

Response by Dr Andrew White to the CMA's market study into music and streaming services. 17 February 2022.

Introduction

Andrew White¹ is currently an associate lecturer in communication, media and culture at Oxford Brookes University. He was previously Professor of Creative Industries & Digital Media at the University of Nottingham's China campus. He has published his research in the form of journal articles, book chapters, newspaper articles, and a single-authored monograph with Palgrave Macmillan entitled *Digital Media & Society*; a Portuguese translation of this book, *Mídia Digital e Sociedade*, was published in 2016. His current research focuses on the DCMS Committee's investigation of the UK music streaming industry, on which he has published the following papers with *The Conversation*:

- <https://theconversation.com/what-mps-plans-for-music-streaming-mean-for-artists-and-listeners-164532>
- <https://theconversation.com/the-music-industry-is-booming-and-can-afford-to-give-artists-a-fairer-deal-168587>

What is the music streaming market failing to deliver?

The music streaming market is dominated by a small number of platforms each of which offers almost unlimited content. The big three labels, Warner, Universal and Sony, control a large proportion of the recording rights of the songs that appear on those platforms, while the publishing arms of those same labels are responsible for a similar proportion of publishing rights. Musicians are largely dependent on the major labels to strike deals for them with streaming platforms. As well as having publishing arms, these labels often have financial stakes in the streaming platforms. All this leaves most musicians feeling that their financial concerns are not being adequately represented in the contractual arrangements for the allocation of streaming revenue; the record labels' biggest stars can strike favourable deals, while lesser known artists struggle. These stars are usually mainstream artists, while niche genres like jazz and classical music are further

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marginalised by certain streaming functions, especially the practice of paying for a song after only 30 seconds of its playing (DCMS 2021a).

These structural problems not only imperil the livelihood of musicians but, in so doing, threaten in the long term the rights of consumers through the reduction in the diversity of content in the UK music market. This in a sense constitutes market failure. It is therefore appropriate that the CMA not only investigates this but also recommends concrete measures to remove these structural impediments to a fully functioning music market. This response limits itself to those areas which arguably could be said to fall under the purview of the CMA's market study. While it is aware of the global context of large, mainly US, companies operating in ways in which are sometimes inimical to UK artists, this response will focus only on remedies that can be applied domestically.

Three suggestions on transparency, contract re-negotiation and safe harbour

1. Free markets function at maximum utility when all participants have access to the same information. In the music streaming market, musicians are clearly disadvantaged in not being privy to the type of information that record companies, publishers and streaming platforms can readily access. Providing musicians with details about the number of times their music is downloaded as well as revenue figures for artists and others along the entire value chain would enable them better to negotiate new contracts or re-negotiate existing ones. Notwithstanding legitimate concerns about commercial confidentiality, Andrea Martin's (of music collecting society PRS) argument that article 16 of the Collective Management of Copyright (EU Directive) Regulations 2016 should be used more forcefully by the UK government to compel platforms to be more transparent about the data they use when operating in the UK's jurisdiction is something that should be considered by the CMA as a means of addressing the weak market power of musicians (DCMS 2021b). Imperfections in the metadata attached to each song is another means by which a lack of transparency impedes the smooth running of the music streaming market. In extremis, this has resulted in a 'black box' of unpaid revenues for songs whose rights holders cannot be identified because of insufficient or absent metadata. In 2019 alone, this global pot amounted to \$2.5 billion (DCMS 2021a). The recent establishment of the Mechanical Licensing Collective under the terms of the US Government's Music

Modernization Act of 2018 is the type of central registry of metadata for every single song which the CMA might also consider championing in the UK (Mechanical Licensing Collective 2022).

2. It is important in a fast moving digital economy that musicians be given the flexibility to adapt to changing markets. This is not easy to do if they are tied down by long-term contracts. Particularly inflexible are legacy contracts, namely those which were signed before streaming became the predominant means of delivering music. The aforementioned imbalance in access to industry statistics also would have meant that many contracts were signed in the past without musicians having the requisite information to use as leverage in negotiation. There are already signs that a decreasing number of musicians are signing life-of-copyright contracts (Hesmondhalgh et. al. 2021). It would be useful to encourage more of these kind of contracts, and, through possible changes in regulation, facilitate the revocation or re-negotiation of contracts where appropriate. Much in the same way that households can switch their energy suppliers, enabling musicians to re-negotiate their contracts within a reasonable timeframe and, in extremis, revoke them would revitalise the music streaming market. This might enable platforms as well as record labels to compete for musicians, and hence make the market more competitive. This would be particularly useful for the niche genres, like jazz and classical music, mentioned above, which could disentangle themselves from existing commitments to work with platforms, like Bandcamp, which are more appropriate vehicles for their kind of music (Enos 2022).
3. Incorporating something similar to article 17 of the EU's 2019 Digital Single Market directive would empower musicians in the streaming economy. Freemium models like YouTube Music can generate money from unlicensed music on their platforms (DCMS 2021c). The company addressed this in a written statement to the DCMS's inquiry into music streaming, arguing that incomplete or absent metadata is responsible for it not being able to immediately check the status of songs uploaded by users (YouTube Music 2020). Further, YouTube Music is assiduous in taking down content upon notification that it is not licensed to appear on its platform. Be that as it may, the existence of musicians' songs on freemium platforms can undermine them in contractual negotiations; after all, why would record companies and streaming platforms offer generous rates for content that might appear elsewhere for free? Article 17 addresses this by diluting the type of 'safe

harbour' defence that platforms tend to use. Against those platforms' defence that ignorance of infringements invalidates liability, Article 17 states: "online content-sharing service providers should also be liable if they fail to demonstrate that they have made their best efforts to prevent the *future* [my emphasis] uploading of specific unauthorised works" (EU 2019). An incorporation of such an article into UK law alongside a central metadata registry as proposed above would provide more security for musicians in the streaming market and more power in negotiations with record companies and streaming platforms.

Final thought

Record companies and streaming platforms often cite regulatory restrictions, most usually international copyright treaties, as justification for not being more flexible in their dealings with musicians. In particular, the World Intellectual Property Organization's (WIPO) 1996 Copyright Treaty is correctly cited as determining that music streaming should not be treated as broadcasting, and hence not permitting 'equitable remuneration' for artists. However, a recent paper by the organization recognised that international copyright law has not kept pace with technological developments and that there might indeed be scope for accommodating equitable remuneration within the existing legal framework (Castle and Feijoo 2021). I think that it is in this spirit of flexibility that we must think about improving both the competitiveness of the music streaming market and the plurality of musical content.

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