

BPI REPOSE TO THE CMA DIGITAL MARKETS TASKFORCE CALL FOR INFORMATION

INTRODUCTION

The recorded music industry has changed dramatically over the last two decades as it has evolved to become a truly digital industry. In 2019, over 57% of recording industry revenues came from digital uses of recordings, reflecting the industry's progressive approach to embracing innovative methods of providing access to recorded music online. Rapid growth in 2019 of 7.2% in the UK recorded music market was driven by fast-rising levels of subscription audio streaming (+23%), more than compensating for a decline in the physical market of 10.4%.¹

As record companies have embraced this digital future, they have continued to invest in artists, technology and infrastructure. These investments and innovations underpin the UK's global competitive strength in recorded music (as the second largest source of music exports), provide fans with instant access to a library of tens of millions of recordings, and give artists access to global markets and fan bases across the world.

Despite this growth, and the clear importance of digital channels to the recording industry, the widespread unauthorised use of music online remains an industrial-scale problem which continues to distort the market. These distortions affect legitimate competition and impede the launch and spread of new innovative digital services, in turn hampering the economy, employment and efforts to invest in further innovation in the UK.

Regulators and legislators need to recognise and identify such challenges to fair competition and innovation in the digital markets.

We therefore welcome the CMA's consultation and recognition of the need for safer, fairer, and more legitimately competitive digital markets with legal content and greater accountability of digital services, to help achieve markets that embraces competition and innovation.

This submission sets out:

- **Section 1: Background to the BPI and the role and importance of the music industry.**
- **Section 2: How the distortion of competition and innovation for the digital music industry has arisen due to the proliferation of unauthorised content online which is aided by digital services and intermediaries that do not take sufficient action to prevent it.**
- **Section 3: The scope of digital platform and intermediaries we consider have strategic market status and which therefore distort the markets.**
- **Section 4: How this problem may be solved through clear and enforceable Codes of Conduct via the Digital Taskforce process.**
- **Section 5: Conclusion and views on procedure.**

¹ IFPI Global Music Report 2020.
BPI (British Recorded Music Industry) Ltd

1. BACKGROUND

1.1 About the BPI

The BPI is the UK record labels' association that promotes British music and champions the UK's recorded music industry – the world's fourth largest and the biggest exporter of recorded music in the world after the US. The BPI helps to safeguard the rights of its members and of all the artists, performers and record label members of collecting body PPL – who collectively create around 99 per cent of all legitimate sales and streams of music in the UK. The BPI's membership consists of over 450 independent labels and the UK's three 'major' companies, which together account for up to 85 per cent of legitimate domestic music consumption.

The BPI leads in its world-class content protection work, which seeks to promote the value of music and support an eco-system in which creators can thrive. It helps to tackle infringing activity and encourages legal consumption of music so that artists, labels and rights holders can get secure a fair reward for their investment in creativity and can keep producing more new music for fans to enjoy across streaming, digital and physical formats.

In 2019 UK artists were responsible for one in nine artist albums sold worldwide. The BPI helps to promote British music overseas through numerous trade missions as well as through the [Music Exports Growth Scheme](#), which since 2014 has awarded over £4 million in government funding to over 250 music projects benefitting mainly independently-signed artists. The BPI provides valuable insights, training and networking with its free masterclasses and presentations and through its [Music & Tech Springboard Programme](#), [BPI Insight Sessions](#), [Equality Training Programme](#), [WisdomWednesday](#) events, and its authoritative yearbook and reports. In 2018 is set up [The BRITs Apprentice Scheme to give](#) new opportunities to young people from diverse backgrounds to enter the music business.

The BPI certifies [The BRIT Certified Awards](#) – the iconic Platinum, Gold and Silver Awards Programme; co-owns the *Official Charts*; owns and organises *The BRIT Awards with Mastercard* – which, through the BPI's charitable arm, [The BRIT Trust](#), has helped to raise over £27m for music education and wellbeing charities, including the BRIT School and Nordoff-Robbins music therapy. The BPI is also home to the *Hyundai Mercury Prize*.

1.2 The role and importance of the music industry

The music industry in the UK plays an important role – economically and culturally. Economically, the UK's music industry is worth £5.2 billion annually to the UK economy as well as giving the UK enviable 'soft power' around the world. In 2019, UK record labels generated domestic revenues of over £1billion, marking five years of successive growth after a period in which revenues suffered as a result of digital disruption.

This economic success leads in turn to more investment back into creating more music – including unearthing and developing new British talent from a diverse range of background and making music across a breadth of genres. As with many creative industries, the role of the creative investor is to be in a position to take risks in order to achieve success – and in music means that for every Ed Sheeran or Adele who achieve huge global success, there are many more who don’t make it. This ‘virtuous circle’ of investment also serves consumers well, providing a pipeline of exciting new music for fans to enjoy alongside extensive access to music catalogue through an increased range of ways to listen.

The success of the UK recorded music sector also plays a vital global role, with the British labels’ heritage and continued investment in music making the UK the second largest exporter of music in the world (with export income of c £500 million in 2019, and with one in nine albums sold globally by a British artist. In addition, this global position plays an important ‘soft power’ role – particularly valuable to the UK’s competitiveness post Brexit and in seeking to secure free trade agreements. However, the global market is becoming increasingly competitive, with new markets developing as music creators, and streaming increasing in many territories – and while the UK’s global recorded income is growing, global share has declined over the last few year to around 10% from a high of 17% in 2015. In this increasingly competitive global landscape it is all the more important that labels invest heavily in new music and the promotion of artists around the world.

