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Brief for: Commercial Communications in Commercial Programming

October 2010

ABOUT UK MUSIC

UK Music is the umbrella organisation which represents the collective interests of the UK's commercial music industry - from artists, musicians, record producers, songwriters and composers, to record labels, music managers, music publishers, and collecting societies.

UK Music consists of:

- Association of Independent Music representing 850 small and medium sized independent music companies;
- British Academy of Songwriters, Composers and Authors with over 2,200 songwriter and composer members;
- BPI representing over 440 record company members;
- Music Managers Forum representing 425 managers throughout the music industry;
- Music Producers Guild representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers;
- Music Publishers Association, with more than 250 major and independent music publishers representing close to 4,000 catalogues;
- Musicians Union representing 32,000 musicians;
- PPL representing 42,000 performer members and 5,000 record company members;
- *PRS for Music* representing 73,000 songwriters and composers and music publishers

Background.

1. UK Music is sympathetic to the plight of the commercial radio sector and to Ofcom's efforts to explore regulatory options that could ease its financial difficulties. However, some of the options currently under consideration would have a direct and detrimental effect on the UK's commercial music industry, the diversity of commercial radio programming and – ultimately – on music fans, artists, composers and audiences alike.
2. At the heart of the UK's commercial music industry sits a complex network of songwriters, composers, musicians, artists, artist managers, record producers, record companies, music publishers and collection societies all of which are supported by an expanding number of ancillary, dependent and associated occupations such as booking agents, live music promoters, equipment and instrument manufacturers, retailers online and offline and venue owners.
3. While we address the remainder of this paper from the perspective of the songwriter, artist and record company, it is important to remember that any impact upon this core element of the industry will have profound implications for the entire industry.
4. Against an often-prevailing assumption, in reality our sector is characterised by a variety of very small innovative enterprises. SMEs account for 90% of all music businesses¹. In reality the majority of record companies working within our sector employ less than 10 people. By way of example a recent survey of the 850 companies who comprise the membership of the Association of Independent Music showed that the average employee headcount was two people per company².

Ofcom Broadcasting Code Review.

5. UK Music is most concerned about proposals which raise the possibility that commercial arrangements might be introduced in relation to the selection of, or rotation of music for broadcast on commercial radio, throughout our industry a practice normally referred to as "payola".
6. We would like to emphasise that this proposal does ***not*** have the support of any part of the commercial music industry

Current Commercial Arrangement.

7. Commercial radio is currently licensed to broadcast music by *PRS for Music* and PPL acting under a direct mandate from songwriters, artists and rights holders.
8. Ofcom's proposals relating to a commercial arrangement which might influence the selection and or rotation of music rather incorrectly assume that our collective licensing bodies, *PRS for Music* and PPL Ltd, have the authority

¹ Department for Culture Media and Sport, "SME Music Businesses: Business Growth and Access to Finance", February 2006.

² AIM annual membership survey 2009

to carry out negotiations which might create an association between artists and any brands or identities.

9. In fact, collecting societies such as *PRS for Music* and PPL do not have any such mandates. For reasons which we set out below, songwriters and artists retain the right to approve such associations.
10. Under *PRS for Music* membership rules, the composers or songwriters upon becoming a member only assign the performing right which comprises the right to communicate the work to the public. No other rights are assigned, especially those which might be used in conjunction with any other commercial activity.
11. PPL also make clear the limitations and exclusions in their licences they provide to radio stations. The following is an extract from PPL's public website:³

As a guide, licences are usually subject to the following restrictions:

- *usage in advertisements, signature tunes and station identity signals is excluded*
- *re-mixing or editing the sound recording is excluded other than for broadcasting less than the full length of the sound recording*
- *usage in circumstances where it may be reasonably considered detrimental to the performer or record company is excluded*

Artist Right to Approve Association.

12. Songwriters and composers retain the right to consent to any adaptation or the putting of a musical work to support any goods, services or products, an activity which under UK copyright law requires their formal consent⁴.
13. In general terms, composers will reserve the right of prior written approval before their music can be used to support a specific advertisement or other use. Therefore a record company or music publisher must have the written approval from a composer before they can allow the use of the work for the advertisement or promotion of a brand.
14. Sitting alongside this economic right, songwriters and composers may also invoke their moral right⁵, that is, the right to object to any derogatory treatment of their work. Moral rights exist to protect the personality of the composer. The protection provided for by this moral right could also include the context in which a work is used. This means that even if the work is not altered or modified, derogatory treatment could be found.

