent copying and other unauthorized uses. There is no doubt that the successful implementation of DRM systems for the music industries poses major problems, especially given rivalries among the various hardware, software and telecommunications companies involved (see Burkart and McCourt 2006: 101-119 for a detailed discussion). Nevertheless, DRM systems have grown increasingly robust – certainly robust enough to deter most ordinary users. Prophecies of the death of the music industry at the turn of the millennium were based on the idea that these technologies would be easily sidestepped by knowledgeable computer users (see various interviewees in Mann, 2000). But the numbers involved in such specialist use will be even smaller than those involved in P2P networks. In the long run, as DRM technologies become more sophisticated, such hacking may ultimately be no more significant than other (analogue) copying technologies that have plagued the cultural industries since the 1960s – audio taping, video cassettes and VCRs – and CD piracy. These have been significant irritants, and have presented considerable challenges to the music industries. But the music industries have managed to keep the irritation just about under control. In the case of audio cassettes and audio taping, music industry lobbies even succeeded in getting some national governments to charge tape manufacturers a levy on tapes sold. The main difference between such analogue technologies and digital ones is that there is much less loss of sound quality in making digital copies. But for most users, it seems likely that the obstacles that will be put in the way of digital copying will be substantial enough to prevent copying. As in the era of audio cassettes, there will continue to be a premium on the purchased commodity for many consumers. Most music fans in the 1980s and 1990s had piles of home-made cassettes *and* dozens of purchased CDs, pre-recorded cassettes and LPs. While mix tapes made by friends and lovers were cherished items, so too were luxurious gatefold sleeves and elaborate artwork. Music as a cultural form, while primarily auditory in nature, has always been tied to the visual and the tactile, now more so than ever. It seems likely that at least in the medium term, and even for younger consumers as they grow older, music collections will continue to be a mixture of purchased commodities and home-made copies.

As DRM systems have become more robust, two separate and parallel markets for digitally distributed music have already developed with incompatible formats: one for computers and

another for third-generation mobile phones. This dual market presents the music industries with instability, but also with opportunities. A number of well-resourced mobile phone operators all launched music download services in 2003-4, KDDI, T-Mobile, SK Telecom and Orange amongst them, and as mobile telephony grows as a means of consuming music, there will be rapid changes in alliances between software, telecommunication and record companies. By 2005, legitimate online music sites were becoming established in advanced industrial countries (it is worth remembering that much of the world's population is still experiencing music via cassette). Apple's iTunes music store was the best-known of these, but dozens sprung up across the world. Some of these sites sell their music by subscription: consumers can download a certain amount of music per month for a fee. This is an attempt to apply the business models of cable and satellite television to the purchase of music. However, music consumers seem happier with the purchase of individual tracks and it is these sites which look set to lead the way into the digital future, at least in the online world (though reports suggest that a surprisingly high number of 'legal downloaders' are paying for entire albums rather than downloading individual tracks). By 2005, digital sales accounted for \$1.1 billion of total recorded music sales, the equivalent of 5.5 per cent of the trade value of recorded music sales (*Music and Copyright*, 27 September 2006). An interesting difference here is that in Europe and North America, most of these digital sales are online, but in Asia distribution by mobile telephony is dominant. Industry analysts are currently predicting that the growth of mobile distribution will outstrip that of online models, even in Europe and North America (*ibid*) but it is too soon to be sure. It is also too early to be clear about the effects of digital sales on 'physical' sales of CDs, music DVDs, cassettes and vinyl – though some business analysts What is not in doubt though is that digital sales of music will increase rapidly in the years ahead.

There is further evidence that the recording industry is going to weather the digital storm. Sales of portable digital players are booming: 20 million units were sold in 2004, and industry experts predicted sales of nearly 200 million units in 2010 (*Music and Copyright*, 24 November 2004). The iconic portable player, the iPod (which plays AAC files rather than MP3s) has been one of the most seductive consumer objects of the new century, and many other companies are now launching their own portable players, including Panasonic, Samsung, Philips, Sony and Dell. While early evidence suggests that digital music players have not automatically led yet to big increases in online digital music purchases, such sales are likely to increase with time (*Music and Copyright*, 27 September 2004).