2. THE DISTORTION OF COMPETITION AND INNOVATION FOR THE DIGITAL MUSIC INDUSTRY

The music industry was one of the first to feel the effects of the challenges posed to copyright-dependent creative businesses by the emergence of the internet in the early 2000s. Prior to returning to growth in 2015, the industry experienced more than 15 years of significant revenue decline mostly due to the large-scale unauthorised use of music online. This included sites launched in the early 2000s such as The Pirate Bay and Napster – and while legitimate streaming services have helped rebalance the system and enabled growth in recent years, unauthorised use of music online remains an industrial-scale problem for the recording industry. One recent study quantified the commercial value of music digital piracy in 2015 at USD 29 billion worldwide, and estimated that it could grow to USD 53 – USD 117 billion in 2022.² As noted in that study, the weight of academic research concludes that piracy imposes significant economic harm on legitimate music revenues. In the UK, the commercial value of digital music piracy in 2019 stood at £1.15 billion, with losses to industry revenues of £122.4 million.

The music industry was also one of the first to respond to these digital challenges, and the industry’s return to growth has been facilitated (in large part) by the labels licensing their music to a plethora of (legitimate and responsible) online audio and audiovisual content services with new and innovative business models.

² *Frontier Economics Ltd, “The Economic Impact of Counterfeiting and Piracy. A Report Prepared for BASCAP and INTA”, p.28-33 (2017), available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>*

The BPI and its members have also gone to additional considerable lengths to tackle the unauthorised distribution of music online, as further described in section 2.1 below. However, unauthorised content continues to be prevalent online across a variety of different types of platforms and services, from the illegal sites and social media platforms that host (and take insufficient action to address) infringing content, to a range of intermediaries that support (and often profit from) pirate websites by providing them with services that help them to run their business.

Allowing such unauthorised activity to go unchecked, without means for proper redress to prevent it, creates a distorting effect on fair and properly functioning content markets. This is because right holders and responsible and legitimate digital services are forced to compete with providers of unauthorised content, which are able to offer commercial entertainment content to stream or download for free, or at heavily reduced prices, and without respecting legitimate commercial terms such as official release dates. The sites providing or facilitating access to unauthorised content are often in jurisdictions where legal remedies are unavailable, and are frequently assisted by online intermediaries who are often themselves hosted or domiciled in jurisdictions where rights are difficult to enforce.

Not only does this reduce the revenue of licensed online music services, undermining legitimate competition and the ability of digital services to invest in innovation, it diminishes the attractiveness of licensed music online, directly reduces the music sector's revenues (damaging the UK economy, employment and reducing investment in new artists and creative content), and may inhibit the development of new legal digital markets altogether.

It is also worth noting that in addition to being harmful to legitimate competition and to the consumer interest, such behaviours are also linked to wider consumer harms. Many unauthorised sites, for example, contain large numbers of links to harmful content such as pornography without any warnings or age restrictions, have insufficient data protocols that facilitate phishing or are funded by unlicensed gambling advertising. Advertising for non-Gambling Commission licensed gambling sites accounts for 60% of advertising found on the Infringing Website List (IWL) held by the UK's Police Intellectual Property Crime Unit (PIPCU).

In summary, the failure of many major online services to take reasonable measures to prevent or reduce the unauthorised use of content, coupled with the misapplication of liability privilege provisions which can artificially distort licensing negotiations not only deprives right holders of their legitimate income, but also creates unfair competition in the digital music services market and supports consumer harm.

2.1 Need for action

In recent years, the BPI and its label members have gone to great lengths to tackle these issues. As well as working with many digital companies to license their content, music labels have invested

heavily in content protection work. This involves extensive monitoring and issuing of notifications to platform operators to remove links to illegal copies of UK labels' music, legal actions, criminal investigations, consumer education campaigns and, in the UK, anti-piracy roundtables, convened by Government, to encourage voluntary commitments to tackle infringing material

These roundtables have produced some modest progress - for example Facebook has introduced new measures to proactively identify and remove links to illegal websites on its platform. However, across the markets as a whole there remain many significant issues; and the voluntary nature of these processes have emphasised the inherent weaknesses in securing sustained, reliable action. While voluntary measures agreed between rightsholders and platform may go some way to addressing these issues, and are in principle an attractive vehicle for resolving issues, we remain concerned that they are effective only with platforms that themselves are committed to eradicating illegal content, and achieve little in respect of platforms for whom that is not a priority goal.

It is important to note that introducing any Codes of Conduct must not prejudice the copyright liability regime that already exists for digital services. Services which play an active role and feature unauthorised content may be liable for copyright infringement and their potential liability under the existing copyright regime should not be affected. Any Code of Conduct style regime that comes into force in the UK pursuant to this process should not give active digital services any new liability privileges. However, Codes of Conduct could play a valuable, complementary, role in the event that such digital platforms fail to take sufficient action against infringing content.

Furthermore, in practice it has frequently proven impossible to pursue effective legal action against illegal websites. Services making money on the back of unauthorised online distribution of music can establish themselves almost anywhere, while providing copyright infringing content across borders and simultaneously in any number of territories. The operators act in anonymity, protected by shell companies, domain name privacy services, or both; and the digital services and intermediaries upon which these illegal websites rely for internet services (including search engines, payment providers, advertising networks, ISP hosting services) generally do not require their (business) customers to provide proof of their true identity and contact details and continue to provide services even where they have clear knowledge that their customer is infringing copyright.

