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**Music artists' earnings and digitisation:
a review of empirical data from Britain and Germany**

Abstract:

Digital technologies are often said (1) to enable a qualitatively new engagement with already existing cultural materials (for example through sampling and adaptation), and (2) to offer a new disintermediated distribution channel to the creator. From a review of secondary data on music artists' earnings and seven in-depth interviews, it appears that both ambitions have remained, until now, largely unfulfilled. The paper discusses to what extent the structure of copyright law is to blame, and sets out a research agenda.

Introduction

The relationship of the artist to the market, mediated by transferable copyrights, has evolved in several phases. Up to the 18th century, copyright was typically practiced as the one-off sale of an original manuscript to a market intermediary (stationer/publisher or performing entrepreneur/patron). Subsequent exploitation of a work, often very shortlived, was left to the discretion of the new owner. No royalties were payable.

Early statutory copyright terms were short. Under the English Statute of Anne of 1710, protection was granted for 14 years from publication (renewable once), and limited to reprints of books or other writings. With England as the trend setter, the subject matter of copyright soon embraced engravings (1735), music (1777), fabric designs (1787) and sculptures (1798).

During the 19th century, the copyright term began to be measured from the life span of the authors and their immediate heirs. *Post mortem auctoris* terms were introduced for example with the author laws of the French revolution (1791; 1793), the Prussian Act for the protection of property in works of science and the arts (1837) and Talfourd's copyright act in the UK (1842).

In negotiations with authors, publishers gratefully accepted these extended terms of protection and explored prolonged exploitations in the market, such as repeat performances. Royalty contracts became common in music and print publishing.

The shape of Western copyright was settled with the Berne Convention of 1886, and integrated into the global free trade area with the WTO TRIPS Agreement of 1994. The regime combines a nod to the creator -- exemplified by a term of protection derived from the author's life -- with

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the economic structure of transferable property rights, creating a market for cultural productions. Thus the application of copyright in the contractual relations of music and media arts (despite any author driven rhetoric), always has been a function of the bargaining power of market intermediaries.

The 20th century was characterised by a shift towards multi-channel exploitation of works, for example through recordings, films, broadcasts, advertising. What used to be secondary exploitation turned into the dominant intermediating activity. New technologies of exploitation often led to a concomitant change in the range of infringing activities under copyright law. Adaptation, translation, recording and broadcasting all became exclusive to the right owner.

At the end of the 20th century, music production and consumption dramatically embraced digital technologies. In 1982, the 'music instrument digital interface' (MIDI) was introduced, revolutionising music production. Within a decade, professional recordings could be assembled in widely affordable home studios. In 1983, the CD came to the market as the first digital mass consumer product. In 1994, Netscape's Navigator browser was released, initiating rapid worldwide Internet adoption. The MP3 compression standard (1994) and peer-to-peer technologies such as Napster (1999) turned the Internet into a music distribution medium.

These technological developments may appear to have two main copyright potentialities:

- Digitisation enables a more extensive engagement with already existing artefacts (for example through sampling and adaptation), and may break down the traditional copyright barrier between creator and user.
- Digitisation offers a new disintermediated distribution channel which may affect the bargaining power between creator and existing market intermediaries (and thus the structure of copyright contracting).

This paper aims to assess to whether these possibilities have been realised – and if not, why not.

Methodology

Definitions:

'Music and media arts' for the purposes of this study was defined as any artefact that can be delivered digitally as strings of 1s and 0s where sound is an essential and dominant feature of the receptive experience. This definition allows for the inclusion of words or pictures (i.e. multimedia music works), but music videos, video installations, computer games, radio plays are not the primary focus of the study.

The term 'artist' is used to cover a contemporary creative role that may include three legally distinct activities: composition, production and performance of sounds.

These definitions are adopted for working purposes only. The first definition narrows the category of artefacts sufficiently to ensure historic comparability of music industry data. The second definition widens the traditional conception of music creation by pooling the legal categories 'author of musical work', 'producer of sound recording' and 'performer' to capture contemporary artistic practices.

Data collection:

Three methods of data collection were used:

(A) Desk research, reviewing existing quantitative data on artists' earnings in music and media arts.

(B) Visits to industry events, such as trade fairs, policy symposia, and professional development seminars, to scope current issues and explore views of leading members of copyright organisations (Collecting Societies; Music Publishers; Record Labels). Six such events were attended in 2003.

(C) In depths interviews with a selection of artists.

The focus was on the UK, with German data used as a complement.