Finally, the major record companies have been moving towards the integration of peer-to-peer networks into the legitimate on-line music market, as an alternative means of promotion and distribution, and as a second front in the battle against supposed threats to their intellectual property (litigation being the other). Various companies are competing to develop systems of fingerprint filtering, which would allow networks to examine an audio (or other digital) file, and determine its identity by looking up a mathematical fingerprint in a database (Rosenblatt, 2004). The network could then either forbid usage, or allow it under specified conditions. Even relatively successful implementation would mean that other file-sharing companies will no longer be able to offer a defence that they are unable to trace the use of the files made available through their software. The entertainment corporations are also working with P2P sites to make them 'legitimate'. After their successful action against Kazaa and Grokster, resulting in the 2005 Supreme Court ruling referred to above, the major corporations worked with Kazaa to relaunch it as a 'legitimate' site, once Kazaa's owners had paid damages of \$100 million to various major record companies (BBC, 2006). In late 2006, Google, the owners of YouTube, were reported to be frantically negotiating with various entertainment corporations, to supply content to the site, and ward off potentially crippling lawsuits (*Financial Times*, 3 November 2006, p.1).¹ How successfully the new legitimate networks will be able to appropriate the subcultural capital of the underground and semi-legal file-sharing sites is still unclear. But it seems that the various actions of the entertainment industries, including the major record companies, are beginning to have an effect. As one

industry analyst put it, 'The market is now fragmenting. Unless you are an ardent downloader it is becoming harder to know where to go' (Mark Mulligan, quoted in BBC, 2006).

The battle to enclose the provisional and semi-legal commons afforded by file-sharing technologies is well underway, and while such actions will never be fully successful, they will ward off the kinds of catastrophic collapse envisaged by some in the heyday of Napster.

Questioning the crisis: internationalisation, copyright and business cycles

Digitalisation, then, hasn't yet killed the music business as we know it; and there is little prospect that it will. I now want to probe further the assumption, prevalent in many journalistic accounts, that the recording industry's fortunes in the first years of the twenty first century were in irreversible decline and, in so doing, draw attention to three important features of the cultural industries neglected in much recent coverage: internationalisation, the importance of copyright, and the cyclical nature of business under capitalism.

Reports of decline were based on sales statistics collected by national recording industry trade associations affiliated with IFPI. IFPI is a global trade association which strongly represents the interests of the multinational entertainment corporations that dominate the world music industry. IFPI has done a very effective job of publicising the problems facing the record companies over the early years of the twenty first century. Its website and various publications have given great prominence to various statistics showing declines in sales and revenues. IFPI reports, for example, that global music sales fell by 14 per cent over the 2001-3 and that, though they temporarily recovered in 2004, declined again in 2005. IFPI attributes the declines in sales almost entirely to file-sharing and to more traditional forms of 'piracy' such as the large-scale copying of CDs and audio cassettes. IFPI have been involved in campaigns against these more traditional forms of piracy for decades, and there are signs that its campaigns are being taken increasingly seriously, with major crackdowns by authorities in Russia and China in 2006.

There is no reason to believe that IFPI is being dishonest about the decline in sales that it reports. But we should pause for a moment to consider why IFPI, on its website, might want to trumpet its members' poor figures. The reason is that such rhetoric can help the lobbying power of the recording industry, by strengthening arguments that domestic industries need government support in shaping legislation, in carrying out successful litigation, and in gaining the go-ahead for mergers, such as that between Sony and BMG's recorded music divisions in 2004, or between Universal and BMG's music publishing arms in 2006.

A second reason for questioning the notion of a terminal crisis in the music industries is that, while sales figures have undoubtedly been poor in recent years, the music business does not consist entirely of the sale of commodities such as CDs to consumers by record companies. Academic and journalist Simon Frith has been insisting since the mid-1980s that the music industries are based not so much around the manufacture of things, as the creation of rights (see Frith, 1987, p. 57). The opportunities to exploit the ownership of various rights in musical works have expanded consistently over the last century, as the mass media have proliferated and grown; and these opportunities continue to expand. The development of new media technologies has led to the extension of rights in musical works into new realms.