The copyright liability regime has not proved effective in creating digital content markets that are undistorted by illegal competition - indeed, illegal competition remains highly prevalent and largely unconstrained. Legal actions are too difficult and slow, "notice and takedown" too fragmented and reactive, and entirely voluntary cooperation in Roundtables too ineffective to deliver to consumers digital markets where illegal content is the exception, rather than the rule.

There is clear need to provide for different and truly effective measures and procedures to ensure digital services play their part in reducing unauthorised uses and allow for fair and legal competition

and innovation in the digital market place. Indeed, a well-functioning market where IP rights are effectively enforced is key to achieving a level playing field among all businesses, increasing consumers' trust in the digital marketplace and ensuring legal certainty, transparency and a healthy ecosystem where all its participants are fairly rewarded. An essential feature of this is the adoption of robust responsibilities and obligations for digital platforms, including intermediaries. Until that is achieved, the digital market will not perform to its full potential. We offer further thinking on the remedies that the Codes of Conduct might include in section 4 of this submission.

3. SCOPE: DIGITAL PLATFORMS AND INTERMEDIARIES WITH STRATEGIC MARKET STATUS DISTORTING THE MARKETS

This submission focusses on two types of digital service which currently distort the market for digital content through their failure to take effective action to reduce infringement. The first are hosting platforms, such as social media companies and online marketplaces, which may host infringing content themselves or link to it; the second category are online intermediaries which provide a variety of internet services to infringing websites. Digital intermediaries can play a crucial role in the fight against unauthorised use of content because they are often best placed to stop or prevent online copyright infringements. These intermediaries span a range of different types of platforms, businesses and behaviours, including search engines; content delivery networks (CDNs); internet access providers; hosting service providers; payment providers; domain registrars and registries; advertisers and online advertising networks; app store operators.

The services in these two categories might in certain cases attract liability for their role in committing or facilitating copyright infringement or in other circumstances might be able to claim the benefit of liability 'safe harbours'. However, in both cases, regardless of the position under copyright law, the services should be under a duty of care to take reasonable steps to ensure that they do not host infringing content or assist sites that are committing copyright infringement, by providing services to them. It is only if legitimate companies hosting content or providing services are under a 'duty of care' to take reasonable measures to reduce infringement online that the enormous scale of online piracy can be effectively reduced and legitimate competition in content markets promoted.

The current lack of such responsibilities and obligations is frustrating given that, in recent years, technology has advanced by leaps and bounds, enabling the accomplishment of tasks that would have been unimaginable when the current laws were written. Today, many of these companies are among the world's most sophisticated and innovative, and well-positioned to take reasonable steps to prevent their services being used to facilitate the distribution of illegal content. If they fail to fulfil these responsibilities, the risks are significant – the UK's cultural sector's eco-system (in particular when it comes to the creation of new content) could be harmed, and UK economic growth and digital innovation hampered.

We therefore welcome the CMA's recognition that legislative and/or regulatory measures need to be introduced to enhance the accountability of all types of digital services in order to protect and promote competition and innovation in digital markets and to address the anti-competitive effects that can arise from the exercise of market power in those markets. In order to meaningfully do so, any intervention must address the problems that cause this holistically.

In this section, we set out a non-exclusive list of Categories of digital services that we consider have Strategic Market Status and case studies within each category. These are designed to provide an insight and illustrations of the type of services that should be subject to enforceable codes of conduct. It is also worth stressing that this suggested approach would not mean only the largest/most dominant operator in any category having SMS and falling with scope of a Code of Conduct; small and medium sized companies could do almost as much harm as the large ones. For example, some of the online intermediaries that are used by illegal services are relatively small and sometimes provide a go-to service to a particular niche, working in conjunction with other smaller facilitators of illegal activities. If the scope would exclude such small and medium sized companies, it would not risk not fully achieving its objective to provide a digital environment where legitimate competition can take place and innovation can be encouraged. Further, it should be noted that the list of examples given here is by no means exhaustive, and it will be important to ensure that the agreed scope should remain flexible and future proofed given the fast changing nature of the digital market.

3.1 Social Media Platforms

Apart from their wide use, a number of social media platforms have become major means of distributing infringing music content, both audio and video and including both hosted content and links (including embedded links) to infringing content on hosted external sites. Due to their social nature, these platforms can be used to share and distribute infringing material rapidly and on a massive scale. Further, many other infringing services use social media as marketing platforms. This is in many cases facilitated by the offer of a highly organised service and search functionality, which allow users to find and be served with content of interest, whether authorised or not. Such platforms generate revenues, including from advertising of goods and services based on highly sophisticated targeted capabilities that are possible due to the services' access to large amounts of user data.

Despite a number of these platforms having become central channels for the distribution of infringing music content, thereby distorting the market for legitimate content services, they do little to address the problem (typically relying on overly broad safe harbours and lack of obligations on them to do so).

Case Study 1: Twitter

Twitter, Inc is headquartered in California, USA and has entities/offices around the world including in Spain, France, Germany, UK, and Australia.

