#BrokenRecord Campaign response to CMA scoping document:

Music and the Streaming Market Study

Introduction

We are enormously grateful to the CMA for this historic opportunity.

The #BrokenRecord Campaign has been a hugely effective grassroots campaign to reform the music industry involving tens of thousands of creators from across the UK. The DCMS Select Committee inquiry into the Economics of Streaming was, in many ways, a result of the Campaign's actions. Tom Gray, the Campaign's founder, was the first to give oral evidence. He also wrote a letter to the Prime Minister (requesting a CMA investigation) which carried the signatures of hundreds of the best-known music-makers our country has ever produced with the support of the Ivors Academy and Musicians Union.

For the purposes of this study, we believe the most important feature of our community is that British performers, artists, songwriters, and composers represent hundreds of thousands of SMEs.

The success and remuneration of those SMEs at this point in history is almost completely governed by global tech and music corporations rather than their own ability to negotiate a fair price. Even where they have collective rights (as in PRS), competition law prevents any ability to assert the power of a natural monopoly. So, the value of those collective rights is, in fact, mostly determined by the direct licensing of major corporations. Ironically, lawful oligopolistic power trumps the 'natural monopoly' of 150,000 SMEs.

We are extremely pleased and thankful that this study has been undertaken; recognition of its necessity is no small victory for our Campaign. We cannot overstate the deep feeling across our community of music-makers and music lovers (YouGov helped us poll consumers), that there are multiple aspects of this market that are failing creators and consumers alike. We are hoping that the CMA will seize this singular opportunity to make necessary reforms. With this in mind, we would firmly endorse and request that the CMA employ its full powers to make a referral for a more comprehensive investigation of this market.

Comments on scope

These are the considerations for the proposed scope: points of focus we would like to recommend.

To UUC or not to UUC (or to radio)?

There has clearly been a huge distortion created by safe-harbour copyright protections. Zero (end user) pricing has been extraordinarily disruptive to music license valuation in the digital market. The whole recording industry would dearly love for government to close this loophole as a matter of principle.

However, the CMA report on platforms very recently stated,

> *"The advertising-funded business model is not novel, nor is it inherently problematic from a competition perspective. Newspapers have been generating revenue in the UK through advertising for several hundred years. On television, ITV provided the first alternative to the BBC in 1955, when it began its ad-funded broadcasting. Similarly, commercial radio stations have been generating revenue through advertising in the UK ever since the market was liberalised in 1973. These services have added substantial value to our society. The same is true of many services provided by digital platforms"*
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> (Competition & Markets Authority 2020, 44–45).

So, we see a quandary here. A great deal, if not the majority, of music licensing appears to operate in ad-funded situations in the UK. Having attempted to use YouTube as a comparator in our own research we have discovered that it is almost impossible to base evidence around YouTube. There is no accounting trail in a zero-price market: no invoices and no sales.

Therefore, whilst we are happy for the CMA to observe the effect on pricing of YouTube, we also believe that it may serve only as costly and cumbersome misdirect, when most of the issues facing SMEs relate to the interactions of rights-holders, licensees and collecting societies.

There is a much more convenient zero-price benchmark available in the form of radio.

There appears to be an assumption that users will turn to YouTube if streaming platform subscriptions went up in price, but why not radio? It is clear from developments in algorithmic playlists, spoken-word podcasting and streamed 'radio' services within platforms, that they consider themselves to be in competition with broadcasting services (most of which are now digital or online). But, unlike YouTube, if consumers move to radio there is a significant financial benefit to music SMEs because of a mature 'fair value' based licensing market and 'Equitable Remuneration'.

So, we believe that to benchmark subscription streaming to UUC when radio is as close a competitor, is impractical (incorporating zero-pricing into competition practice is extremely difficult), and leaves out a well-understood, accountable benchmark for the fair treatment and remuneration of creative SMEs.

We contend elements of subscription services (like algorithmic playlisting), under the terms of the Copyright, Design & Patents Act (1988), are not covered by the 'Making Available' right and are, in fact, 'Communication to the Public' (as there is no selection by the listener at their time of choosing). Therefore, the distinction between which markets these services are operating in is somewhat murky (from a legal standpoint) but, at least, the necessary regulatory framework is in place.

UUC itself simply needs its own regulatory framework. The competition problems within the relationships between labels & platforms, label & publishers, artists & labels, collecting societies & publishers, etc, are dwarfed by the dysfunctional actions of a single global giant. The study needs to recognise that YouTube's 'value gap' and its regulatory special status are fully known quantities. After all, the UK government had planned to regulate them prior to Brexit. The need for regulation does not require further discovery.

