

CMA MARKET STUDY INTO MUSIC AND STREAMING SERVICES
SUBMISSION FROM THE IVORS ACADEMY OF MUSIC CREATORS**1. Introduction**

- 1.1. The Ivors Academy of Music Creators welcomes this important market study and believes a full market investigation is required into the structure, activities and market power of the major music groups. We believe there is market failure arising from these issues which is suppressing the value of the song (publishing rights), reducing the value of royalties directly paid to songwriters and composers and stifling innovation to the detriment of music consumers.
- 1.2. We have been very concerned about these issues for some time and were grateful when the Digital, Culture, Media and Sport Select Committee agreed to an inquiry. The resulting Report on the Economics of Streaming was very welcome, as were the subsequent responses from the Government, and Competition and Markets Authority. As you will be aware, Paragraph 14 of the 'Recommendations and conclusions' of the Select Committee Report, states that "As long as the major record labels also dominate the market for song rights through their publishing operations, it is hard to see whether the song will be valued fairly as a result."
- 1.3. It has long been the case that such dominance has existed but the concentration has increased with streaming and it is materially hurting the supply, demand and consumption sides of the market. We fear that size is a problem in online markets where 'winner takes all' network effects seem to operate. We propose the formal separation of publishing businesses from label businesses which would help to both limit the concentration of power but also enable the publishing rights to be valued according to the market rather than having their value limited by corporate interests.
- 1.4. We believe that the concentration of power also affects the range of options open to composers and songwriters. Matters such as contract transparency, contract adjustment and rights reversion are currently being explored by the Government and measures in those areas would be helpful in limiting the negative effects of market dominance, but we nevertheless believe that the core of the problem is the structure of the market and that reform is needed.

Publishing rights

- 1.5. The journey from the creation of a song to that song being streamed by a consumer involves a number of commercial interactions at different levels. With the creation of a song, several rights to that song are brought into being, which can be commercialised in different ways. The value of the song is essentially the value of the collection of those publishing rights. When the song is recorded by

performing artists, different rights are created which attach to that specific recording, the recording rights. We set out below the market interactions relating to publishing rights.

- 1.6. At the highest level upstream, thousands of creators are active in the process of creating new songs, some of which might be successful, some of which might not. At this level, music publishing companies offer services to composers and songwriters, which include providing creative and financial support (including in the form of advances), matching those authors with co-writers and performing artists, ensuring the legal protection of musical works, promoting authors' works to potential licensees, marketing and negotiating the licensing of rights, and administering authors' rights (including registrations with, and collections from, collecting societies). In return for providing these services, a publisher receives a share of the royalties generated by an author's work. This market is known in competition law as the market for publishing services to authors.¹
- 1.7. Music publishers are able to license downstream the works and the catalogues of the authors to whom they provide music publishing services upstream. At this downstream level, previous merger decisions to date have recognised that there are five different categories of copyrights constituting separate product markets where music publishers deal with (prospective) users of works:²
 - a. Mechanical rights – the right to reproduce a work in a sound recording;
 - b. Performance rights – the right for commercial users such as broadcasters, concert halls, theatres, clubs and restaurants to divulge a work to the public;
 - c. Synchronisation rights or “synching” rights – the right for commercial users such as advertising agencies or film companies to synchronise music with images;
 - d. Print rights – the right to reproduce a work in sheet music; and
 - e. Online rights – rights to exploit a work online, consisting of both mechanical rights and performance rights.
- 1.8. The table below gives more details as to the various “rights” that are relevant to this market study, the areas of commercial exploitation to which they relate and also an indication of the licensing models involved – in particular where the rights are licensed collectively by collecting societies (CMOs) and where licensed directly by publishers.

¹ See for example Decision by the European Commission of 1 August 2016 in Case M.8018, *Sony/ATV*, paragraph 15.

² See Decision by the European Commission of 22 May 2007 in Case M.4404, *Universal/BMG Music Publishing*, and Decision by the European Commission of 26 October 2018 in Case M.8989 *Sony/EMI Music Publishing*.