Twitter is a widely used global social networking platform, with reportedly 166 million Monetisable Daily Active Usage worldwide, in Q1 2020.³ Its core service allows users to post “tweets” of up to 280-characters or “retweet” the posts of others. Tweets can include text, URLs that link to external sites and hosted content such as videos. Twitter offers a highly organised service and search functionality, which all allow users to find and be served with content of interest. The platform generates revenues, including from advertising of goods and services. Twitter’s technology platform and information database enable them to provide highly sophisticated targeting capabilities for advertisers. Twitter’s revenues for the 2019 fiscal year amounted reportedly to USD 3.46 billion.⁴

Apart from being a widely used social media messaging service, Twitter has become a major platform for distributing infringing music content, both by hosting unauthorised music videos and by providing links to unauthorised content on hosted external sites. Due to the social nature of Twitter, its volume of users and ease of access, the platform can be used to share and distribute infringing material rapidly and on a massive scale.

In 2019, Twitter was notified for over one million infringements of music copyrights on its service⁵, including over 50,000 pre-release music infringements. What makes the situation worse is that Twitter does not take steps to prevent any future infringements of content that has been notified nor remove infringements retrospectively. According to IFPI data for the period June 2019 – June 2020, over 15,000 individual titles that were notified to Twitter reappeared on the service. The top 10 tracks reappeared between 10,000 and almost 20,000 times in that timeframe, either as hosted videos or via links to other infringing sites.

What is more, unlike other platforms, Twitter charges rightsholders large amounts of money for the ability to search for tweets on its API that include or link to infringing content, at scale and without a time limitation. In other words, Twitter is not only outsourcing to right holders the task of trying to remove IPR infringements from its platform but is also generating revenue thanks to the presence and large volume of repeat infringements on its platform.

Further, many other infringing services use Twitter as a marketing platform due to Twitter’s large user base. When infringing sites add new content, these links can be automatically added to their associated Twitter feed thereby driving new users and more traffic to the infringing service. There are even accounts dedicated to the distribution of pre-release leaks where snippets of the illegal content are being posted. To increase visibility, operators of pirate sites will use the Twitter API to post the same infringing link via many different accounts instantly.

This makes Twitter a clear example of a gatekeeper with strategic market status as it has adopted the role of being a central channel for the distribution of content, and its position means that other markets depend on this; by allowing the proliferation of unauthorised music content on its platform, Twitter severely impacts the ability of legitimate music industry players to compete in a fair market.

³ https://s22.q4cdn.com/826641620/files/doc_financials/2020/q1/Q1-2020-Shareholder-Letter.pdf

⁴ <https://www.statista.com/statistics/204211/worldwide-twitter-revenue/>.

⁵ This figure excludes any data collected through the API agreement between IFPI and Twitter, Inc. All data has been collected directly from IFPI member companies through their own arrangements with 3rd party vendors. BPI (British Recorded Music Industry) Ltd

Case Study 2: Telegram

Telegram is a cloud-based mobile and desktop messaging application which is hugely popular. The service reportedly has 400 million monthly users and is the most downloaded social media application in over 20 countries.⁶ The mobile application has been downloaded over 100 million times from the Google Play Store.

All Telegram messages and data are securely encrypted, with an additional layer of end-to-end encryption for “secret chats”. Telegram has also deliberately structured itself to protect against disclosure of users’ private conversations and personal data. For example, all secret chats are device-specific and are not part of the Telegram cloud. Telegram’s business model is unclear, and it currently appears that it is not operated for profit.

Telegram constitutes a massive problem for music right holders because its functionality is not limited to a pure private messaging function. The service is widely used as platform to share unauthorised music content which can be permanently downloaded or streamed from dedicated channels⁷, groups or bots⁸. Channels and bots are usually open to the public and are very easy to find by using external search engines. “Groups”, which are also used as means to share music, can have up to 200,000 members. Telegram undermines the legitimate digital music market by offering features that directly compete with licensed download services and streaming platforms (e.g. a background listening function), without paying anything to right holders.

Right holders around the world have taken action against Telegram, including via litigation in Italy and India. The music industry also reached out directly to Telegram and there has been a limited form of response. For example, Telegram often takes down individually notified infringements in channels or even blocks or removes illegal channels as such. However, it is completely unclear whether it also takes reasonable measures to ensure that the same operators cannot open similar channels, or which measures it takes to prevent illegal uses in general. To date, Telegram has rejected any request from the music industry to enter into a dialogue to discuss a more meaningful approach.

As with Twitter, this position means that Telegram is a gatekeeper with strategic market status. Its role as a central channel for the distribution of content means that other markets depend on it; by allowing the proliferation of unauthorised music content on its platform, Telegram severely impacts the ability of legitimate music industry players to compete fairly.

⁶ <https://telegram.org/blog/400-million>

⁷ Channels are tools for broadcasting one-way messages/content to an unlimited number of subscribers. Channels can be used to push infringing music content to subscribers for download and/or streaming. The content offered on a channel may be curated by the operator or be specific to a particular artist, genre, country or region. Channels typically include a search functionality which allows subscribers to easily locate particular content and/or include a browsable menu of all available content, including music content, news publications, films and television programmes. The selected audio file can be streamed and downloaded. Channels can be private which only allows subscribers that are added by the creator or receive an invitation to join or public which means they can be joined by any Telegram users.

