

Copyright and Creation: repositioning the argument

Authors

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1.Introduction

In the last decade the creative industries have been affected by the appearance of disruptive innovations (Bustinza et al., 2013a). Significant business, legal, academic and political debates have arisen as a result of the impact of these disruptions, particularly with regard to issues of copyright protection, illegal file sharing and the appropriateness of legislation to safeguard creator's rights (Parry et al., 2013). Whilst some argument remains as to the level of remuneration that artists and copyright holders should be paid for their work, there is general agreement that current laws are not sufficient for the digital environment and different IPR legislation is necessary, but the challenge lies in what form the legislation should take (Liebowitz, 2011).

A report from LSE Media project (Cammaerts et al., 2013) makes a case against the current proposed form of legislation in the UK for protecting intellectual property rights in the digital domain, the UK Digital Economy Act (DEA, 2010). We consider an in-depth evaluation of this act legitimate and valuable, both in economic and legal terms. However, the LSE report has several drawbacks in methodology that raises questions as to the validity of parts of the argument made in their call for a review. In presenting their argument Cammaerts et al. (2013) overlook some of the existing evidence from analysis of the impact of the implementation of IPR policies. Studies which show a reduction in file sharing activity and an increase in revenue post legislative reform hail from the US (Bhattacharjee et al., 2006), Sweden (Adermon & Liang, 2010) and France (Danaher et al., 2010, 2012).

The objective of this short report is to better position Cammaerts et al. (2013) work in the literature, which in turn will help policy makers in taking informed decisions. The structure of this report will be as follows. In Section 2 we discuss on the problems of biased bibliographical sources of information. In section 3 we summarize some inconsistency in the argument, section 4 discusses the generalizability of the success of business models across different creative industries and section 5 on co-creation and

legislation. This is an interesting debate and our arguments seek to be expansive but will ultimately be incomplete.

2. Biased sources and interpretation of academic articles.

Different methodologies have been used to analyze the relationship between illegal file-sharing and purchasing activity (Parry et al., 2013), including:

- *Aggregated data*: This method employs aggregated information at city, region or country level and relates variables such as internet penetration or piracy rates with industry revenues. The most representative analyses' from this stream of research are Liebowitz (2008) and Bustinza et al. (2013b), both of which find file sharing damages sales, reporting a negative relationship between illegal downloading and industry revenues.
- *Consumer survey data*: This is the most extensively used approach to data capture in the literature and the stream of research it generates has, in most of the cases, found a negative relationship between file sharing and purchasing, (Hong, 2004; Rob & Waldfogel, 2004; Zentner, 2006; Vendrell-Herrero et al., 2013). There have been some exceptions, as Andersen et al. (2010) and Chi (2008) find no evidence of file sharing substituting for purchase.
- *Consumer transaction data*: This line of research has reported more counter-intuitive results. Information capture comes from downloading (Oberholzer-Gee & Strumpf, 2007) or clickstream data (Aguiar & Martens, 2013). These are relevant detailed sources, however, the analysis of such data needs great skill and care. Reports failing to be diligent have been potentially misleading and subsequently criticized by academia (Liebowitz, 2006, 2011; Parry et al., 2013) and industry associations (IFPI, 2013).

Cammaerts et al. (2013, p. 3) report includes the statement “*evidence does not support claims about overall revenue reduction due to individual copyright infringement*”, which is supported by one reference, Aguiar & Martens (2013). The selection of this one citation neglects the extensive body of empirical methodologies mentioned above. Such a claim suggests citation bias which, Christensen-Szalanski and Beach (1984, p. 77) propose may be because "authors select citations to serve their personal goals (May, 1967) or to advocate their favored hypothesis (Armstrong, 1979)".