It is worth briefly reviewing the history of this extension of rights, in spite of the challenges posed by policy and industry jargon, because it helps give a sense of how the music industries themselves think about revenue opportunities in a changing world.²

- The holders of copyright in a musical work are protected by national laws and various international conventions. Copyright is essentially not one right, but a bundle of rights.

- The most basic rights derive from the authorship of a musical work; *author's rights*. In effect, this involves owning the rights in 'the composition'. We can say, for the purposes of clarity, that there are two main versions of these rights in the composition. The first type, *performing rights*, was first established for the authors of musical works (i.e., compositions) in the nineteenth century. This involves the right to authorize or prohibit the public performance of their work. These rights were codified in the Berne Convention of 1886, to which most countries are now signatories. Crucially, this involved the right to receive payments for the public performance of compositions.
- The development of recording led to the development of what is essentially a second major type of right attaching to the ownership of the musical work, the *mechanical right*. This in turn has three major aspects: i) rights in respect of the incorporation of the work into a 'mechanical' device such as a gramophone record, tapes, CDs and so on, are sold; ii) a parallel right to receive payment when a performance of a musical work is 'synchronized' into a film, or an advert, or a television programme. These *synch rights* are obviously now a very important source of income for the owners of compositions; iii) in some countries, the right to receive payment for, or prohibit, copying of a 'mechanical inscription' using the composition.
- It is essential to understand that in the vast majority of cases where these author's rights – the rights in a musical composition – are in any way valuable, these rights are usually assigned to music publishers as part of a publishing contract. Most successful writers are signed to a publishing deal with a music publisher that is part of a multinational entertainment corporation, who therefore essentially 'own' the rights to the musical work. These publishers will usually pay royalties to the composer or their estate, at a rate determined by the publishing contract. Hit songs generate considerable amounts of revenue for music publishers.
- The development of recording and other technologies also eventually led, by the mid twentieth century, to the rise of another kind of right, *neighbouring rights*, called 'neighbouring' because they adjoin, but are separate from, author's rights. These are essentially, when it comes to music, rights in recordings, or *phonographic rights* (though this term is not always used³) and there are two main elements of these rights. The first is a *reproduction right* that allows the owner to prohibit or authorize the copying of a recording. Second, a *public performance right* means that broadcasters can use a recording without permission but must make a payment. Note that these are really versions of the performing right established in the nineteenth century for *authors* of musical works, but extended in the era of mechanical reproduction, to the *performers* of musical recordings. Just as the authors who are entitled to author's rights in musical works usually assign them to music publishers as part of publishing deals, so the performers who are entitled to these phonographic rights in the recording of their performances usually sign them away as part of recording deals. (In some countries these rights are assigned in the first place to the record company as the originator of the recording.) These phonographic rights (and other neighbouring rights relevant to other cultural industries) were agreed by international treaty only in 1961, with the Rome Convention, but have been much more seriously codified by the TRIPS chapter of the World Trade Organisation treaty of 1994.
- Contracts between composers and music publishers, and between performers and record companies, determine for how long the ownership of musical compositions and recordings (respectively) will stay in the hands of the companies to which they are assigned, and when, if at all, they will 'revert' to the composers or performers. These contracts are, with some exceptions, quite asymmetrical, in that publishing and record companies have a great deal more experience, expertise and power than the artists they are signing. Reversion will usually happen when the copyrights are low in value. It is

not unusual for artists to sign recording and publishing deals with companies owned by the same parent corporation.

- The scope and duration of the actual rights (rather than the assignment of them) is determined by statute. As we shall see, this has become a key battleground in the contemporary cultural industries. Because the cultural industries are increasingly businesses founded on the value of rights, the major corporations are involved in constant battles to extend the scope and duration of these rights.
- An important final note on this issue concerns the practicalities of collecting and distributing rights income. Monitoring the use of songs and recordings is impractical for smaller copyright owners, so national collection agencies provide licences for users.⁴ These users include broadcasters, shops, restaurants, airlines, cinemas, dance clubs, and hotels. It is no surprise, then, that such licences involve considerable amounts of money, an equivalent of three per cent of global recorded music sales, but in some countries (such as the Netherlands and Denmark) the equivalent of ten to fifteen per cent (*Music and Copyright*, 13 September 2006). Moreover, these collection agencies are now very assiduous in monitoring public space on behalf of their clients; and the music business is putting considerable pressure on agencies (especially non-western ones) to improve their collections. In the USA and Japan, the world's two biggest markets for recorded music, record companies and performers have performance rights only in broadcasting, not in other public performance of sound recordings. The record companies are likely to make changing this a top priority, and if their lobbying attempts are successful, this will provide a massive extra revenue stream.