⁸ Bots are third-party applications that operate within Telegram which can be used as specialised search engines to locate specific music content (e.g. a particular track by a given artist). Unlike a channel, where content is being shared by the operator, the bot is an automated programme that responds to user commands. For example, there are bots that feature commands that allow users to search by song title or artist name and will deliver the search results comprising of available audio files which the user can stream, permanently download and share with other Telegram users.

Case Study 3: Twitch

Twitch is an interactive live-streaming service for user-created content. It also allows users to upload videos and clips. Initially Twitch focused on video-game play but it is increasingly becoming a general entertainment platform. It is available as a free app on desktop, mobile and television. According to Twitch, it has over 3 million creators streaming each month.

Content on Twitch is highly organised. Tags applied by creators or Twitch itself allow content to be located via browsing or search. Twitch also promotes certain channels and offers personalised recommendations. Twitch generates revenues via advertising, subscriptions and in-game purchases. Twitch shares revenues with creators that qualify as affiliates and partners.

Twitch has increasingly become a problem for music right holders because of the availability of unauthorised music content on the platform. Typical copyright infringements include live streams of sound recordings akin to a radio station or a DJ set, sound recordings included in live video game plays, chat bots delivering specific sound recordings when requested by viewers. Further, live videos and clips can be archived and can therefore remain available to viewers as hosted content.

According to public data, Twitch applies a fingerprint technology to detected copyright infringing sound recordings in hosted videos. However, according to the music industry's experience, this technology does not apply to hosted clips and to live content in general. Therefore copyright infringements often remain completely undetected and right holders are required to send takedown notices addressing the most harmful content on Twitch. A general solution or more proactive measures by Twitch are still missing.

The popularity of Twitch in the video game streaming space, as with the other case studies in their respective markets, means that it is a gatekeeper with strategic market status. Its role as a central channel for the distribution of content means that other markets depend on it; by allowing the proliferation of unauthorised music content on its platform, Twitch severely impacts the ability of legitimate music industry players to compete fairly.

3.2 Search Engines

Search engines are the primary signposts in the online environment and frequently list extensive copyright infringing sites, including Torrent trackers, Mp3 aggregators and stream rippers, presenting consumers with new ways to access infringing content. Pirate sites affecting the music industry receive a considerable amount of their traffic from search engines, primarily Google Search. For this reason, record labels and music trade bodies continue to invest resources in delisting infringing search results which point users to unlicensed music.

To date, BPI has delisted over 510 million URLs from Google search results linking to illegal copies of UK labels' music; and, in 2020 alone, has delisted over 17 million URLs associated with 193,000 different titles (tracks, singles and albums), on behalf of 35,000 artists and 10,000 labels, across 6,000 pirate sites.

The key objective of our delisting programme is to remove infringing URLs from search results, so that they are not presented to consumers, and to achieve demotion of the infringing website itself, pursuant to a Code of Practice agreed by BPI and the Motion Pictures Association with Google and

Bing in 2017, whereby a domain which has had over a certain threshold of delisted URLs is expelled from search results.

The demotion mechanism appears to be effective in reducing the visibility to highly-indexed and infringing sites, and we are in discussion with Google to define the parameters for the demotion of stream rippers and other pirate entities. However, we feel that more should be done by Google and other search engines to *prevent* the indexing of infringing results in order to minimise losses to the industry.

Currently, for any infringing page that is being delisted or site that is being demoted, a new one is ready to take their place. We refer to this as ‘infringement repopulation’. Right holders have to invest an incredible amount of resources to keep up with the repopulation of infringing search results, while users continue to be served alternative pirate options.

The repopulation phenomenon can be observed across all site types and may take different forms. Pirate sites operators are well aware of the delisting process and have organised themselves to continue their operations nonetheless. In the meantime, music content that could and should be monetised is offered to search engine users for free.

If we take the stream ripping phenomenon, for instance, we understand the role Google could play in reducing the problem. Stream ripping is the most prominent form of digital piracy affecting the music industry, both in the UK and worldwide. Stream rippers are sites or applications that allow users to obtain a direct download of music content from a streaming URL of their choice. Industry survey data shows YouTube is the number-one streaming platform for music, and that content from YouTube accounts for over 90% of the streams which are ‘ripped’ online. This is due both to its market size and position, and to its refusal to protect content at source by using effective encryption to all of its streams. Legitimate music streaming platforms require users to have paid-for subscriptions to be able to download the same content which any user can currently rip from YouTube for free. This distortion is a major inhibitor to growth within the recorded music market.

Stream rippers generated 250m UK visits in the past 12 months, costing the UK music industry an estimated £17.6m. According to BPI data, over 147m (59%) of these visits came from Search. Given that Google accounts for over 90% of UK search traffic to the major pirate sites monitored by BPI (SimilarWeb) and that streams from YouTube account for over 90% of the music that is ripped online (IFPI Consumer Survey 2019), the music industry has found itself in a predicament where Google’s flagship products (Google Search and YouTube) are the prime gatekeepers to the most prominent form of music piracy. In addition to that, many stream ripping apps can be found on the Google Play store, some with tens of millions of downloads. Google also often features as the provider of advertising services to both stream ripping websites and mobile apps.

Legitimate platforms undertake significant investment to generate traffic, gain subscriptions and provide a revenue stream for artists and labels. The fact that Google points users to pirate sites, hosts infringing mobile apps on their app store and continues to provide advertising services to bad actors devalues the investments made within the legitimate economy to support the workers within the industry.