Above all, we do not want this study to be a wasted opportunity for the SMEs (on whose behalf the study was requested), so we humbly ask to keep the focus on what can practically benefit struggling music SMEs. We accept that UUC is in scope, but it could be a hugely complex side-show for this study.

Power

Who are the majors? On initial inspection you might think it is simply Universal, Sony and Warner music, but Merlin, an aggregated distributor, control a significant portion of the UK market. BMG have over 10% of the UK market and we believe Beggars Group have a significant share. Recent data from Blokur shows that 'fully independent' music (artists doing direct distribution) only represents 6% of the total market. This is considered 'democratisation' by tech enthusiasts despite that 6% representing nearly 7 million creators. Here, definitions of 'major' and 'independent' are somewhat misleading. However, for the purpose of these comments we will stick to the big three.

Playlists and 'feature' placements are necessary for artists to grow their audience. But the major music companies dominate not just playlisting but all of streaming. This market feature reduces consumer choice and puts the onus on artists to sign with major companies to access the market. Inclusion on playlists and placement does not occur in a fair and open manner. This discriminatory behaviour pushes creators into less equitable arrangements with major companies in order to access the market.

Three record labels enjoy 69.2% share of the total recorded music market, but consider this data captured by Goldman Sachs (for a brochure to draw investment into Vivendi, Universal Music Group's owners): of the Spotify Top 50 tracks (on June 29th, 2020) 88% was major owned music. Evidence of limited access to market.

Ownership of the Spotify Top 50 Playlist as of June 29, 2020

LABELS	Number of streams	Market Share
Universal	49, 660,054	48%
Sony	28, 257,678	27%
Warner	13,992,588	13%
Everyone else	12,130.633	12%

We also note that when these companies are seeking investment (in the case of the Goldman Sachs brochure PDF) the statistics appear to state almighty market-share (including their independent distribution), but since the announcement of the CMA investigation the industry is describing their market share as smaller.

As an aside, we would like to draw attention to the fact that not all artists are the same. This is often misunderstood. There are very different challenges to an artist or band depending upon their genre and number.

Whilst a self-producing hip-hop solo artist might be well-placed to keep their rights in a negotiation with a label and may have the viable option of working with an independent distributor (although often major owned), a pop artist, requiring featured playlisting, production investment and marketing is likely to not only part with their rights to their recordings but also some proportion of their merchandise and ticket sales. Similarly, a band with five members working with an independent label will most likely have to waive their master rights for life-of-copyright because they require greater capital investment. We highlight this because we would like to caution against using unique artist profiles with vastly different power relationships to form conclusions.

It is #BrokenRecord's contention that music has always been a precarious career and success has always been bestowed on relatively few who try, but we are seeing a collapse in the professional class of songwriter, producer and performer who, for generations, have supported the industry and made the music these companies sell. This functions while the culture/mythology of the last century prevails and many are still attempting to make their vocation work, but the consumers will be the ultimate loser when music is no longer understood to be a viable career.

However, total market share is not the source of major power – it is, in fact, their catalogues.

History Trumps Innovation

An outdated physical sales model applies to the digital market.

Major Labels have upheld their contracts from the pre-streaming era. This, when they demonstrably have fewer of the costs associated with the physical era, such as manufacturing, distribution, sales, storage, regional talent-seeking and physical breakage. The super-normal profitability of streaming for major rights holders can be regarded as rent-seeking behaviour. Significantly less productivity with much greater margins. The extraordinary growth in executive pay does not appear to reflect an industry that is struggling, unlike their creative counterparts.

To illustrate this 'rent-seeking' position consider C.C. Young & Co's recent analysis of Warner Music Group's annual accounts (attached). It reveals WMG's spending on Artist & Repertoire declined from 31.92% in 2017 to 28.41% in 2021. This equates to a 3.51% reduction in Warners spending but an 11% reduction for their recording artists. This while their recorded music net profit (as a proportion of income) in the same period has leapt from 13.87% to, an astonishing, 19.43%.

> *"The good news is that our [profit] margins are way better when compared to the last great era of profit 20 years ago; our margins are amazing now. Revenue, profit margin, market share, all of those things are a [balancing] act. At Sony [Corp], margin is really important and our margin is excellent. Are we perfect? Of course not, we have other areas to improve [in] — but the margin is not an issue. Obviously I'd like revenue and profit to be perfect, but the margin will not go down, it will get better."*
>
> Rob Stringer, CEO of Sony (Music Business Worldwide 2019)

The balance between the master rights and publishing rights have been kept broadly in line with the physical era, with the only addition of a performing right (because the publishing side recognises the equivalency to radio) for authors. Whilst we accept that the performing right has needed the mechanical right (through direct licensing) to achieve its value in market (because of the performing right's 'natural monopoly' regulation), the argument that publishing income has grown within market conditions falls down when you realise, somewhat counter-intuitively, that is the addition of a discrete performing right that is truly responsible for the overall growth in value outside of tiny percentage increases i.e. it is streaming's behaviour that is analogous to 'radio' that has helped music authors achieve significantly greater value, not negotiation. Once again, how creators are treated under the 'communication to the public' is a very important point of reference.