Cammaerts et al. (2013) make judgments without introducing evidence which shows clearly both sides of an argument, providing a contrast expected in academic writing. All the assumptions and claims made by authors need to be contrasted through control variables (Danaher et al., 2012) and other statistical procedures (Parry et al., 2013). Mathematically it is possible to find correlations between many different things but they have little meaning if relationships are not subject to contrast. Despite their calls for independence in reviews and the provision of access to the methodologies and assumptions made in reviews, paradoxically, Cammaerts et al. (2013) avoid talking in depth about the factor that may explain the decline in sales that has been scientifically contrasted and is the key subject of the legislation; illegal file sharing.

3. Inconsistent arguments and the laugh test

Complex theoretical arguments can disguise implicit assumptions and empirical arguments based on complex but erroneous methods can lead to dangerous and incorrect conclusions. Kennedy (2003) proposes the application of the “laugh” test to check whether a finding has any sense. He proposes analysts explain their findings and conclusions to a layperson and observe if the person can avoid laughing. Let us use this test on some of the arguments of Cammaerts et al. (2013) in different contexts.

Creative Industry revenues are not declining overall: In the Figure 1 (p. 6) of the report Cammaerts et al. (2013) show a picture representing the revenues of the industry that is presented as evidence that revenues didn't decline. The figure draws on information from many different sources but is used to show that concerts are the main source of revenue upon which artists should draw following the decline of sales of recorded music. The figure clearly shows the significant decline in the recorded music market, protection of which is the goal of copyright legislation, and a slight overall decline in revenues for the industry.

However, in the report focus is placed upon the growth of live revenue from concerts. Overlooking the acceptability of the loss of revenue from recorded music; let us instead change the context. Rather than musicians, let's talk about academics as that is our personal context. In an imagined scenario, the head of the department unilaterally

decides that all the members of the staff will no longer benefit from research income. Instead staff will teach 3 times as many hours per week, on average moving from 6 to 18 hours per week if they wish to maintain their salary. What is likely to be the immediate response? Almost surely academics will complain as they will not have the free time available for their creative activities, which in the academic world is research. Research is required to generate new knowledge and enhance future teaching. Without it, there is no intellectual progression and future markets will all draw upon the same teaching material. This would change the centre of value creation from the originator of the work to the teacher. It is unlikely that significant new bodies of research would be undertaken without compensation and the academic research community would collapse. Whilst we have never cited the Christian Bible before, Luke 6:31 appears appropriate: “*Do to others as you would have them do to you*”.

Figure 2 (p. 8) uses IFPI digital music report data to show the significant global revenue growth of recorded digital music, from 2% in 2004 to 34% in 2012. Coming from the global trade body for music, the IFPI, these figures can be taken as reliable. The report stresses the growth in the UK is even higher “UK revenues from online music were higher than revenues from CDs and vinyl combined (55% for online and 45% for CDs and vinyl of total revenues from sales of recorded music)”. However, it is notable that in the report the vertical axis of the graphs changes between figures 1 and 2. Data is presented as Millions of USD in figure 1, but in figure 2 growth is given as a percentage of total. As a percentage of total revenue, growth is impressive, particularly in the UK. However, by using IFPI UK data which we have available to us we can put the figures for digital and physical recorded music all into Millions of GBP. This new graph includes the context of the declining recorded music market; exhibit A. From this graph we can see that whilst digital revenue is growing it has been doing so in a fast declining market, gaining an increasingly larger piece of a smaller pie.