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Given the undoubted Strategic Market Status of both Google and YouTube, we hope that the CMA will support the music industry in promoting the necessary measures to ensure that official music services do not have to compete with parasitic entities to secure good ranking in search results.

3.3 Online Marketplaces

Marketplaces include platforms such as Amazon, eBay and Alibaba. The level of IP protection offered by each marketplace platform is currently dependent on the proactive measures the platform *voluntarily* takes. The discrepancies between one platform and another show that these platforms function as gatekeepers with right holders entirely dependent on to whatever changes they may or may not decide to implement.

The differing policies of the various marketplaces perversely favour platforms that have less stringent IP protection policies. Since each platform takes a cut of the sales which they facilitate, preventing infringements can also hurt their bottom line. Thus, this creates a distortion in the market to the benefit of those platforms that chose to do the bare minimum in the absence of effective legislation.

Case study: eBay

The platforms that have chosen to take a more proactive action via machine learning or Know-Your-Customer (KYC) procedures (Alibaba and Amazon) are now mostly clean of unlicensed music products. On the other hand, eBay continue to offer a confusing mix of authentic and fake/unlicensed goods, with the latter often undercutting the price of the former and therefore being the preferred choice of the buyers.

This not only creates an unfair competitive regime between legitimate sellers and offenders on eBay, but can also divert traffic from more controlled platforms where the price for the same product will tend to be higher.

In June 2020, eBay.co.uk received 282.3m visits from the UK (SimilarWeb), putting it in a key strategic role for impacting the markets through its actions or indeed inaction. BPI delists more infringing product from eBay than any another platforms combined; in 2020 over 17,000 listings have already been removed from eBay.co.uk. The products range from counterfeits of genuine releases to bootleg recordings, most often in vinyl or CD format, occasionally hard drives and USB sticks. The repertoire offered greatly varies, including current chart-topping tracks, heritage acts and beyond, damaging the industry across the board.

Know Your Customer (KYC) procedures on eBay are much less stringent than elsewhere, and the platform has a much more diffuse range of vendors from larger businesses to individuals selling on an ad-hoc basis. Unlike Amazon and Alibaba, we are unaware of eBay employing any machine learning for the purpose of infringement prevention.

Therefore, we propose the introduction of a standard for the level of IP protection that all marketplace platforms should be able to guarantee in order to ensure fair competition. Ideally, this standard will entail a degree of proactivity in the detection and removal of the infringing content and enhanced Know-Your-Business-Customer procedures. This will work towards such marketplaces no longer negatively impacting other industries via their central role as gatekeepers to the purchase of content and products.

3.4 Content Delivery Networks (CDNs)

Many websites use Content Delivery Network (CDN)⁹ and Domain Name Server (DNS) services, including many copyright infringing websites. The by far more popular service is the US based company CloudFlare that claims to serve data from 200 cities in over 95 countries.

Case Study: CloudFlare

A consequence of illegal websites using CloudFlare is that right holders cannot determine the original IP address of the website that is responsible for delivering the content. Rather the directory will list the IP address of the server within the CDN from which the content is delivered. In doing so, CloudFlare offers anonymity to operators of illegal websites which makes direct enforcement actions by right holders extremely difficult. CloudFlare also offers other feature beyond the CDN, for example it recently launched the “1.1.1.1. app which is a public DNS resolver and allows users to access websites even if the domain name of that website has been blocked by ISPs; it also offers VPN services. These features are a particular problem in the UK where website blocking procedures through the High Court are an extremely important remedy for right holders. However, these features have much broader repercussions than just the facilitation of copyright infringements, e.g. in relation to users’ safety, malware, criminal activities in general.

There are various enforcement actions ongoing in respect of CloudFlare in different jurisdictions around the world, particularly in the US, Italy and in Germany. The actions have been initiated by different right holders whose common objective is to require CloudFlare to stop supporting illegal activities. 75% of the sites currently processed by the BPI anti-piracy department are using the Cloudflare CDN. Given its key strategic role, we believe Cloudflare should do more to prevent its services being used in connection with unauthorised use of content online.

3.6 App Stores

⁹ A CDN is a system of distributed servers that improves the efficiency of the delivery of internet content to end users. The CDN works by delivering content from servers that are geographically closer to areas of higher user demand. CDNs typically achieve this by maintaining servers in data centres around the world. They replicate the website’s content on each of the servers, so that the content can be downloaded from the place which is closest to the user, rather than having to deliver it from a central point, which may be a long way from where the user is physically located. The benefits to website operators from using a CDN include: (i) increased content delivery speed; (ii) ability to cope with a high level of web traffic that may overload the servers of the client website; and (iii) caching static content so sites may remain active even if a client website’s server goes down. CDNs can also often offer benefits to website operators for dealing with network security threats such as hacking, DDoS attacks or viruses. Once a threat has been detected at one location in the CDN network, a solution or fix can be found to deal with it at the point where it was located, and then disseminated throughout the CDN network, thereby making that network more secure for all users.

App stores, such as Google's Google Play Store and Apple's App Store, are digital distribution platforms for computer software called applications, often in a mobile context. App stores control the distribution of content, via (generally, but not exclusively, third party) apps, to users, which puts them in a central gatekeeper role when it comes to the distribution of content that may affect digital content markets.

Case Study: Google Play Store

The Google Play Store, owned and operated by Google, Inc, is the official mobile application store for Android devices.