Putting aside the details of particular rights here (important though this is), the crucial point is that the fate of the music business should not be understood in terms of sales alone. The music business is founded on rights, and the possibilities for exploiting these rights have grown steadily over time, and continue to grow. As Simon Frith has put it, in an analysis of the relationship of music to other media:

Providing sounds for radio and television, for films and advertisements, for computer games and mobile phones, for public spaces generally, is nowadays as commercially important as directly pleasing the public. The 'music industry' describes a complex network of rights-owners and licensed users, a continual flow of rights income which seems inexhaustible and sometimes, indeed, quite random (Frith, 2004, p. 176).

The main lesson for the current analysis is that we must not mistake reports of declining sales of CDs in the face of the impending rise of digital distribution as a reliable sign *in itself* of an out-and-out crisis amongst the music groups of major multinational entertainment corporations. While the revenues of the music publishing divisions of the multinational entertainment companies are not as formidable as the revenues of the recorded music arms, the profit margins are considerably higher. *Music and Copyright* estimates a return on sales of 20 per cent for music publishing, as compared with 10 per cent for recorded music (24 November, 2004). While the major companies do not dominate music publishing to quite the same degree as they do recorded music, the late 1990s saw big acquisitions of catalogues. The five major music publishers (Universal, Warner, Sony, BMG and EMI) in the early 2000s accounted for about 65 per cent of the global gross revenue of publishing (as opposed to about 70 per cent of the recorded music revenues).⁵

This consideration of rights raises another reason to treat ominous warnings about the death of the music industry in the era of digital distribution with scepticism. These industries have been extremely successful in lobbying governments for changes in copyright law, changes which are decidedly favourable to the major corporations that dominate rights ownership. The supposed threat offered by digital technologies, in particular the internet, has brought about a legislative response which has 'vastly increased the scope of copyright but also has done so in a way which benefits corporate interests at the expense of those of both artists and consumers'

(Frith and Marshall, 2004, p.4). The first major response to the rise of the internet came with the World Intellectual Property Organisation conference in Geneva in 1996. Signatories agreed to update their national laws to allow rights holders to extend their rights into the internet and other computer networks. The result was the Digital Millennium Copyright Act in the USA in 1998, and the EU Copyright Directive of 2001, with various European countries making this law in their respective countries in 2002 and 2003. Such an extension of copyright law into digital terrain was to be expected, but these acts also contained clauses which made illegal the development of software which could counter the digital rights management (DRM) systems which are being used by cultural-industry corporations to protect their content (see below). This was a sign that the digital environment was being fruitfully presented by the copyright industries, such as the music industry, as a threat, one against which legislation was needed to protect them.

It was in this environment that the Sonny Bono Copyright Term Extension Act was passed by the US Congress in 1998. This extended the term of protection for works copyrighted after 1 January 1923 from the date of the death of the author plus 50 years, to the date of author's death plus 70 years. In addition, the 'protection' granted to works made by corporations, including films and most popular music recordings, since 1978, was extended from 75 years to 95 years. This was the result of significant lobbying of Congress by PR consultants briefed by corporate copyright holders such as Disney. The economic case for this extension was laid out in a Congressional Research Report (Rappaport, 1998) which calculated the value in 1997 of copyrights created between 1923 and 1942, the years covered by the extension of copyright protection, as \$317 million for the film, music and book industries. In 2003, the Act was challenged in the US Supreme Court, on the grounds that it un-necessarily restricted the public domain. As part of their case, opponents of the Act challenged the figures in the Congressional Research Report. The \$317 million figure was based on 3.35 million copyright registrations, of which only 13 per cent (425,000) were renewed, of which in turn only 18 per cent (77,000) were active. Of these registrations, only 49,000 related to music, film and books. So, opponents argued, why stop the other 3.3 million copyrights going into the public domain? (*Music and Copyright*, 2 October 2002). The challenge failed.