Performing rights	Mechanical/other reproduction rights
<p>To communicate the work to the public</p> <ul style="list-style-type: none"> • Radio broadcasting (CMO) • Linear TV broadcasting (CMO) • Cable transmission (CMO) • Online streaming (non -interactive) (CMO) <p>Which includes making the work available:</p> <ul style="list-style-type: none"> • Video on demand/interactive TV streaming services (CMO) • Interactive music streaming (CMO) • Music and audio-visual downloads (CMO) 	<p>To copy the work in any material form</p> <ul style="list-style-type: none"> • Graphic reproduction of the music and/or lyrics (and sale and distribution) – hard copy print or electronic copies (direct by publisher) • Reproduction in physical copies (plus distribution) – e.g., CDs or DVDs for retail (usually via CMO) • Reproduction in TV programmes for broadcast (“synchronisation”) (usually CMO) • Reproduction in music videos, feature films and adverts (“synchronisation”) (direct by publisher) • Reproduction on servers for the purposes of traditional broadcasting TV or radio programming (CMO) • Reproduction on servers by VOD or audio-visual streaming services and customers’ devices (to the extent not exempt) (CMO) • Reproduction on servers by music download or streaming services and customers’ devices (often licensed directly by the publisher and often in conjunction with a CMO)

1.9. In short, the licensing of mechanical and performance rights for offline use is generally carried out by collecting societies on behalf of publishers. Synchronisation and print rights are generally licensed and administered directly by the publishers.

1.10. Online rights for music streaming and download services are subject to a hybrid solution whereby mechanical rights in songs authored by writers registered to “Anglo-American” collecting societies are generally licensed directly by publishers (as the rights are usually vested in the publishers and historically not the collecting societies) but in Europe and many other regions other than the US, the publishers license those rights in conjunction with CMOs who license the “matching” performing rights. Even where the rights are licensed in conjunction with a CMO, it is the major publishers who usually negotiate and agree with the larger online services the commercial terms that will apply. Different rules apply to mechanical and performance rights over songs authored by writers registered to “Continental European” collecting societies, where for historical and legal reasons, both sets of rights are usually assigned to and then licensed by CMOs. This is further explained in Appendix 1.

1.11. Most UK creators fall under the Anglo-American model. With respect to streaming, this means that their mechanical rights are licensed directly by the larger publishers and that their performance rights revenues are collected and distributed by CMOs, following the major publishers having also negotiated the rate for performing rights alongside the mechanical rights. The reason for the protocol for the

relevant performing rights being licensed alongside the mechanical rights in this manner and a brief description of the model under which these publishing rights are licensed to the global streaming services in Europe, former Eastern bloc countries, and much of Asia is set out in Appendix 1. As explained elsewhere in this submission, publishing rights generate significantly less revenue from streaming than recording rights.

Recording rights

- 1.12.** A different set of rights is known as recording rights. These rights attach to the recording of a song as performed by one or more performing artists. The particular recording of the song in question generates rights that are generally owned by the record companies (or labels) with whom the performing artists are contracted. Recorded music rights are licensed to streaming services by music labels. The labels collect directly the royalties related to recording rights.
- 1.13.** For several reasons, it is a fact that when music is licensed to the digital service providers, a vastly larger share of available revenue is paid to the labels for the rights in the recordings compared to the share paid to the publishers for the rights in the underlying music. This is explored in more detail in Section 2 below.

The combination of publishing rights and recording rights increases market power

- 1.14.** Whilst publishing rights and recording rights are distinct and provide revenue streams to different types of UK creator (i.e. songwriters/composers and artists - even though there may be some overlap), the market has developed through various mergers and acquisitions to a position in which the three major music companies all operate both publishing and recording businesses. As a result, when a song is streamed, streaming revenue associated with both publishing rights and recording rights may flow to the same major music company.
- 1.15.** As the European Commission has recognised, publishers who also have a recording business have control over a larger set of songs for which they can threaten not to license music publishing rights and/or recording rights to online platforms (hold up). This may increase their bargaining power vis-à-vis streaming services. In this case, the revenue shares from publishing may significantly understate the real market power of the music company.³

Structure of the remainder of this submission

- 1.16.** In the remainder of this submission, The Ivors Academy will explain why publishing rights are undervalued (Part 2), and why this undervaluation is a result of structural competition concerns in the relevant markets (Part 3). In conclusion, we will set out why a full market investigation into the sector is necessary (Part 4). The Ivors Academy stands ready to respond to any questions the CMA has and to assist the CMA throughout this process.