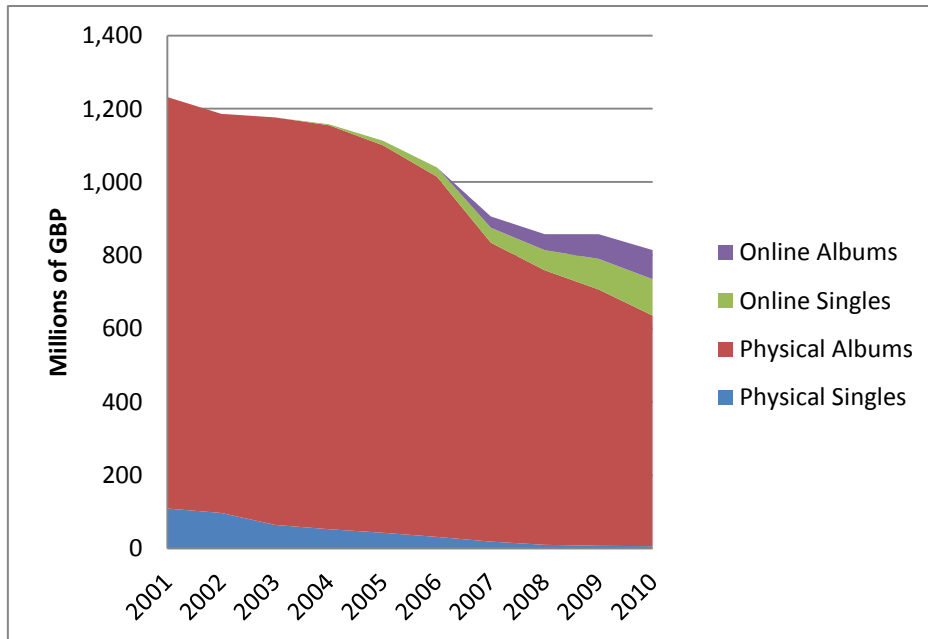


Exhibit A. Total Market for Recorded Music in the UK 2001-2010 (IFPI Recording Industry in Numbers).

The report then makes the bold claim “Revenue from online sources including recorded music sales, streaming, online radio, subscriptions and other is increasing, both absolutely and as a percentage of overall revenue” (p. 8). This is true, but when viewed in context of the whole market the figure and the claim no longer present a compelling argument for ‘growth’. The copyright holders are not receiving the value from the market for their recorded music which they previously enjoyed. That they are getting more revenue from digital than physical formats is, one imagines, of little comfort.

Restrictions on file sharing stifle innovation: Authors affirm “Intervention to enforce copyright infringement legislation on individual file sharers risks stifling innovation” (p. 5). Now changing the context and employ the laugh test, let us imagine that a home has 3 rooms and one of the rooms is empty. Are stifling innovation because this room could be used by someone to run a business? The house is our private property. The meaning of private property is we can do with our property what we consider best; nobody can dispose of our assets, in this case one of the rooms of our house, without permission. The authors use the theory of Open Innovation (Chesbrough, 2003) to suggest UK DEA enforcement of copyright infringement legislation would stifle innovation. However, the open innovation conceptualization is always based on a voluntary cession of resources. If an entrepreneur or a firm presents a successful

business model to music property rights holders, they will likely accept a cession of resources (i.e. iTunes). Whilst, perhaps remarkably, it has been a matter of debate between scholars as to whether musicians require remuneration to continue to create new work (Oberholzer-Gee & Strumpf, 2007; Liebowitz, 2011), Liebowitz contends that the right to dispose property remains with the individual or organization, and why should music be different?

Digital markets have evolved new technologies and new business models and represent a significant centre of innovation. Cammaerts et al. (2013) state *“had the music industry started to adapt to the digital environment earlier, rather than trying to fit the new digital culture into their old business model, the record companies could have witnessed growth much earlier”*. Again this would appear to be true. Faced by such radical innovation the music industry, as owners of resource, did not keep pace with the free sharing of information over the internet. The industry, initially at least, failed to engage sufficiently in order to benefit from potential digital revenue streams. As West and Gallegher, (2006, p. 321) state *“the existence of external knowledge provides no benefits to the firm if the firm cannot identify the relevant knowledge and incorporate it into its innovation activities”*. The growth of digital revenues would suggest that the industry has made significant strides forwards, integrating knowledge and innovating new business models. The overall loss of total market revenue would suggest that there is still much work to be done in building sales channels which link to their customer base (Bustinza et al., 2013a).