Such acts of legislation suggest that the original purpose of copyright, to stimulate creative activity within a society, is being sidelined in favour of the protection of corporate interests. This can be seen as part of a broader shift in the status of the cultural industries in economic and employment policy in the advanced industrial countries. Nicholas Garnham (2005) has shown how various strands of Information Society thinking have helped to sustain a very problematic view that the cultural sector is a key area of economic growth within the global economy, and how this in turn has led to an alliance between various business interests and the state around the extension of intellectual property rights. Garnham makes the further, related claim that the popularity of the notion of the 'creative industries' (as opposed to the term 'cultural industries', which has tended to be associated with more critical appraisals of media and cultural policy) derives precisely from its appropriation as part of Information Society rhetoric. The Congressional Research Report echoes the grandiose claims made about the economic value of intellectual property made in other (less than independent) research, claims which are in turn used by the 'creative' or 'copyright' industries to exert influence on policy-makers. The successful creation of such a coalition of interests around the value of the creative industries in many countries is another sign that we should take claims about the vulnerability of the recording industry with a heavy flavouring of salt.

The digitalisation crisis in long-term context

I've been arguing that the crisis in the recording industry, often attributed to digitalisation, has been exaggerated, and while this exaggeration may not have been deliberately cultivated by the recording industry, it has favoured their interests in arguing for policy change.

Nevertheless, it cannot be denied that the early twenty first century saw a downturn in the fortunes of this particular cultural industry. I now want to put this downturn in long-term context.

Many accounts treat crises of profitability and investor confidence in the cultural industries as if they depended on the diversity and quality of artistic input. According to this view, the problems faced by the recording industry have come about because the world lacks a Madonna, a Michael Jackson, or a Beatles – performers who can generate massive global sales across a series of releases. (Similarly, popular accounts of film's re-emergence from its 1960s doldrums attribute its recovery to the artistic brilliance and/or commercial savvy of a new generation of young directors). While such considerations are not irrelevant, it is hard to believe that there will ever be a serious lack of talented performers and composers in the world of music as a whole. What matters is how talent is framed, developed and understood. Two other factors have been considerably more important in the cyclical history of the ups and downs of the recording industry: the level of demand in economies as a whole (which obviously affects all industries, though to different degrees – sales of a non-essential item such as music are obviously likely to suffer more than, say, those of soap in general conditions of falling demand); and the relationship of musical recording to changing technologies of storage and retrieval (gramophones and shellac 78 RPM discs, hi-fis and LPs, Walkmans and audio-cassettes, CDs and CD players, to today's i-Pods, MP3 players and digital files).

The importance of these factors – general demand and technologies of storage and retrieval – can be examined by looking at the history of the recording industry, which has experienced three major periods of sustained growth, and three shorter periods of downturn, of differing degrees of seriousness. Major periods of growth have been marked by a synergistic relationship between increasing consumer demand for recorded-music commodities and for new playback technologies, as well as general economic growth. This was the case in the 1920s, when gramophones, phonographs and other devices fell in price and rose in quality. It was true of the 1960s and 1970s, when stereo records, audio cassettes and hi-fi helped to fuel further demand for rock, soul and other genres around the world. And it was especially true of the 1980s and early 1990s, the era of the CD and the Walkman. The successful marketing of the CD (on the basis of its supposedly better sound and undoubted playback convenience) meant that consumers accepted very high charges for the CD, and, as vinyl records and record players were increasingly hard to come by, paid to replace their old vinyl with new CDs.

The first period of downturn took place from 1929 to the mid-1930s, when worldwide economic depression sent sales of records and sheet music plummeting. The second came in the late 1970s and early 1980s, when global recession was again a major factor, compounded by high oil prices, which made vinyl records extremely expensive, and by increasing competition from new forms of leisure expenditure and, in the USA, the world's biggest entertainment market, new audio-visual technologies such as cable television.