It was expected that methods (A) and (B) would generate artist profiles and an interview protocol as the basis for in depths interviews (C).

Initially, it was planned to interview artists according to five types, covering

1. independent, commercial unsigned artist with local live event following
2. artist entirely dependent on the subsidised arts sector
3. established artist whose work substantially relies on re-using other people's work
4. media artist with substantial royalty income from performance of her work on TV etc
5. cultural icon whose work is frequently sampled or adapted by other artists

However, discussions with copyright societies, labels and publishers indicated that it was difficult to validate these artist profiles as typical. It was claimed: 'each artist is different', and 'no two income streams are the same'. Within the time and resource constraints of a pilot study, no survey could be carried out.

It was therefore decided not to concentrate on artist profiles as representative of the population of music and media artists. Rather, the selection of artists aimed to capture experiences that reflected the impact of digital technologies. The review of artists' earnings data (Method A) was important in providing a context in which to generalise from these individual experiences.

Eight artists were interviewed in November, December 2003 and May 2004 in Germany and the UK. Four interviews were conducted in person, four on the telephone, each lasting about 1 to 1 1/2 hours. Notes were taken and written up within 24 hours.

The artists were (self-definitions):

- Rock artist, also running label and publishing company
- Session musician with songwriting credits
- Dance and 'library music' artist
- Electronica artist and DJ (many samples, 3 top ten singles)
- Electronic music artist (contemporary 'classical')
- Techno jazz artist, also running production, label and publishing company
- DJ and producer (crossover techno/contemporary)
- Film and media composer, also active in copyright society

All interviewees are mid-level entrepreneurial artists, i.e. they succeed in making a full time living from music.

Interview protocol:

1. Artist earnings

What are artists' income streams, incl. percentage from copyright (royalty) and non-copyright (live, media, teaching) sources?

2. Digital distribution technologies

Is Internet distribution benefiting independent and niche repertoire? What are the obstacles to self-publishing, self-distribution?

3. Transformative use

What are artists' experiences in using material claimed by third parties (e.g. sampling, bootleg tracks)?

4. Non-copyright consumption practices

What are artists' perceptions of P2P services, pirate radio, unlicensed clubs?

Results: Markets in creative industries

The arts show an oversupply of creative ambitions (Hirsch 1972; Peterson & Berger 1975) combined with curious 'winner-take-all' demand patterns (Frank & Cook 1995; Kretschmer et al. 1999). This has two main effects on copyright contracting.

(1) Since many more products want to enter the market than can be consumed, there is an important role for the commercial intermediary, acting as selector or gate keeper. In the music industry, publishers, record companies, broadcasters or clubs can play this role for different markets. The bargaining power of artists early in their career is therefore weak.

(2) Despite ever more sophisticated marketing efforts, commercial intermediaries have been unable to reliably predict demand patterns. Nobody knows the next hit. Only about one in ten releases will repay its initial investment (Goldberg 2000; Kretschmer et al. 2001). Market intermediaries tend to favour known artists with a track record. The bargaining power of consistently successful artists is therefore very high.

Only two reliable large scale studies of artists' earnings were identified: (a) an analysis of royalty distributions of the British collecting society PRS published by the Monopolies & Merger Commission (now Competition Commission) in 1996 (*Performing Rights*. London: HMSO Cm 3147) and (b) a German analysis of artists' insurance data for the federal ministry of employment in 2000 (*Bericht der Bundesregierung über die soziale Lage der Künstlerinnen und Künstler in Deutschland*). See Appendix for a summary of data.

In 1994 (MMC 1996), 1438 UK composers and lyricists (of a total of 15,500 writers) received more than £2500 from performing royalties (for broadcasts and public performances). 10 composers received more than £100,000. (In addition to performing royalties, composers can expect to earn a similar amount from mechanical royalties for the sale of sound recordings).

1994 PRS income distribution (15,500 writer members)
source: MMC 1996

10 composers more than £100,000.
204 more than £20,000
459 more than £10,000
848 more than £5,000

8,237 under £100

1998-2000 PRS income distribution (30,000 writer members)
source: annual reports

200 more than £100,000

700 more than £25,000

1,500 more than £10,000

2,300 more than £5,000

16,000 under £100

The average annual earnings for a German composer in 1998 (total in *Künstlersozialkasse*: 3717) were in the region of DM 22,000 (~EURO 11,000). About 90% of musicians (total in *Künstlersozialkasse*: 26,545*) earned below DM 30,000 (~EURO 15,000). 2650 musicians earned above DM 30,000, with 125 musicians earning above DM 102,000 (~EURO 51,000).

