

# Statement of scope and market study notice: Music and streaming market study

Response from the Incorporated Society of Musicians (ISM) to the Competition and Markets Authority (CMA)



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## Introduction and background

- The Incorporated Society of Musicians (ISM) welcomes the opportunity to comment on the CMA's Statement of Scope relating to its 'Music and streaming market study'.
- The ISM is the UK's oldest professional representative body for musicians, set up in 1882 to promote the art of music and to protect the interests of all those working in the music sector. The ISM's membership comprises of over 11,000 members and 180 organisations working in every part of the profession. We support our members with legal services and advice, insurances, professional development and guidance in their work as a musician.
- The ISM represents working musicians. Our responses therefore focus on issues which affect this essential part of the music industry. As such we are not in a position to respond to questions aimed at record companies, streaming services and other corporate entities, unless where relevant to our membership.

## General questions

1. *What have been the main changes in the music industry as part of the shift to music streaming, including any changes to:*

- a) business models;*
- b) the cost structure of the industry (eg costs of music companies, costs recouped from music creators; and costs of music streaming services);*
- c) risks that music companies and music streaming services take on; and*
- d) the way firms compete at different levels in the music streaming value chain?*

- For ISM members, the most significant result of the market shift from unit sales to streaming of music is the impact on allocation of revenues generated by consumers' use of music to those involved in music creation.
- Sales of physical copies and downloads are made at quantifiable price points, generating revenues in accordance with the traditional seller/buyer model. Shares of royalties on physical sales and downloads are generally clear and at fixed rates, applicable to the industry as a whole. While there remain multiple rights holder entities in recorded music (song writer, publisher, performing artists, record company) standard industry licensing mechanisms were understandable,

transparent and accessible to all.

- The shift to streaming changes this dynamic. Revenues generated by unit sales are replaced in the streaming model by shares of revenues apportioned to rights holders according to mechanisms which differ from one streaming service to another. These mechanisms do not recognise a direct seller/buyer model, whereby an artist or a recording receives a share of revenues according to actual consumption of their work by listeners. Instead revenues are apportioned according to shares of overall revenue and overall usage.
- This plays to the advantage of larger entities in the industry, particularly larger record companies, whose position allows them to build on existing profile and relationships to ensure their music has a high likelihood of broad consumption. Popular artists and popular genres can be very successful on streaming platforms. However, the value reportedly received by the larger music companies from streaming bear no relation to the revenues earned by artists outside the very top echelons of popularity. It is of course acknowledged that out of the millions of recordings available at any given time not all can be successful, however there is a divide between the few entities for whom streaming has brought significant economic benefits, and other entities contributing to the music economy, including the majority of our members.
- Smaller independent music companies and independent artists cannot compete at this scale, with the result that their 'per stream' usage may be relatively high, but their share of revenues earned through the revenue share model will be very small indeed. The result of this shift has been a significant reduction in real revenues earned by our members for their recordings. This impacts on the livelihoods of working musicians, and is a contributing factor in turning potential professional musicians away from a career as a performing artist. This in turn reduces the talent pool and ultimately risks impacting consumers, through reduction in choice and diversity of music content.
- As regards risk taken on by music companies, our members are individual working musicians not corporations. They are therefore not directly involved in investment into music services and related risk. This is not to say that they are not impacted as a result of corporate investment strategies in music streaming services. It is acknowledged that some years ago, entities such as large record companies and Merlin looked to support the nascent digital music services by taking equity stakes in return for licensing of recordings, while potential revenues from these services was as yet unknown.
- In the intervening years, streaming has become the dominant form of music consumption, with increased competition among streaming services on a global basis. Nonetheless the negotiating power as regards revenue shares from streaming services remains in the hands of the larger companies. This has an impact on the overall state of licensing of streaming services for our members. Performing artists have essentially no ability to negotiate rates for the use of their recorded performances on streaming platforms.
- It should also be noted that the nature of the bargain between recorded music companies and streaming services impacts on music writers and publishers as well as performers. Whereas collective licensing of most aspects of musical works functions relatively well in the context of unit sales, it has not been effective in the context of licensing streaming services.
- Part of the reason for the disparity in value between works and recordings lies in the fragmented nature of licensing structures of musical works. This structure is

similarly fragmented between large and small right holders of musical works as it is on the recording side. A small number of large music publishing companies make their own licensing arrangements for the works they control, and thereby assume the majority of the available value. Smaller publishers and independent writers rely on collective negotiations through entities such as IMPEL or PRS For Music, whose negotiating power is significantly reduced through the lack of the catalogues licensed directly and the fact that the majority of the value available has already been assumed by individual licensing deals. Fragmented licensing has a negative impact on writers and publishers relying on their industry licensing structures. This is detrimental to many individual writers and smaller publishing companies, who do not see the returns enjoyed by the larger publishers.

- We look forward to reviewing responses from entities such as PRS for Music to understand their position in more detail, but it is understood that their licensing of musical works on streaming services has not succeeded in generating the levels of revenues generated by the larger recording entities for the reasons set out above.

3. *Are there any key technological or other changes anticipated in the music industry, particularly anything that could impact competition in the future, either between music companies or between music streaming services?*

- Technological advances have delivered tremendous benefits to musicians in recent years. Indeed it is now possible for anyone to create, record and release music into the global digital music ecosystem with little more than an internet connected laptop. Access to creating music is now more openly available than ever, which can only be a good thing for society.
- The downside is that as more music is made, it becomes increasingly difficult to be heard. With specific regard to competition, as millions of recordings are put up on streaming services every week, all competing with each other and the entire back catalogue of virtually all commercially released music, individual artists struggle to raise their profile and tap into the potential opportunities afforded through today's digital industry.
- From a competition point of view, it is a concern that artists working with better funded commercial partners are the ones really benefitting from the globalised, 'always on' digital music market. While anyone can make and release music in principle, it remains a struggle to find, build and sustain an audience - and thereby a career - when competing against artists supported by sophisticated and well-funded operators.