Some of the evidence presented by LSE is confusing in the narrative. They cite analysis on the effect of the implementation of legislation to curb digital copyright infringement in France, the HADOPI legislation: *“A survey by the HADOPI agency created to administer the Law showed an increase in legal content consumption and a decrease in illegal consumption of around 5% in 2012, two years after implementation. Directing media users to legal platforms also seemed to be effective in boosting legal sales with iTunes sales increasing by 23 to 25% after HADOPI’s implementation”*. This evidence from an academic peer reviewed paper (Danaher et al., 2010) empirically shows that legislation decreasing illegal and boosting legal digital consumption by up to a quarter on a single, if dominant, digital sales channel. The report then details the politicking within the French government as this legislation was not popular with a vocal group

who felt it infringed their freedoms. The legislation was duly tempered, but remains in place as it is demonstrated as being effective. The work here appears to contradict itself as the statement is made that “*Targeting individual internet users is not likely to reverse the trend toward an online sharing culture, and there is an urgent need for independent verification of claims of harm to the creative industries as a result of individual copyright*” (p. 12), despite the independent evidence from Danaher et al. (2010, 2012) empirically indicating the contrary.

In our view Cammaerts et al. (2013) report that both of the arguments presented, “*Creative Industry revenues are not declining overall*” and “*Restrictions on file sharing stifle innovation*” hold true. But when these arguments are tested in context they become less conclusions and would struggle to pass the laugh test (Kennedy, 2003).

4. Can successful business models be generalized across sectors?

The decline in music revenue is a complex issue that involves considerations of changes in consumer attitude, market environment, the business models employed by organizations and illegal file sharing. For convenience of analysis, these issues are usually treated separately, but they are deeply interrelated. Empirical research shows that 22.5% of global consumers are not interested in downloading or purchasing music digitally (Bustinza et al., 2013b). The same study reports that 28.2% of the population engages in illegally downloading files, violating the rights of the property holders. Together these groups represent a complex challenge for the sector, requiring consideration of IPR protection and the way consumers are engaged through sales channels. The music industry has had to change its role. As Lewis et al. (2005) note “*the ownership and protection of artistic content in the supply chain. The internet is destabilising the supply chain for music by challenging the pre-web role and domination of the music industry supply chain; and by changing the primary entry barrier in the sector from the incumbents exploiting their ownership of copyright to one of trying to protect it*” (p. 349).

Cammaerts et al. (2013) draw upon other industries, which are likely to be affected by UK DEA (ibid p. 8/9) including motion pictures, video games and books. Whilst these industries are facing similar challenges and need consideration, the music industry is not

the same as other creative industries and great care should be taken when comparisons are made between them. The industries differ in format of delivery, potential file size and context of use as, for example, music does not face the same language barrier at the point of consumption as a book and has a much smaller file size than a film. Volumes produced and consumed are also different and much higher for music. Consider how many different songs you have heard in the last week and compare that to the number of computer games you played, films you saw and books you read. These are just some of the many differences. The music industry was the first of the industries to be impacted by file sharing, with early peer-to-peer applications developed specifically to illegally copy and share music online. Piracy affected music first (Daniels et al., 2006) and so far has impacted upon revenue more significantly than other creative industries.

To focus on a single example comparing games and music, Cammaerts et al. (2013, p. 6) argue, *"the digital gaming industry is also thriving and introducing innovative ways of generating revenue"*. Whilst this statement may be true, video games content protection employs sophisticated means of piracy prevention. It was always more difficult to copy games and game consoles that have mechanisms to avoid the use of pirate copies. Xbox use of extensive online consumer engagement allows them to test the validity of consumer's game files and they actively block those who are identified as having an illegal copy of a game from the shared online environment. Innovation in the gaming industry is based on a business model that protects property rights (MacInnes et al., 2002), without the requirement of regulation. Vernik et al. (2011) have shown that the music industry's attempts to implement Digital Rights Management restrictions are ineffective in preventing illegal file sharing because those who most suffer inconvenience from this restriction are legal purchasers.