The period from the late 1990s to the present can be seen as a third period of downturn. Like the earlier downturns, it derives from general economic recession, in the wake of the collapse of the dot.com bubble in the United States, and financial collapses in Asia and Latin America. The peaking and decline of demand for CD players and CDs was a major factor too, as was increasing uncertainty about what new form of distribution, storage and retrieval might ultimately come to replace it, as consumers read reports of new types of delivery system on the horizon, but were unable to get any clear sense of what system might prevail – or, in many cases, of how the different systems worked.

Fuck you Lars, the music belongs to us too

I've been suggesting that the level of crisis and chaos in the music industry of the early 2000s was by no means unprecedented, and that digitalisation is just one of a series of technological innovations which have had impacts on the business of music over the last century. And I've emphasized the complex intermingling of a number of factors: not just technological innovations, but also general economic conditions, political values, lobbying powers, copyright law and practice. In this same spirit of stressing a multiplicity of causes and effects, let me now try to summarize – inevitably with a degree of speculation – the implications of recent developments for the industrial production, distribution and consumption of music, and for the analysis of the music industries and the cultural industries more generally.

The recording industry. There have been some changes in the structure and strategy of the major corporations. There has been withdrawal or partial withdrawal from manufacturing and distribution, with these operations being sold off to third parties. This should not be read as disintegration, however (this was the mistake that analysts of post-Fordism made in the 1980s in interpreting earlier developments in the film industry - see Hesmondhalgh, 1996). Nor is it a sign of the 'disintermediation' we heard so much about during the dot.com boom. For the major corporations retain crucial control over the marketing and promotion that largely determine what music most consumers get to hear and know about. The signs are that such marketing is being centralized, in order to produce blockbuster hits, whereby key albums by key stars make an immediate and very big impact on public consciousness. A parallel here is with the increasing emphasis in the film industry on massive publicity to generate big revenues on opening weekends. Meanwhile, the size of record company rosters has been drastically cut – especially non-English rosters in the overseas divisions of the multinational corporations (*Music and Copyright*, 23 June 2004).⁶ As already mentioned, there has been further consolidation of an already highly-concentrated business. A new development after the Sony BMG is that the four majors divided (no doubt temporarily, for very little is stable in capitalism) into two tiers, with Universal and Sony BMG accounting for nearly a quarter of global music revenues, and EMI and Warner Music Group (no longer part of AOL Time Warner, but in the hands of an investment company) for about an eighth each. Small and medium-sized companies have generally not been able to reap the rewards of the new opportunities for promotion and marketing afforded by the internet and the world wide web in spite of some euphoric predictions in the late 1990s. Such companies have been able to develop key acts in certain genres, notably alternative rock and rap, but nearly always in conjunction with the financing and marketing expertise of the majors. The interdependence of 'independents' and majors continues.

Consumption. Digitalisation and other recent developments have brought about a further proliferation of ways in which at least wealthier consumers can experience music: on the computer while sending emails, choosing from vast databases of music while using digital music devices, and so on. This has led some commentators to speak, with awed reverence towards the efficacy of digital markets, of a new era where consumers purchase an extraordinarily diverse set of products, and where even the least popular recordings are still purchased by *someone*: the hugely hyped notion of 'the long tail' (Anderson, 2006). In effect, this is a celebration of the diversity brought about by the digitalisation. The problem however remains inequality of access, for example to broadband, and to knowledge about how to use these technologies. Work in the sociology of consumption has shown for many years now that wealthier, and more educated consumers tend to be very omnivorous in their tastes (a seminal paper was by Peterson and Simkis, 1992). Even for those who can afford broadband and a variety of regularly updated playing devices, a considerable investment of time is still needed – uploading CD collections on to computer and then on to iPods and other MP3 players can take many many hours. As suggested earlier, it may well be that only committed downloaders will be able to find their way effectively around the 'free' file-sharing world.