³ Decision by the European Commission of 26 October 2018 in Case M.8989 *Sony/EMI Music Publishing*, paragraph 67.

2. Publishing rights are undervalued

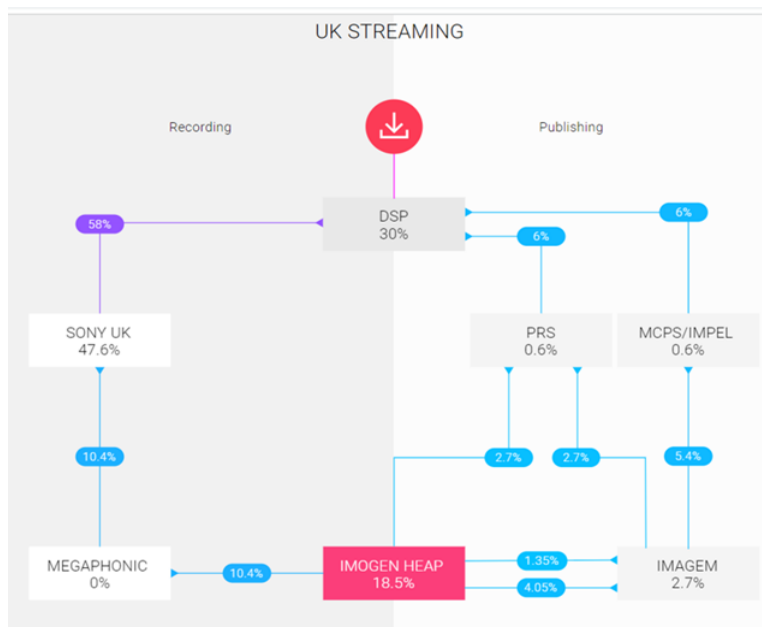
- 2.1. There is an increasing body of research and findings that point to the publishing rights being undervalued in comparison to the recording rights and that this has arguably been the case since the advent of streaming. A recent exploratory study by Joel Waldfogel, Professor and Frederick R Kappel Chair in Applied Economics at the University of Minnesota's Carlson School of Management, analysed the Billboard Hot 100 weekly charts 1980-2016 with a view to determining the differential importance of songwriting vs. performing talent in determining the extent of sales. Using regression analysis, Waldfogel was able to explore the relative contributions made to the success of a song by the songwriter on the one hand and the performers or artists on the other. Whilst Waldfogel is careful to point out that more detailed research using a larger data set is required before robust conclusions can be drawn, the preliminary results of this analysis point to parity between the two contributions. These results lend weight to our proposition that the songwriting is as important a driver of streaming value as the recording and there is, therefore, no justification for the disproportionately low returns to those who hold those publishing rights. The study is set out at Appendix 2.