The MMC PRS study only captures copyright income while the German data includes income from non-copyright sources, such as teaching or media work. However, the results of both studies broadly match with a number of smaller artists' surveys. For example, the UK Society of Authors survey (Poole 2000) to which 1711 members responded revealed average earnings of £16,600 per annum. 75% earned under £20,000, 61% under 10,000 and 46% under £5,000. According to a GEMA (German collecting society) insider, only about 1,200 German composers can live from their creative output (Dümling 2003, p. 313; citing Wahren 1995).

Only a small minority of artists reaches ordinary living standards from copyright income.

A questionnaire survey of Austrian composers' earnings by a group of sociologists from the Vienna Hochschule für Musik und Darstellende Kunst (now Musikuniversität), delivered the following income profiles (*Komponistenreport*, 1993):

630 questionnaires, 283 returns, average age 37 years:

Income from compositions as percentage of total income

below 10%:	36.8%
10-20%:	31.2%
21-49%:	14.1%
50% and more:	17.8%

Most composers received also income from other musical activity (performance & teaching):	82.0%
non-music professional activity:	25.6%
family members:	18.2%
charity:	3.9%
capital:	1.1%
other sources:	3.5%

* Figures for the distribution of earnings were only available for an aggregate of all musicians. See Appendix.

It is well-known that in the UK, the social benefit system plays an important part in the early stages and gap periods of artistic career. Our interviews confirmed this.

Earnings from non-copyright, and even non-artistic activities are an important source of income for most creators.

Two arguments can be made why the 90:10 distribution of copyright earnings still represents effective support for the creative basis of society. Both arguments are doubtful.

(a) The market picks the winner. Copyright supports the best segments of culture.

Products accounting for the top 10% segment include blatantly industrial products (such as singles tied in to populist TV shows), but also cultural classics (such as the Beatles). It is evident that much that is culturally worthwhile is not, and will never reach this Top 10 segment. Diversity of cultural production, and support for niche communities is not a major effect of copyright.

(b) Artists are risk takers. Without the prospects of potential top 10% earnings, nobody would become an artist.

This argument warrants closer empirical attention. It is unlikely that production in the lower earning segments would cease without the incentive of possible top earnings, in particular if non-copyright support was available, such as grants or benefits. However, the prospect of financial success appears to be a significant motivation.

The rationale of artists' contracts

Most artists' earnings formally involve the sale or licensing of copyright (often structured as advances plus royalty entitlements). However, it is difficult to determine precisely the role of rights in the generation and distribution of artists' income. Contractual transactions may emulate the effects of copyright, as they do for sport stars (who do not legally own their performances).

To give an example: A film composer may receive £5,000 for the delivery of a sound track to a television series. This may be divided into an author's fee and a production fee. Additionally the composer may receive performing royalties via a writer collecting society (PRS) for each broadcast on TV, royalties from a performers' collecting society if the composer conducts (performs) his/her own score (PAMRA), and mechanical royalties via MCPS if a soundtrack is released.

Without the existence of copyright, the composer may still be commissioned for delivery of a soundtrack, just as a footballer is paid to play football. Similarly, the composer may contractually receive royalties, just as the footballer may receive a bonus for winning a title, or making an agreed number of appearances.

In a market transaction, the contracting parties should normally agree only a royalty deal (rather than a one-off flat fee) if there are benefits from risk-sharing or benefits from the artist's continued association with his/her works, in enhancing the work's reputation by supporting promotional efforts and giving performances (cf. Towse, 2001).

However, the institutional structure of copyright societies has historically led to advantageously structured royalty terms. Composers receive a greater share of income than the market would allocate to them. For example, in Germany the collectively negotiated pay-per-play performance fee received by performing right society GEMA is split 2/3 : 1/3 in favour of the composer (mechanicals 60:40). Under PRS statutes, the upper limit for the publishers' share is 50%. As one would expect from economic premises, there is increasing pressure by more powerful actors, such as advertising agencies and broadcasters, to capture valuable copyright royalties by setting up their own publishing companies. These new music publishers do not promote the music they sign but act simply as a legal vehicle for receiving royalties. Mol & Wijnberg (2004, forthcoming) term this trend 'value chain envy'.