4. *Are there areas within the stated scope of the market study that the CMA should particularly focus on, or any important areas it has missed?*

- The music ecosystem has evolved into a fragmented and complex landscape that does not place those who create music – musicians, artists, composers and songwriters - at its heart. Whilst recognising the scope of this market study is limited to the streaming market it would be remiss not to acknowledge there are numerous associated challenges. These include the ability to process royalties generated from streaming services due to poor data held by streaming services, collection societies and the ability to link song data to recording data; a lack of transparency around licensing deals which make it impossible for musicians to determine whether royalties received are accurate, and; contracts with labels and

publishers that pre-date streaming. For the streaming market to successfully support musicians these wider issues must also be addressed.

### **Competition between music companies**

5. *How do recorded music companies compete with each other in:*

- a) *The supply of services to music creators to develop and bring their music to market; and*
- b) *The supply of music to music streaming services?*

- The services provided to music creators by companies in the digital music industry have broadened exponentially over a relatively short period of time. In the very early days of digital music, established music companies looked to set up their own digital supply chains. Artists and independent labels not affiliated to one such company would struggle to access any digital music outlets. Content delivery required specialist skills and resource. As the digital market developed, competing service providers entered the market to offer generic digital delivery services. This market has been at saturation point for some years.
- Competition among such service providers is now characterised by a suite of services, targeted at various subsets of independent music companies and/or artists. These additional services include: assistance with accessing wider commercial opportunities for music than simply delivering to music outlets, fulfilment of physical music and merchandise sales, and various ancillary rights management services.
- We value the market access opportunities created as a result of years of investment by many entities into creating a working global digital music economy. The emergence of additional service offerings has also brought benefits. However our members are mindful that the broader the services offered, the less visibility and control they may retain as artists, opening up potential for unfavourable treatment. ISM works closely with its members to ensure they understand the fundamentals of industry rights and structures, and are kept up to date on industry developments. This helps them make informed decisions when dealing with their business partners.

6. *How well is competition working at present between recorded music companies?*

7. *How, if at all, is competition between recorded music companies likely to change in the future?*

8. *To what extent can music creators seek better terms for the services they are offered by recorded music companies?*

- a) *What are the key drivers of a music creator's choice of recorded music company? What role do music managers play in this?*
- b) *What are the key factors determining the bargaining power of music creators in negotiations with recorded music companies?*
- c) *Does the strength of competition between recorded music companies vary for different types of music creator, for example music creators at different stages of their career – and if so, how and why?*

- The majority of artists and independent music companies rely on a third party service provider to place their recordings in the digital music marketplace. These services usually have deals in place with the music outlets/DSPs by which the

DSPs share revenue for repertoire consumed on their services. These deals are between the third party service and the DSP, and offered 'as is' to clients of the third party service. There is no scope for improvement or adjustment of terms.

- With regard to relationships between artists and recorded music companies, there may be some scope for negotiation, depending on the relative bargaining strength of the individual artist. From the point of view of almost every artist looking to partner with a music company (ie a record company, but also any number of other service providers), a critical distinction must be drawn between 'number of potential partners' and 'choice of potential partners'. It remains the case, as it has for many years, that artists struggle to gain the attention of any commercial partners whose support and investment they are seeking, unless they are in the rare (and somewhat counter intuitive) position of already having a significant profile and audience.
- Most artists do not find themselves in the position of having a genuine 'choice' of potential offers from partners, which they are free to decide on terms most beneficial to them. In the vast majority of cases there will be one offer, if any. If several offers are on the table concurrently, then the key driver behind the decision will be financial. Usually the more money is on offer – usually by way of advance, but sometimes through favourable revenue share terms – the more likely that offer will prevail. It can also be the case that the nature of the relationship between artist and record company or other commercial partner may be a defining factor in choosing who to work with. Creators need to feel comfortable that their partners understand and support their creativity, which can influence who artists seek to work with.
- Please refer to further detail provided in our response to Question 1.

### **Competition in music streaming services**

18. *How do consumers use music streaming services and to what extent is their usage influenced by playlists or recommendations?*
- It is our understanding that playlists are the dominant mechanism for most consumers to discover music, both new music and existing music perhaps aggregated by themed playlists. We are also aware of concerns that playlist choices made by music services, both human and algorithmic, have been subject to undue influence by entities representing various artists in order that certain recordings are featured on playlists more prominently than others.
  - If true, this is a form of payola operating in the streaming music economy, which can only be seen as anti-competitive and potentially extremely damaging for industry and consumers. We stand against any such practices, and support our industry colleagues actively seeking to address this.
19. *What barriers, if any, are there to:*  
*a) entry and/or expansion in music streaming services; and*  
*b) innovation in music streaming services?*

20. *What, if any, competition or consumer issues are there in the supply of music streaming (see paragraphs 98, 100 (c) and 103 above for examples of the types of possible issues the CMA intends to explore)?*

21. *How can competition in music streaming services be strengthened?*

- We anticipate detailed responses to be submitted by various industry entities on the issues created as a result of exploitation of so-called 'safe harbour' provisions by some online digital music platforms, including music services. We support our industry colleagues in bringing this issue to the attention of regulators. It is clear that music services are not competing equally where one is operating a fully licensed service, while another is taking advantage of a legal mechanism to effectively avoid paying creators for use of their work.
- Safe harbour provisions were enacted to aid the early development of the internet. Development is very far advanced at this point, such that historic provisions intended for a past era must now be discontinued.

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