The undervaluation is based on the wrong premises

- 2.2. The undervaluation of publishing rights in the online arena was endemic from the very beginning:
- a. Music streaming arrived around 15 years ago, after the creation of the MP3 format in 1993, the founding of Napster in the 1990s as a peer-to-peer file sharing service, the launch of the iPod in 2001, the arrival of the Last.fm music player in 2002, the launch of the Apple iTunes store in 2003 and Pandora's internet radio service in 2005, and the arrival of Spotify in 2008. The industry was dominated by peer-to-peer file sharing piracy in the early years due to a lack of effective paid-for products for the consumer. The new licensed services that began to be established offered downloads which were a direct replacement for the purchase of physical product (CDs and vinyl). Issues that songwriters and composers now face concerning undervaluation within the economics of the streaming industry date back to this point.
 - b. When royalty rates were being negotiated for the use of music in these nascent services, the record labels both here in the UK and in the US, and the new digital service providers worked together to keep the royalty payments to writers as low as possible. For example, in the UK, the initial royalty rates proposed by PRS for Music (then MCPS-PRS Alliance) on behalf of its writer and publisher members were challenged by the major record labels (BPI) as well as the digital service providers (AOL, Napster, Apple iTunes, MusicNet, Real, Sony Connect and Yahoo!) in a 2006 Copyright Tribunal reference. It is notable that the BPI, representing record companies including major labels, was effectively suing the publishing arms of their major member companies to reduce the amount of royalties flowing to songwriters and composers. Much of the justification by the labels for keeping the royalties low was based on what was an appropriate share of revenue in the physical world of CDs for retail sale. This model reflected the costs incurred by the record labels in manufacturing and distributing. The labels approached the online download market (as it was then) in exactly the same way as the physical market both in terms of depressing the value of the publishing rights but also paying artists and performers as if downloads were physical sales and therefore paying them royalties on wholly anachronistic contractual terms. We believe that in the "hay day" of the CD era, profit margins for the record

labels were between 6-8%. The margins now are between 16-22%. From the detailed analysis carried out by Mr Colin Young on Warner Music’s annual statements over the last 5 years, which we believe has been submitted to the CMA, A&R costs as a percentage of income are decreasing steadily by 1% per annum (and yet this cost also includes catalogue acquisition fees which is not true A&R development spend), staff costs have increased by 25% and net profit is increasing.⁴

- c. While the rates paid by streaming services to writers and their publishers have gradually since risen to somewhere between 12-15% of revenue through negotiation and, in the US, formal statutory arbitral proceedings, it remains hard to establish proper value as a result of the unhelpful precedent set when the first legitimate services were being licensed. The record labels receive somewhere between 55-58% of gross revenues which in turn equates to over 80% of the revenue paid to the music industry. The example below, taken from the ‘Life Of A Song’ project (which provides analysis of the licensing and administration rates and deductions related to the song ‘Hide and Seek’ by Imogen Heap)⁵, shows the relative flow of royalties from streaming. It needs to be remembered that, in this case, Imogen Heap is both the performing artist and the songwriter and so receives royalties on both sides, but many songwriters do not. The major point to note is the extraordinarily high proportion of the revenue not only paid to the record labels by the streaming services but also the very large slice of that retained by the record labels themselves rather than it being shared with the performer. This is one of the reasons why there is every incentive on the record label side to maintain that high proportion of revenue attributable to the recording as opposed to publishing because the corporate group keeps more.



⁴ Profit margins for the major music companies of between 16 and 20% are also reported in *Rolling Stone*, see <https://www.rollingstone.com/pro/features/universal-sony-warner-music-profits-covid-1085112/>. Billboard reported an operating margin for Universal of 18.5% in 2020 (<https://static.billboard.com/files/2021/03/march-03-2021-billboard-bulletin-1614816272.pdf>).

⁵<https://loas.creativepassport.net/breakdowns/uk-streaming/>

- d. Music streaming cannot be compared to physical sales. In areas of exploitation of music other than directly by the record labels, where third parties are licensed to exploit both the recording and publishing rights, the royalty payments to each respective side are much closer to parity (in many cases the publishing rights get slightly more); this is true of the royalties payable by radio and TV broadcasters and also, for example, payments for the right to synchronise the respective recording and publishing rights in a track for use in an advert or feature film.

2.3. In addition, while overall rates for the use of music have increased by negotiation, the true value of music to the services is being obscured by the various other economic benefits granted to the major music companies, particularly the record label, which are not shared with creators. The major music groups use complex corporate structures and appear to enter into arrangements with the digital service providers which are not classed as licensing agreements. These arrangements might include equity acquisitions/realisations, marketing and advertising tie-ups, and ad-hoc settlement sums in consideration of covenants not to sue. It is entirely up to the individual music companies to decide whether and, if so, on what basis they would ever share such economic benefits with their contracted creators. It is unclear how this situation is undermining the value of the underlying work and due compensation for songwriters and composers. We believe these structures and arrangements provide considerable economic benefit to those music groups at the expense of UK creators: a legion of regional SMEs.