Rights and Critique. The record companies have been in the process of redefining themselves ‘as creators and exploiters of intellectual property rights’ (*Music and Copyright*, 1 September 2004) for many years. It seems highly likely that the high returns and low costs of music publishing and the constantly expanding opportunities for rights exploitation, both of which I’ve stressed above, will make copyright more and more central to the music business in the years to come – and similar trends are at work in the cultural industries more generally. This may well intensify the efforts of the ‘creative industries’, including the major record companies, to lobby governments in favour of copyright law and practice which will further threaten the public domain and which will favour private, corporate interests. This makes the struggles over digitalisation of music in the early twenty first century particularly interesting, because of the tension between producers and consumers so beautifully crystallized in the music industry lawsuits against music downloaders. The attitude of consumers is not necessarily based on a fully worked-out critique of cultural-industry practice. It is often founded on romantic anarchism, rather than a commitment to the redistribution of wealth. Nevertheless, its affiliation to a notion of the public domain is ultimately critical of the privatising, individualising tendencies of contemporary capitalism. Mann (2000), for example, quotes one fan, addressing the drummer of the heavy metal band Metallica, who took Napster to court in 2000 and thereby instantly destroyed their subcultural credibility: ‘Fuck you Lars. The music belongs to us too’. While I have been sceptical about accounts of the death of the music business, this should not be read as a pessimistic dismissal of recent developments. For discursive struggles over copyright and the digitalisation of music have, I think, helped to reinforce amongst many ordinary music fans a strong sense that the current social relations of musical production should not and need not be as they are. This interpretation should not in any way be confused with the idea that digitalisation increases innovation, creativity or consumer choice. If my analysis is right, a long-term shift of control from the entertainment corporations to audiences is highly unlikely. But there are important countervailing elements in cultural attitudes towards music and towards creativity in general that continue to challenge corporate domination of musical production and circulation. There is a real opportunity in the present conjuncture to build on these romantic and anarchistic elements to spread a more coherent critique. In academia, a spate of recent critical work on these and related issues has helped to put questions of copyright at the top of the agenda of modern cultural criticism (notably Boyle, 1996, Lessig, 2001 and Vaidhyanathan, 2001).⁷ It is upon such foundations that critical analysis of the cultural industries in the digital era needs to build.

¹ Three music majors, Warner, Universal and Sony BMG, were the first to sign deals with YouTube to supply some content in return for licensing deals and cuts on advertising revenue.

² A useful source, which I have drawn on here, are Dave Laing’s various Encyclopedia entries in Laing (2003). Thanks to Jason Toynbee for helping to steer me through the rocky waters of copyright terms. Remaining faults are my responsibility.

³ The ownership of the phonographic rights, of the recording in other words, is indicated in Britain by the use of a ‘p’ in a circle, so this is sometimes known as the ‘circle p’ copyright.

⁴ One of the many confusing aspects of musical copyright is that different agencies collect public performance money on behalf of the owners of the composition and of the recording. As regards author’s rights, or the rights in the composition, in the UK, the Performing Right Society (PRS) collects and distributes money to owners of compositions (as I’ve already explained, these are often the publishing arms of multinational corporations) for performing rights, and its sister organisation the Mechanical Copyright Protection Society (MCPS) collects mechanical royalties. Phonographic Performance Ltd (PPL) collects monies and distributes them to the owners of phonographic rights (two thirds to record companies, most of the residue to performers). In the USA, ASCAP and BMI do work equivalent to that of PRS, and the Harry Fox Agency is the equivalent of the PPL, and also distributes mechanical royalties. Wallis et al. (1999) argue that the principles of reciprocity and solidarity in

collection societies are increasingly under threat from the interests of powerful players, including the major music corporations, broadcasters, and others.

⁵ The reason that I speak of five major music publishers and four major record companies in the early 2000s is that when Sony and BMG merged their recorded music divisions in 2004 (a merger approved by US authorities, and initially by the European Commission, but still under legal challenge in Europe in late 2006 as I write) they did not merge their publishing. In September 2006, Universal's parent company Vivendi bought BMG Music Publishing, reducing the number of major music publishers from five to four (subject to regulatory approval).

⁶ This process is of course reversible, and the major companies may well revert to their strategy of spreading risk across a wider repertoire.

⁷ In this respect, the response of work in the political economy of culture tradition has been disappointing. The index of one otherwise impressive volume on the political economy of culture (Calabrese and Sparks, 2004) contains no reference to copyright, and one reference to intellectual property rights. This remarkable lacuna is not untypical.

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