5. Co-creation and Legislation

The LSE report suggests that providing exclusive ownership rights ignores those who wish to utilize the outputs in their own work, stating *"Insisting that people will only produce creative works when they can claim exclusive ownership rights ignores the spread of practices that depend on sharing and co-creation and easy access to creative works; this insistence privileges copyright owners over these creators"* (p. 10). Value co-creation is important in music and Cammaerts et al. (2013) rightly highlight the need

to ensure any legislation is written such that new works may be developed through creative adaptation of existing work. When listening to digital music or re-mixing the music of an artist the individual contributes their resources and become an essential resource themselves, integrated in the value creation process (Payne & Holt, 2001), and their role and experience form the basis for value co-creation. Individual and communal interactions enabling customers to co-create value with firms are becoming new sources of competitive advantage (Prahalad & Ramaswamy, 2004; Vargo et al., 2008). Value may be realised in many different forms: experience, learning, money etc. and across different levels: the individual, firm and society. Value may be co-created between different groups but IPR legislation from a UK perspective is based upon notions of monetary value capture (Albinsson, 2013). Realizing that monetary value through co-creation with consumers as partners requires an understanding of the role of the link channels which are the points of interaction between originator/provider and the consumer communities where co-created value is experienced and most visible (Mills et al., 2011). Legislative reform must simultaneously facilitate the co-creation of value through the adaptation of creators works whilst compensating them appropriately for their primary contribution. Achieving this balance is of importance and likely to be a significant challenge for policy makers.

Cammaerts et al. (2013 p. 12) cite the Aguiar and Martens (2013) as evidence for the benefits of piracy. In previous work we have shown this work to have numerous methodological flaws that invalidate the claims it makes (Parry et al., 2013). They further state that large organisations are able to dominate the debate as *“The opponents have little or no access to the methodologies and assumptions built into the studies commissioned by these large players”* (p. 12). It is difficult to gain access to data in many industries, but the music industry is data rich, for example IFPI publishes significant datasets with reliable figures that can be readily accessed for analysis. Open access to methods and source data does still remain a problem when examining claims made and there is a need for more open, fact-based discussion. Discussion of music, IPR and legislation tends to emotion, arguments seated in idealism and discourse. More open data would be helpful and would facilitate, if not empirical studies, perhaps analysis based on a critical realism where empirical presentation of facts can be discussed within a socially constructed environment where there may be many truths. In this regard, the LSE report may have been written to stir up debate, but we don't think

this report helps move that debate forward as it is more emotive than academically rigorous and unbiased in its presentation of the arguments.

6. Conclusions.

In this brief research note we have sought to examine in detail the report from Cammaerts et al. (2013), which raises interesting issues with relation to the implementation of the UK Digital Economy Act. Whilst the call for a review of legislation may have some merit, the report has several drawbacks, which could be taken to invalidate the demands made for review. We demonstrate that (1) their bibliographic sources are clearly biased, (2) some of the key arguments cannot pass the ‘laugh test’ or are not properly defined (i.e. co-creation) and (3) the generalization of business models to all sectors is not appropriate.

The LSE report does not sufficiently reference the admittedly small number of studies on the economic evaluation of internet regulation, the only evidence coming from US (Bhattacharjee et al., 2006), Sweden (Adermon & Liang, 2010) and France (Danaher et al., 2010). No study data is available for the UK and the impact of legislation could usefully be modeled. The evaluations from other countries could be helpful in strengthening the UK DEA relation, particularly with regards the challenge we highlight between the right of privacy for individuals, the need to protect property rights yet allow creative use of that property by communities in the co-creation of value. The current legislation would seem inadequate in this regard.

Although this work may strongly criticize the form of Cammaerts et al. (2013) report, we agree with their main message, the need for independent evaluation and review of legislations like the UK Digital Economy Act through studies using open access data which can be thoroughly peer reviewed by the community.

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