The changing role of the songwriter

2.4. Not only is the current apportionment of royalties predicated on the old economics of the industry and a time when record labels were responsible for the physical manufacture and distribution of records and CDs, it also completely ignores the changing roles of writers and the individual investments they now have to make:

- a. Music starts with the creator (songwriters, composers, lyricists, artists, producers). However, according to the Office for National Statistics (ONS), musicians earned an average income of £23,059 in 2018 – well below the national average of £29,832. According to UK Music, creators contributed £1.1 billion to total export revenues in 2018 and a total of 139,352 people were employed in the Music Creator sector in 2018. Without the ingenuity and industry of these thousands of creators there would be no music and no music industry. For comparison purposes: in 2019, Warner Music Group paid its six top executives a total of \$593m and in 2021 Lucian Grainge of Universal alone was paid \$290m. The proper valuation of publishing rights should result in more money being received by music creators who, under the more progressive agreements with publishers, are entitled to receive some 60-80% of the revenue received by the publisher. ⁶
- b. Technology has changed the relationship between songwriters, composers, producers and artists and the production of master-standard recordings. Many writers are now asked to write music and develop artists in their own studios, in their own time and at their own cost. Commonly this activity will not be paid for by the artist or the label. Days and weeks of work can be undertaken at the writer's risk with no guarantee that the results of the sessions will be used and provide any return on this investment. The cost of this type of development work with

⁶ <https://www.midiaresearch.com/blog/music-subscriber-market-shares-q1-2020>

artists used to be covered by labels. Publishers invest in the songwriters and therefore also face some of this risk, and so in moving the cost to the music creators, the labels are reducing their upfront costs and associated risks and putting them on the publishing side with no commensurate increase in the revenue allocated to publishing. Labels are now commonly signing artists once the development work has been done and a more finished and less risky 'product' is available.

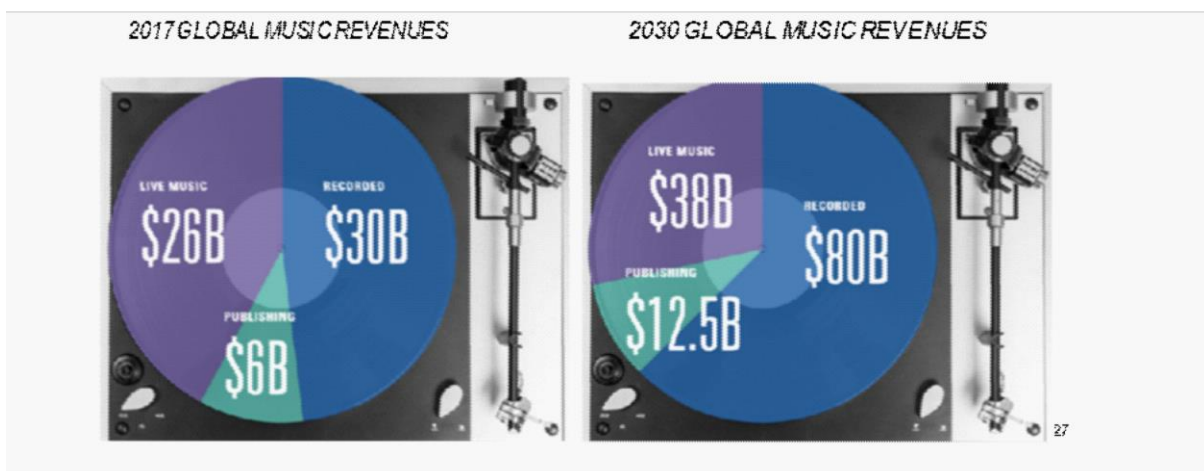
- c. If songwriters and composers are to take on the role of developing artists, their time should be compensated, and the associated risk reflected in a greater retained stake of future royalties for themselves and their publishers. In the current era, the risk/return economics for songwriters and composers make it less and less possible to sustain incomes and careers and for this type of investment to continue.

