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Written Submission to Competition and Mergers Authority (CMA) on music and streaming market study

This submission focuses on areas not covered by the second phase of the Intellectual Property Office (IPO) commissioned research on Equitable Remuneration, Contract Adjustments and Rights Reversion, and highlight three major areas in understanding the potential inequity underpinning the current music streaming ecosystem: 1) revisiting the current split of the revenue, 2) the definition of streaming and 3) asset economy.

1) Revisiting the current split of the revenue

First, the way revenue is shared amongst diverse stakeholders has received significant attention during the DCMS inquiry. One area that was most controversial was the 52% of the share allocated to the recording sector. The independent publishing sector and the music creators' community believe the current share is unjustified whilst the major publishing, and recording sector believe otherwise. The crux of the debate lies with two main points; 1) Has the current share sufficiently reflected the changes affected by the streaming environment? And 2) Is the record sector's A&R investment justifiable for the current share?

It is claimed that the current split is based on the Copyright Tribunal decision in 1991[1] when recording companies were bearing great risk and investment for manufacturing and distribution and the turnover was relatively low and was ultimately based on historical compulsory licensing rates. Although the share for publishing in fact has increased from 8-10 to 15 per cent, it is still a moot question whether 52 per cent of the share is justified when the cost for manufacturing, distributing, and storing the physical products is not borne by the labels but by the Digital Service Providers (DSPs).

This relates to the second point about the cost for A&R. The record sector believes the current share is justified for their need to invest in nurturing new talent and the considerable risks this involves. It is argued that the investment in A&R, R&D, as well as marketing and promotion spend increased. BPI data suggests the A&R cost increased over time. However, contradictory evidence was presented in which Warner Music Group's public figures showed that the percentage of the turnover for their A&R in fact decreased over the past a few years[2]. In addition, both the details of A&R and the extent of risk were also questioned: Is investment classified as A&R spent on purchasing catalogues or on talent development?; and is record companies' risk as severe as before when they rely heavily on data and tend to sign

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[1] *British Phonograph Industry Ltd v Mechanical Copyright Protection Society Ltd (No 2), 1991.*

[2] Warner Records on the New York Stock Exchange has gone up from 2,359 million to 3,000 million over four years (from 2019-2021) in which it shows that the artist and repertoire costs has gone up, $964, $1054, $1178. But when calculated as a percentage of turnover, it shows 31.92%, 31.37%, 30.68%, 30.13%.

contracts with artists who already have established a certain level of followers and number of streams.

2) Definition of Streaming

Another area that received significant attention relates to the definition of streaming. Currently streaming is defined as the making available right. The making available right is a right granted under UK and international copyright law that applies when content is accessed at a time and place a user chooses. Following the introduction in Article 10 of the WIPO Performers and Phonograms Treaty (WPPT) 1996 and EU's Information Society Directive in the 2002, it was enacted in the UK in 2003.

The significance of how to define streaming lies with the different rates of royalties distributed to different stakeholders. The key debate point is whether the interactivity element in the making available right is valid in the way music is now consumed on streaming where both active and passive listening are used. A diverse range of proposals have been made, from classifying streaming as broadcasting, something between making available and broadcasting, or classifying only the active listening as the making available.

Relatedly, record labels 'license' their music to Digital Service Providers (DSPs) but distribute revenues to artists based on a 'sale (reproduction)' model. It is claimed that this practice allows labels, who already take the biggest share of the pie, to benefit from the bigger share of the revenue in contracts with their artists, as well as the margins generated from the outdated contracts.

Given that how streaming is defined can have significant ramification in the way the revenue is distributed in the market, I believe this is a field that requires further research.

3) Asset Economy

The oligopoly and vertical integration have long characterised the music business structure. But the recent oligopsony (Digital, Culture, Media and Sport Committee, 2021: 113–123) has further reinforced the market power the major corporations wield in the market . In a system where there is an explosive growth of new music creators, enabled by the easy and affordable tools to make and distribute music, there is a concern that the music is increasingly becoming a tool to enrich those in power, allowing firms to derive value from the rent by controlling intellectual property rights as well as the ownership of an asset. Music therefore is no longer a commodity but a mere stream to generate 'rent.' And the scale of economy achieved through mergers and acquisition and buying up extensive number of catalogues give more market power and enable the major companies to gain better terms and positions, whilst a stream receives just a fraction of 1 pence every time it is listened to. In this new phenomenon known as 'asset economy (Adkins et al., 2020; Birch and Muniesa, 2020; Rikap, 2021),' it is often the shareholders of big corporations and stock market value that is deemed to be more important and the focus of the business rather than investment and remuneration of music creators. Leaving this unchecked may result in exacerbating the inequity in the market, but also risking the future of creative production. I therefore believe that a further investigation into the way music is treated and ultimately used and valued would have a significant impact and help evidence the current debate.

References

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