As at the start of Q2 2020, the Google play store contains over 3.3 million android applications. Unlike other application stores the play store requires that developers pay a one-time registration fee of \$25 in order to publish their application on the platform. The platform allows developers to categorise applications as well as setting a price for the application, including in-app purchases. There are 33 categories of mobile application on the Google Play Store with Music & Audio comprising of 6.1% of all published applications, with 1% of these paid applications. Music is also heavily featured in applications categorised as 'Games' which represents 24% of the total applications available. The Google Play Store is included as part of the android operating system installed on mobile devices, tablets and some laptops. Google offers developers a 'Software Development Kit' ("SDK") which allows for the rapid development of applications. In addition, there are many other SDKs available to streamline development and functionality.

Over the last year, right holders have continued to request the removal of applications where either the application's primary purpose is either stream ripping or direct distribution of unlicensed music, or sound recordings are used as a soundtrack to a game without a licence. In addition, right holders have observed a growing trend whereby full albums or compilations are embedded within an application and available to the user via an inbuilt player and operate as if the album was purchased via a licensed platform. There are over 8,000 of these applications with the majority of these applications being free to the user and containing in-app advertising. The number of these applications grows daily with Google taking on average 2 – 3 weeks to remove.

This role provides the Google Play Store with a central gatekeeper role when it comes to the distribution of content that may affect digital content markets.

3.5 Other problematic intermediaries

The categories and case studies included here are intended to give a sense of the range of gatekeepers involved in providing access to infringing material online. The examples given focus on just some of the operators who act as intermediaries. However, there are a number of others who should also be considered to have SMS and appropriate for inclusion within the scope of a Code of Conduct. This includes internet access providers, hosting service providers, payment providers, domain name registrars and registries; advertisers.

Further information can be provided on these types of services if of value to the Digital Taskforce's further considerations.

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4. REMEDIES: RESPONSIBILITIES AND OBLIGATIONS FOR DIGITAL SERVICES – CODES OF CONDUCT

4.1 Industry and policy & regulatory action to date

Since the rise of the internet and the explosion in unauthorised, infringing music distribution and usage from the early 2000s, the music industry has taken extensive steps to tackle piracy.

Many IP-based sectors have invested extensively in resources – human, technical and financial - to track infringing behaviour issue notices and report repeated, infringing activity. This includes the BPI, which acts on behalf of the UK recorded music industry in the UK, in collaboration with IFPI (International Federation of the Phonographic Industry), which coordinates the work with the other international trade bodies. The music industry sends out millions of takedown notices to online services every year which requires a huge human effort and significant financial resources. It should also be noted that the vast majority of these notices refer to content that has already been notified to the same online service before. Costly civil actions are also frequently undertaken against pirate site operators.

BPI is actively involved in Operation Creative, an anti-piracy operation funded by the UK IPO and managed by the City of London Police Intellectual Property Crime Unit (PIPCU). Pirate sites popular among UK users are added to the Infringing Website List (IWL) held by PIPCU.

Once a site is on the IWL, PIPCU will issue a Cease & Desist (C&D) notice to the site operator(s) (if known), take action to disrupt any money flow coming from advertising and payment providers as well as the provision of internet services by registrars, registries and web hosts. The IWL now has more than 4000 copyright infringing websites on it, 550 of which have been referred by BPI since particularly detrimental to the music industry.

The BPI works closely with the Government’s Intellectual Property Office (IPO) who are responsible for overarching policy relating to IP and work in conjunction with industry around enforcement of IP regulation (including participation in the roundtables discussed below). The BPI and the Motion Pictures Association (MPA) also work together on a public education campaign funded by the UK IPO to promote consumption of digital content from legitimate sites under the banner of ‘Get It Right from a Genuine Site’.

In the UK Government’s Creative Industries Sector Deal, published in 2018, UK policy makers acknowledged the economic importance of the creative industries, which now generate £111billion in GVA for the UK economy. It also recognised the scale and severity of IP infringement in hampering this important sector, including music. To address this problem, roundtables were established by the IPO and chaired by the BPI to give right holders and digital service providers a common platform to discuss IP related issues and get a formal commitment by the DSPs to take a more active role in ensuring IP protection. Right holder participants included representatives from music, film and TV, publishing and sport. Roundtables covered social media, online mar and online advertising.

As noted above, regrettably, the roundtables have so far produced limited results and their voluntary nature has made extracting firm commitments challenging. However, the examples provided above demonstrate the scale of the problems that continue to exist, without any available remedies presently available to tackle them.

Proposals to seek statutory measures to address piracy are still being negotiated. Discussions about the introduction of an online harms legislation have also been ongoing, with the case being made that the economic (and associated consumer harms) outlined above could legitimately be considered for inclusion in an Online Harms Bill. However, the Government has indicated that this is not the proposed approach. Therefore, the introduction of Codes of Conduct would be a suitable and impactful vehicle through which these concerns could be addressed.

The various initiatives that the music industry has been engaged in have identified a range of remedies to tackle copyright infringement and unlicensed music distribution that should be included within the Codes of Conduct. Some key remedies are summarised below.

4.2 Code of Conduct remedies

Under a general “Duty of Care”, DSPs should be required to take reasonable steps to stop and prevent copyright infringement. The reasonable steps will depend on the type of platform or intermediary in question, but any action should be meaningful and effective to ensure content protection. The Codes of Conduct are aimed at enhancing the accountability of all types of digital services in matters of IP protection.