Royalty terms for performers are less advantageous, and much closer to actual bargaining powers. Traditional recording contracts were for extended exclusive periods. Over the last decade, record companies tied artists with a combination of advances and options which could be unilaterally exercised by the label. Since advances paid are recoupable from production, video and promotion expenses (often exceeding \$500,000), most artists up to sales of 200,000 copies, appear never to receive any royalties for their performances. As one interviewee said: 'the majors don't want you to stop working'.

Several interviewees made more money selling only a few thousand records via local vinyl retailers or concerts, than from earlier recording contracts.

Results: Views of the digital environment

All the artist careers we engaged with in our interviews were affected by the revolution in media production associated with digital equipment. Since the late 1980s, professional studios were affordable with countless possibilities for sampling, manipulating and mixing sounds. In 1991, one artist said he had spent £7,000 for his first home studio. Some of our interviewees entered the market at that time, exploring new genres such as house, acid, jungle or trance. The distinctions between composer, performer and producer became increasingly blurred.

(a) sampling

For all our interviewees, creative engagement with contemporary cultural materials, arguably a core potential of digital technologies, was prevalent. However, this had been hindered through highly bureaucratic and costly processes of sample clearance. For example, if an artist wants to include a sample from another record, major right holders often insist on a controlling interest of 50% to 100% of the rights in the new track. EMI demands that these rights are preserved even in future remixes where the original sample may no longer be recognisable (Music Publisher Association contract seminar 13/11/2003). Remixes of whole songs typically require assignment of 100% of the rights in the new (adapted) track.

One interviewee thought it was best not to clear a sample if only 1000-2000 records would be sold, and risk 'cease and desist' letters. Another argued for a system of compulsory licensing, with fees of \$250 per sample deposited with a trust fund (avoiding costly searches). Others supported releasing samples from the scope of copyright altogether: 'Some songs use 200 samples just for the drum loops. The club music of the 1990s is based on infringements.'

(b) distribution

When the prospect of ubiquitous digital connectivity appeared on the horizon with the release of Netscape in 1994, there was an expectation that artists would soon be able to reach a global Internet market without the help of intermediaries. Music and media arts which can be delivered entirely as strings of 0s and 1s, should have anticipated this trend, enabling niche consumption to flourish, and perhaps subverting winner-take-all markets.

We find little evidence that this has happened. Bargaining power has remained firmly tilted towards intermediaries. Reasons include

- o the difficulty for individual aspiring artists of getting noticed among the 'noise' of creative ambitions
- o the reluctance of many artists to engage with alternative forms of copyright exploitation.

A new generation of copyright laws predominantly concerned with preventing unauthorised distribution in digital networks through proprietary digital rights management (DRM) technologies has not helped (WIPO Internet Treaties 1996; DMCA 1998; EC Information Society Directive 2001).

Recently, US based agencies for collective digital distribution aimed at independent labels and individual artists, such as the Independent Online Distribution Alliance ("<http://www.iodalliance.com>"), Digital Rights Agency ("<http://www.digitalrightsagency.com>") or CD Baby ("<http://www.cdbaby.com>"), have attempted to change this. The performance of new royalty contracts on offer, such as CD Baby's 91:9 split in favour of the artist, should be researched closely.

Some interviewees thought self-publishing was not cost effective, taking up too much promotional effort in placing tracks. Most were willing to participate in on-line services (if they had not already signed away their on-line rights to publishers and labels). Rather than plunging radically into e-commerce, many artists seem to have become shrewder in exploiting strategically the royalty possibilities of the existing copyright system: for example producing works that are high on the collecting society valuation scale (Germany's GEMA *Wertungsverfahren*), or making a succession of small deals for individual tracks.

Non-Copyright Responses

There are strong indications that a significant creative element of society no longer accepts the current structure of copyright, with long exclusive rights bundled in the hands of major right holders.

- o On the user side, we are familiar with the arguments from ever increasing 'piracy' rates on peer-to-peer file sharing networks (such as Napster pre-2000, or Kazaa). For example, participants in the 2000 MORI Study 'Intellectual Property: Public Attitudes' particularly resented restrictions on non-commercial use.

- o On the creator side, we find garage communities that mix or hide their sources, producing so-called bootleg records under artist identities such as Freelance Hellraiser, Frenchbloke, or Soulwax. Remixes from familiar copyright protected material may include combining Madonna with Telex, Kraftwerk with Whitney Houston or Depeche Mode with Eminem. Recent controversy includes the Grey Album by DJ Dangermouse, mixing the

Beatles' White Album with Jay-Z' Black Album (<http://www.greytuesday.org/>); 24 February 2004).

o Even intermediaries, such as metropolitan sub-culture radio stations or dance clubs now often operate outside the accepted frame of copyright laws.