It is only through market dominance that the old physical paradigm has been upheld. Ownership of the biggest and most valuable catalogues has meant not only the ability to imprint the norms of the last century on the 21st, but also to stifle innovation.

> ***"****Power is about who calls who and whose call you take. That's power. Power is a combination of the ability to write checks, the ability to make things happen, the ability to block things—political power, the ability to testify and the requirement to testify at a senate hearing and have five commissioners against zero in favor of what you said. Power is the ability to buy and sell*

*businesses. Power is the ability to stop new services. Power is the ability to create new services. That's power.***"**

Lucian Grainge, Chairman & CEO of Universal Music Group. Billboard Magazine 2013

There is a well understood and common practice for these companies to demand equity in a new technology in order to license their catalogues. Where entrepreneurs have been unwilling to part with equity, a model is likely to fail without access to these popular catalogues.

#BrokenRecord supports 'rights recapture' for recording artists not least to give artists an opportunity to renegotiate their historic terms, but also to create a natural, progressive way to break up these catalogue monopolies, promote innovation and give greater market access to independent and fully independent music.

Equity

Up until now there has been a clear failure from many labels and platforms to supply the most relevant and required information (to both the IPO Creator Earnings Report & the Select Committee) to crucially understand their operations and treatment of contracted SMEs. We remain concerned that many industry assertions are taken at face value despite clear historic evidence of highly exploitative behaviour and practices. Indeed, the DCMS Select Committee report went so far as to call for a 'complete reset' of the business and identified problems of coercion and abuses in their own investigations. As a matter of equity, creator SMEs simply do not have the necessary transparency or power for a healthy marketplace to operate.

We are, of course, aware that, for the most part, technical rules form most of British competition law, but equity should, nonetheless, be a guiding principle. As Lord Sales, a Justice of the Supreme Court stated in his speech (28 August 2019),

"Equity has operated as a focused safety valve… to curtail opportunistic use of common law rights for abusive ends in the context of certain relationships."

We believe this is such a 'certain relationship'. Issues of transparency and poor remuneration characterise the modern music industry despite record profitability. It is simply impossible for an SME to know if they are getting the best deal when they cannot fully audit their record company (because of licensing NDAs or, if possible, at tremendous expense). This is the case despite English law containing completely analogous regulations for the protection of other contracted professions e.g. The Commercial Agents (Council Directive) Regulations 1993: 12 (1) & (2).

The Cost of Live

The Intellectual Property Office's recent study of creator earnings included live performance and other income streams beyond recorded music to assess the position of British music SMEs. We note, therefore, that it is curious when discussion of the recorded music market occurs, there appears to be little reflection on its effect on the associated live performance market.

Subscription streaming appears to be an incredible deal with the price unchanged in twenty years (Rhapsody, the first streamer cost $9.99 in 2001), but you only need look at concert ticket prices to see the detriment to consumers of these market conditions. As recorded music no longer represents a significant income, they are left to rely on live performance income (and the associated merchandising), as a result ticket prices have soared. In 1998 the highest price ticket to see the Spice Girls at Wembley Stadium was £23.50. When Taylor Swift played the same venue in June 2018, the highest price ticket was £120.

We consider it worth studying how (or if) streaming draws listeners away from local radio's regional 'music scenes' and therefore reduces the ability of small independent venues to survive. In the 15 years prior to Covid we had already lost 20% of our venues. This reduces consumer choice, reduces the availability of cheaper ticket prices and makes it much harder for music SMEs to get started. Small venues are where most creators begin their careers.

Conclusion

Overall, we think it is clear that the dominant power of major music groups, the pricing of services and allocation of income are the most important issues facing music SMEs in subscription streaming. Spotify's unchanged price in over a decade (please note they did not raise prices in the years prior to their biggest competitors beginning to trade) has produced around 25% deflation and this is before you consider their near halving of Average Revenue Per User which leads to the much-publicised collapse in 'per-stream rates' (which don't really exist in a pro-rata system). The behaviour of tech companies to seek user-base growth over profitability leads to a loss-leading culture that can only undermine SMEs and their ability to trade. But the allocation of incomes under 20th century norms makes the problem significantly worse. We believe the CMA should look squarely at these valuations and the reasoning behind them.

Thanks again for this study and our opportunity to input on scope. We would like to stay in contact and, if possible, #BrokenRecord would like to meet the project team.

Yours sincerely,

The #BrokenRecord Campaign