Key areas that should be covered by the Codes of Conducts are:

4.2.1 Notice & Staydown (N&SD)

Repeat infringement remains a significant problem. The measures currently employed by the platforms (Notice and Takedown) are ineffective in tackling the sheer volume and nature of copyright infringing content online. This is partly because insufficient steps have been taken to introduce content recognition technology - such as fingerprinting and auto-recognition – which would identify infringing content prior to it appearing. In terms of the removal of content once notified, it is generally the case that upon notification service providers only remove the individual URL named in the notice, rather than removing all the same infringing copies of the same sound recording. Furthermore, nothing is done to guard against the same piece of infringing material being re-uploaded. 88 per cent of IFPI notices refer to content that has already been notified to the same

website, platform or intermediary. In the UK, in 2019, 67,364 UK music titles (tracks, singles and albums) were repeatedly made available under differ URLs following BPI’s delisting action. Over 1,000 sites listed the same content multiple times, in some cases tens of times (up to 33 times).

Key requirements:

When a hosting service provider becomes aware of infringing content:

- Content recognition technology such as finger-printing and auto recognition should be required

- A notice and stay down policy should be introduced, whereby all copies of the same work/sound recording should be removed to ensure the same work or recording is not re-posted or uploaded in the future

4.2.2 Transparency and Know Your Business Customer

Intermediaries should operate with more transparency. They should provide accurate details to right holders having the legitimate interest of protecting their intellectual property rights and who wish to pursue legal action in appropriate circumstances (right of information).

The existing Know Your Customer obligations contained in the E-Commerce Directive have been shown to be inadequate and unenforceable. A new “Know Your Business Customer” (KYBC) requirement should be introduced, reflecting the processes that exist in the physical world, such as in financial and legal services.

Under a KYBC policy, all intermediaries should ensure that they know the customers they are providing services to. Thus, they should regularly verify relevant information provided by customers, and should maintain accurate details in their customer database.

As long as intermediaries do not keep accurate customer details, right holders, law enforcement agencies and other relevant stakeholders will not be able to take direct action against the operators of copyright infringing websites (or other types of cybercrime).

Key requirements:

- Digital services should be required to verify the identity of their business customers and have accurate and meaningful information about them
- At a minimum this should include: true and verified name, physical address, email address and telephone number. For legal entities this should also include up to date information on company directors and other responsible persons. It may also be appropriate to check bank details.
- Regular checks should be applied to these records
- Where there is failure to comply – either by withholding or providing incorrect information – digital services should terminate services to websites or online services

4.2.3 Free API Access

At present, right holders are constrained in their ability to locate and send notices to infringing content as a result of restricted API access. Enforcement efforts would be assisted with unfettered access to APIs in a way that facilitates detection of infringements on the platform that is commensurate to the

scale of those infringements. Illegal services usually make it extremely difficult to locate any infringing content on their service, e.g. if they incentivise users to use link shorteners and protectors that make the content undetectable. Furthermore, some services require payment for using their API to locate copyright infringing content (include Twitter and amounts). As a result locating infringing material (already an onerous task on right holders) can be unnecessarily inefficient and costly.

Key requirements:

- Current free API limits should be lifted, providing unrestricted access to detect and prevent infringement
- Free API access should be available on all relevant services falling within scope of the Code (e.g. Twitter should not be in a position to charge)
- Right holders should be able to search more efficiently, for example by searching for multiple keywords/hashtags simultaneously (for example linking an artist and a song title)

4.2.4 Additional remedies

Additional remedies, reflecting the issues outlined in section 3 in relation to Scope, might include:

- Measures relating to bulk reporting (enabling multiple reporting of infringements at one time (rather than individual forms; and increased attachment sizes)
- More automation / use of content recognition tools, including finger print, auto recognition and trigger terms, to enable more automated identification of infringing content;
- Enforcement dashboards to improve transparency;
- In terms of stream ripping, encryption of streams where requested by the rightsholder (for example You Tube); an enhanced demotion signal for stream rippers which allow users to circumvent TPMs, and new policies to tackle proxy aggregators which act as gateways to infringing sites.

5. PROCEDURE

By way of conclusion, the BPI offers a few brief thoughts on the question of procedure and how the Codes of Conduct might operate in practice. The model of high level Codes of Conduct which may be accompanied by guidance to provide more granular, service level detail is a sensible approach and one which would facilitate the flexibility that it will be important to establish. We therefore strongly agree that “any new approach will need to allow any future regulator or regulators to take swift action to address harm where it arises”. Experience shows that digital markets evolve at significant pace. For rightsholders whose content is distributed and used on these platform, the speed of change and the constant emergence of new services and the growth of existing ones makes it a priority to ensure that a Code of Conduct framework is able to adapt quickly and to include any platform having gatekeeper, Strategic Market Status. Devised in this way will ensure that the introduction of Codes of Conduct will provide clarity both to rightsholders and clarity and certainty to digital services about the responsibilities they have. This approach will have meaningful, positive impact on both digital innovation and on the creative industries in navigating the next phase of evolution of the digital market.

We trust this submission is useful to the work of the Digital Taskforce in articulating the key issues for the recorded music sector and where the introduction of Codes of Conduct could play a valuable role in helping combat unauthorised use of content online. We would be more than willing to meet with officials leading this work to discuss the matters raised here in more depth.

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