One interviewee accepted that pirate radio was 'good promotion', and that Ibiza clubs played his records for free. 'If I am desperate for them to play my music, why should they pay me for it?' As 'secondary benefits' of such unauthorised exposure, some artists named 'further remix work', or 'DJ invitations'.

Artistic motivations are complex, with some creators favouring wide distribution over the exclusive control promised by copyright law. This is in line with a questionnaire study of academic authors conducted by Gadd et al. (2003), and the growth of licences under the Creative Commons initiative. Others were happy with the exclusive structure of modern copyright, as they had learned to benefit from the system.

Conclusions and future research

Is there evidence of a break down of the barrier between creator and user?

The answer is an unambiguous 'Yes' -- but much creative reworking takes place despite copyright barriers. Right owners' terms remain very onerous, hindering engagement with contemporary cultural materials.

Has digital distribution benefited creators financially?

The evidence here is contradictory. The often made claim that copyright supports the creative basis of a society is empirically doubtful. There is a suspicion that copyright underpins vastly unequal rewards.

Creator and investor interests are not the same. Copyright suits investors (music publishers, labels) who are incentivised to market and distribute the works they exclusively control. Copyright also suits creators with a track record of hits who can extract favourable terms from investors.

Copyright does little for new and niche creators who often sign away their bargaining chips cheaply. In the absence of alternative compensation schemes, digitisation so far appears to have brought few financial benefits from disintermediated distribution.

Royalties from performing rights administered by collecting societies (which cannot be individually renegotiated to reflect economic bargaining power) appear to form an important and increasing part of artists' earnings. They appear to encourage artists at the margins of full-time work.

A more systematic profile of creators' income streams across different sectors and different legal frameworks (jurisdictions) would be highly desirable. Copyright contractual income (involving a transaction of rights); copyright non-contractual income (via collectively negotiated or statutory royalties administered by copyright societies), non-copyright contractual income (such

as live performances or teaching) and income from non-artistic sources can be conceptually separated and captured by survey data and collecting society distributions.

Cultural policy should be based on a clear empirical picture of the role of copyright in creative production. The questionnaire below is proposed as an empirical instrument that might fill this gap for the music sector, using UK terminology.

<p>Research agenda: analysis of music artists' earnings</p> <p>Total income:</p> <p>1. Income from music:</p> <p> 1.1 Copyright: Non-contractual income</p> <p> PRS:</p> <p> MCPS:</p> <p> PAMRA/PPL:</p> <p> 1.2 Copyright: Contractual income*</p> <p> Studio work:</p> <p> Record sales (apart from MCPS):</p> <p> Own label:</p> <p> Own publishing company:</p> <p> 1.3 Non Copyright: Contractual income</p> <p> Live performances:</p> <p> Grants/commissions:</p> <p> Sponsorship/merchandising</p> <p> Teaching:</p> <p> Other (please specify):</p> <p>2. Income from non-music sources:</p> <p> Family support:</p> <p> Capital:</p> <p> 'day time job':</p> <p> Other (please specify):</p>

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* Copyright contractual income is defined here as negotiated payment that involves a transaction of rights.

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Appendix 1: Monopoly & Mergers Commission (UK 1996): Performing Rights

PRS income distribution in 1994

<i>Bands of net domestic distributed revenue* £</i>	<i>Number of writers</i>	<i>%</i>	<i>Cumulated % from top</i>	<i>£m</i>	<i>%</i>	<i>Cumulated % from top</i>
Up to 24	4,812	31.0	100.0	0.04	0.19	100.0
25-49	1,624	10.5	69.0	0.06	0.29	99.8
50-74	1,001	6.5	58.5	0.06	0.30	99.5
75-99	800	5.2	52.0	0.07	0.34	99.2
100-149	920	5.9	46.9	0.11	0.56	98.9
150-199	632	4.1	40.9	0.11	0.54	98.3
200-249	460	3.0	36.8	0.10	0.50	97.8
250-499	1,481	9.6	33.9	0.53	2.6	97.3
500-749	750	4.8	24.3	0.46	2.2	94.7
750- 999	452	2.9	19.5	0.39	1.9	92.4
1,000 – 2,499	1,130	7.3	16.6	1.79	8.8	90.5
2,500 – 4,999	590	3.8	9.3	2.11	10.4	81.7
5,000 – 9,999	389	2.5	5.5	2.75	13.5	71.4
10,000 – 19,999	255	1.6	3.0	3.50	17.2	57.9
20,000 – 49,999	164	1.1	1.3	4.98	24.5	40.7
50,000 – 99,999	30	0.19	0.26	2.04	10.0	16.2
100,000 and over	10	0.06	0.06	1.26	6.2	6.2
Total	15,500	100.00	100.00	20.35	100.00	100.00

* Excluding earnings equalisation allowances, unlogged performance allocations, and revenue from performance of films.