<p>CASE STUDY: ECONOMICS OF SONGWRITING</p> <p><u>Session for a prominent band hosted by 'Songwriter A' with a band comprising three members.</u> TIME: 1-week writing + 1-week production & mix 2 tracks. (master quality 'demo's')</p> <p>COSTS BORN BY THE SONGWRITER</p> <ul style="list-style-type: none">- Studio Rent: £250- Coffee /Tea/Sundries for session: £50- Electricity + Gas:£25- Drummer: £50- Software & Computer & studio Maintenance: £30 <p>TOTAL: £405</p> <p>STREAMING RATE: Spotify average per stream rate for songwriter = £0.0004 How this dilutes for Songwriter A having shared composition rights with the band writer gets 33% (Band gets 66% songwriting) = £0.000133333</p> <p>NUMBER OF STREAMS REQUIRED BY THE SONGWRITER TO PAY FOR THE SESSION: c. 3,037,575.94</p> <p>Band are able to charge £200k + for festival fee playing these songs. The songwriter gets circa £200 for the festival live performance royalties. The Band got resigned to their label for £1m+ advance on the back of the songs. The songwriter gets nothing from the advance.</p>

Songwriters and composers are not extracting commensurate value for the time and resources they are now investing in the development of artists and their sound.

The attitude of consumers

2.5. A well-functioning market delivers choice and competitive value for consumers. The work of streaming services such as Spotify and Apple Music in returning value to the music industry, by creating a paid-for market that has largely replaced the threat of piracy and the perception that music is 'free', should be celebrated. The forecasts for the future growth of streaming are strong but revenue from that growth is not forecast to be apportioned fairly. Revenues to writers and their publishers are projected to double (from a disproportionately low base) but record label revenue is forecast to increase by a factor of 2.5⁷. See also Will Page's report on the Global Value of Music⁸ which also predicts a continuing decline in the publishing share of the market.



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2.6. This unfair allocation of consumers' subscription spend is a real cause for concern and increasing disquiet. A recent survey undertaken by YouGov and supported by the Broken Record campaign, Ivors Academy and Musicians' Union provides some up to date insights into the views of the consumer:

- 77% say artists are not paid enough
- 76% believe writers are underpaid
- 81% would like session musicians to receive some share of streaming revenue
- 83% are of the opinion that most record labels are paid too much
- 68% say the streaming platforms are overpaid
- When asked if they would be willing to pay more for their streaming subscription under the current distribution model, a majority of consumer respondents responded no (69%). However, of those who responded no, approximately half would pay more if an increase in their subscription went directly to the writers and artists they listen to.

⁷ <https://www.statista.com/chart/4713/global-recorded-music-industry-revenues/> and <https://www.toptal.com/finance/market-research-analysts/state-of-music-industry>

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[https://static1.squarespace.com/static/602a5678aeefe23588ad9da9/t/61f148f2ca354319d799daf8/1643202803988/Music+Ally+Global+value+of+music+copyright+grew+2.7%+to+\\$32.5bn+in+2020+-+Music+Ally.pdf](https://static1.squarespace.com/static/602a5678aeefe23588ad9da9/t/61f148f2ca354319d799daf8/1643202803988/Music+Ally+Global+value+of+music+copyright+grew+2.7%+to+$32.5bn+in+2020+-+Music+Ally.pdf)