³ <http://www.ppluk.com/en/Music-Users/Radio-Broadcasting/>

⁴ Section 19 of the Copyright Designs and Patents Act 1988

⁵ Section 80 of the Copyright Designs and Patents Act 1988

15. Whilst some artists do consent and monetise the use of their music in advertisements, others have strongly opposed such uses. This opposition is often grounded in artistic, moral or political convictions. Whilst the stance of some artists with respect to using music in advertisements is very public, the stance of other artists on other issues will be less obvious, thus leading to uncertainties which will make the concept unworkable.
16. The outcome is that in order to comply with the artists' legal and moral rights, every instance where the selection of any music forms part of a commercial arrangement would require the prior written consent of every artist who contributed to the work (composers, musicians, singers, lyricists, etc.) for every song on every occasion.
17. Ofcom's proposals clearly expose broadcasters and any number of other individuals and organisations to the vulnerability of legal challenge by individual artists, composers and songwriters.

Market Entry and Diversity.

18. At present, the driving influence over the selection and/or rotation of music is the complex but healthy dynamic between a commercial radio station, its advertising base and its listeners or target demographic.
19. The cost of music to a station is not a factor in its selection or rotation.
20. Every record has an equal chance of being selected by a programmer or DJ for broadcast. It is a merit-based system, with individual records being chosen on their ability to attract a specialist, mass market, or targeted audience reflecting each station's needs and format.
21. Payola clearly would erect a financial barrier to market entry for commercial radio where at the moment no such barrier exists, both for artists and companies. Unequivocally this will result in fewer opportunities for all, creatively and financially. This would detrimentally impact on the legitimate economic interests of music businesses, investors and individual artists.
22. Payola would unquestionably result in a reduction in the range of music played on commercial radio stations, adversely impacting upon diversity for the listener. We would invite Ofcom to conduct a market impact assessment on diversity should payola be introduced, but all experience and the collective wisdom within the music industry point to only one outcome: a further concentration of the range of music heard by commercial radio audiences, a decrease in the programming available to cater for a variety of tastes and interests, and fewer opportunities for artists.
23. As a consequence, the BBC would potentially become the sole radio broadcaster for the great majority of UK artists and music companies.

Songwriter, Composer, Performer and Rights Holder Collective Licensing.

24. UK collecting societies, *PRS for Music* and PPL, have a long and venerable history in administering the rights and maximising the revenue for their members. *PRS for Music* represents some 73,000 individual composers,

songwriters, and music publishers; PPL has some 42,000 performers and 5,000 record company members. Their strength is derived not only from the efficiencies of their collection and distribution systems but also from the scale of their membership and comprehensive repertoire.

25. Payola would weaken the licensing position of songwriters, composers and performers.
26. It would also run contrary to the prevailing efforts of the EU and UK agencies responsible for the legal framework of collective rights administration. We would suggest that any attempt by Ofcom to introduce changes which would fragment and complicate the rights clearance process would be unwelcomed at a legislator level. In addition, throughout other EC Member States payola is generally viewed as an assault on culture and creativity.

Market Intervention.

27. In a diversifying music market, many artists and musicians are embracing the opportunity to derive new sources of revenue from brand associations. Although artists have always utilised advertising as an income stream - either as synch licensing deals or direct sponsorship – in today’s music economy such partnerships are becoming increasingly important, and for a more diverse range of acts.
28. Recent years have seen a succession of high profile brand/music partnerships – such as Jose Gonzalez’ soundtrack to the Sony Bravia TV advertising campaign (2006), Groove Armada’s one-year deal to release music via the Bacardi brand (2008), and the likes of Prince, McFly and Mongrel, all of whom have released “free albums” via national newspapers.
29. Increasingly, bands are considered brands in their own right.
30. Ofcom’s proposals to allow for the selection and rotation of music to be determined by commercial negotiations would clearly weaken artists’ ability to conduct their own negotiations in this area.
31. Exclusivity is a valuable leverage in negotiations between an artist and a brand. Ofcom’s proposals undermine the ability of artists to use exclusivity as part of their bargaining power.
32. The music industry was the first to feel the full force of disruption brought about by digitisation and is still in a state of very significant transition. Many artists are forging innovative partnerships with brands as an alternative or supplementary source of investment and revenue. Ofcom’s proposals would dramatically interfere in this development and adversely affect the legitimate economic interests of artists and musicians.

Conclusion.

33. Ofcom did not engage with the music industry – a crucial and significant stakeholder -- in advance of these proposals being promoted as a potential solution to commercial radio’s difficulties. Ofcom has not carried out an economic assessment of the impact these proposals would have on

thousands of businesses and individuals in the music industry who would be directly affected. Ofcom have not considered issues related to the range and diversity of music broadcast on commercial radio and the knock-on effect on the BBC. Nor have Ofcom considered the legal challenges which these proposals would be subject to for violating artists' legal rights.

34. For all these reasons, UK Music urges Ofcom to exclude music from any proposals relating to the liberalisation of commercial communication in radio programming.