Appendix 2: Künstlersozialkasse (Germany 2000)

‘Künstlersozialkasse’ is a compulsory insurance for free-lancers, working in one of the four sectors ‘Word’ (mostly journalists), ‘Visual Arts/Design’ (including the advertising industry), ‘Music’ and ‘Performing Arts’ (e.g. actors, directors).

Sector Music (1998)

<i>Sector of activity</i>	<i>number of artists</i>	<i>total income</i>	<i>average income in DM 1,000</i>
Composer	3,717	81,144	21,830
Lyricist	234	6,297	26,910
Arranger	430	7,476	17,386
Conductor	265	7,380	27,849
Choirmaster	382	7,743	19,319
Instrumentalist Solo (E)	1,550	23,151	14,936
Orchestra Player (E)	507	7,251	14,302
Singer (opera, musical)	456	8,042	17,636
Singer (concert)	390	5,957	15,274
Choir	48	676	14,083
Folk music	1,564	28,634	18,308
Tanzmusik	2,552	40,662	15,933
Kurorchester	442	7,299	17,296
Jazz and Rock	2,634	36,255	13,764
Technical staff	474	9,148	19,299
Teacher	10,709	175,006	16,342
DJ	631	11,179	17,716
Others	963	14,000	14,538
Total	27,851	477,299	17,138

Number of musicians with an income in 1999

below	DM 7,561:	1,451
DM 7,561-	DM 8,821:	3,123
DM 8,821-	DM 17,641:	12,969
DM 17,641-	DM 30,000:	6,228
DM 30,000-	DM 40,000:	1,604
DM 40,000-	DM 76,501:	909
DM 76,501-	DM 102,001:	136
more than -	DM 102,001:	125
Total		26,545

Appendix 3: Propositions for copyright law reform*

Proposition 1:

There is no unified category of right owners, covering creators (authors) and investors (producers). **Creators** have four main interests:

- to see their work widely reproduced and distributed
- to receive credit for it
- to earn a financial reward relative to the commercial value of the work
- to be able to engage creatively with other works (in adaptation, comment, sampling etc).

Regarding the appropriate structure of author rights, this leads to three conclusions:

- The creator has little to gain from exclusivity (it prevents widest distribution; it prevents access to other works; it does not ensure financial reward)
- The creator has little to gain from transferability (under prevalent contractual practices, the creator can be bought out in a one-off commercial transaction)
- The creator has a lot to gain from the so-called *droit moral* (a kind of creative trade mark, ensuring integrity of origin).

There are considerable economic inefficiencies caused by the costs of administering rights. Digital technology offers new possibilities of tracing use and rewarding the creator. Transforming collecting societies into regulatory bodies answering to society at large (not only right owners) may be the best way forward. For one detailed proposal, see Fisher 2004.

Proposition 2:

Investors want exclusive and transferable property rights, to extract maximum returns from their investments. Exclusive rights, however, come at a cost to society.

- Useful works become more expensive than they would have been (this is a direct consumer loss).
- Works become available for creative engagements only on the terms of the right holder (this is a loss of cultural diversity, innovation and critique).
- Automatic returns from a backcatalogue of works subsidise existing large right holders, creating an entry barrier to the creative industries (this is an anti-competitive effect).

Regarding the appropriate structure of copyright, this leads to one conclusion:

- Investors should be granted exclusive terms of protection only as a response to market failure: i.e. where without the incentive of exclusivity, a work in the 'useful arts' would not be produced at all.

In the past, the exploitation cycle of cultural products already justified only a short exclusive term. The faster digital dissemination and exploitation environment demands an even shorter exclusive term. Modern copyright laws in the tradition of Berne and TRIPS have got this radically wrong.

* These propositions were first advanced in my article 'Digital Copyright: The end of an era' (2003), *European Intellectual Property Review* 25/8: pp. 333-341. Star creators should be treated as investors.