⁹ <https://www.goldmansachs.com/insights/pages/infographics/music-streaming>

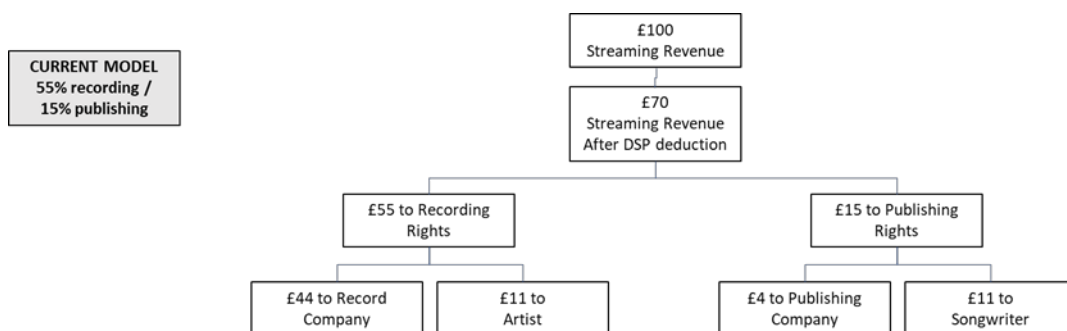
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This survey points to a desire amongst consumers for the investment in streaming made via their subscriptions to go to the writers and performers of the music that they love. Consumers are not aware, and are not supportive once made aware, of how little of their subscription gets paid through to those who write the music they listen to.

- 2.7. Streaming should not be a purely promotional tool for songwriters, composers and artists (e.g. to drive sales of tickets or merchandising) when there are enormous profits from streaming going to all parties other than the music creators. Now that consumers are used to paying for music via an 'all you can eat' model, the industry should look to develop the means of deepening the creator-consumer relationship and the ways in which more content can be bought with funds returned directly to the creators.

The interests of the major record labels

- 2.8. It was in the interests of the major music companies, led by their record label arms to suppress the value of the writers' contribution at the birth of online music and it continues to be in their interests now. In a corporate music group comprising both recording and publishing arms there is a reluctance for the label side to give up the unreasonable proportion of revenue it receives in favour of the publishing revenue simply because the label side is able to retain for itself a greater proportion of the revenue it receives. Over the past few years more of the major music groups have become publicly listed companies and shareholder value is predicated on safeguarding the label arm led profitability. The following diagram shows the current licensing model: not only does the label arm receive a greater share, because of anachronistic contract terms and treating streaming like sales, the label arm also keeps around 80% of it for itself. The publishing side gets far less but also under standard publishing contracts, the publishers pay out around an average of 66% of their receipts to the contracted songwriters. This creates a compelling incentive for the record labels to ensure the publishing share of revenue is kept low.



- 2.9. It is not possible for The Ivors Academy to provide any tangible evidence that the record label executives of the major music groups have specifically interfered with negotiations between their related publishing arms and streaming services in order to suppress the share of revenue attributed to

the publishing. [REDACTED]

[REDACTED] Evidence of the following may be available to the CMA;¹⁰

- a. that negotiations for label rights are usually concluded first and publishing rights held in abeyance until the negotiations with the label have been concluded and so the value is set in accordance with the value achieved by the label;

- d. the existence of favoured nations clauses.

2.10. It is certainly the case that the record labels have been active in any fora examining the rates that should be paid to the publishing side to ensure that the lowest possible rate is applied. At the onset of the digital services when the matter was referred to the Copyright Tribunal in 2006, it was the BPI representing all the record labels (including the majors) that led a consortium of the biggest online service providers at the time. A similar picture can be seen in the US, and indeed recently, although dealing with the rate payable to publishers for physical copies, the record companies reached an agreement with the publishers to a freeze on the rate that was established in 2006. Other interested parties did not accept this settlement and nor did the Copyright Royalties Board who rejected it, leading ultimately to a new settlement providing for a substantial 32% rise, with the judge commenting specifically on the conflict of interest as between the labels and publishing arms of the major music companies (see paragraph 3.18 below). An important point to note is that the rejection by the Copyright Royalties Board was because it included a freeze on 'downloads'. It is highly likely that Music Audio NFTs, or exclusive music accompanying NFTs, will be classed as a quasi-download and the Board did not approve the fact that the freeze would or could apply to future markets (i.e. NFTs).

¹⁰ In any event, as set out in Part 3, the structure of the market is such that explicit coordination may not be necessary to achieve these outcomes. The relevant markets exhibit features that are preventing them from working well which, among other things, is stopping streaming revenues from being distributed in a fair and non-discriminatory manner to artists.

Data and Black Box

- 2.11.** Data is especially important to the music industry because it is fundamental to some participants getting paid and others not. Streaming services, collecting societies and major industry corporations hold millions of pounds from consumption for which there is not the data to ascribe work ownership. Commonly, therefore, these royalties are not paid out to the creators whose music has been consumed and who are the rightful recipients. This money is held because of data issues and out-dated industry practices. It is made up of unclaimed or un-attributable royalties which are commonly referred to as 'Black Box'. After a defined period of time, this money is distributed to the streams that have been correctly identified and paid. These works get a double payment. These shortcomings lead to industry policies and practices that ultimately stop monies from flowing to the creator responsible for the work that has been used in certain instances. Once a common and multi-territorial 'claims window' has closed (the period agreed with the DSPs by when all the licensing bodies across Europe have to process the sales reports and raise their invoices), un-attributable royalties are paid out to the major music companies and collecting societies to distribute them as they see fit. The policies adopted for this distribution of un-attributable money are not transparent across all societies and licensors, but where they are, often the chosen policy is to pay (on a market-share basis) those who have already been paid. There is a significant concentration of listening habits in streaming. The top 1% of artists (16,000) account for 90% of all streams (i.e. 90% of the music streamed by consumers is the same 1% of music). The top 10% of artists (160,000) account for 99.4% of all streams.¹¹ When this level of market-share concentration is applied to distribution, it therefore benefits the most successful artists and creators, and those companies with the greatest market concentration. This is problematic in several ways. Firstly, it is wrong and unfair; royalties for streams that have not been identified should not be paid to streams that have been identified. These unidentified royalties are, by definition, not in respect of works that have been properly registered and matched.
- 2.12.** This is also problematic because the policy creates an incentive for inertia when it comes to industry investments that would increase accuracy. Those with the knowledge and resources to register their data quickly and accurately benefit twice. Those who are not registering works properly are those without large corporate structures and resources, without the awareness, understanding and support. Existing errors in publishing and collecting society databases can only be addressed with significant investment. There are no incentives to improve the system for all, no support for education and awareness and a lack of progress on introducing minimum industry standards for metadata. By removing the policy of paying Black Box unattributable royalties to already paid works, the incentive for the industry to maintain an inaccurate and inefficient system would also be removed.
- 2.13.** Those flaws have led to concerns that major music groups using their licensing power can negotiate "digital breakage" deals predicated on a lack of reporting from the service providers and the absence of accurate data on usage and consumption. The fear is that this enables the music companies to receive large fees which, in the absence of data attributing that revenue to specific works or recordings, they can simply allocate to the bottom line and while this may be a perception rather than reality, The Ivors Academy believes this needs investigation by the CMA.

¹¹ <https://www.musicbusinessworldwide.com/artists-have-a-0-2-chance-of-generating-50k-a-year-on-spotify-lets-kick-this-stat-around/>


3. Structural competition concerns

- 3.1.** The value chain for music and streaming exhibits a number of features that are stopping the relevant markets from functioning well for consumers and creators. In particular, The Ivors Academy is concerned that:
- a. The major music companies form a tight oligopoly which gives them the possibility tacitly to coordinate on certain commercial terms.
 - b. The existing interrelationships between the major music companies and streaming services may mean that major music companies are favoured on streaming platforms and that conflicts of interest arise between their role representing and negotiating on behalf of artists and creators who have assigned or licensed their rights to the majors on the one hand, and on the other hand their ownership of shares in the streaming services.
 - c. Owing to a lack of Chinese walls between their publishing and recording businesses, major music companies have an incentive to funnel more streaming revenues through recording and to suppress streaming revenues due to publishing. Their collective dominant position gives them the ability to act on this incentive.
 - d. A lack of transparency throughout the value chain more generally has a detrimental impact on the ability of creators and consumers to make informed decisions in these markets.
 - e. These issues are collectively and individually having a detrimental impact on the UK music industry and therefore ultimately on consumers. They create a fundamental imbalance between major music companies and streaming services on one hand, and artists and consumers on the other.
- 3.2.** The market investigation regime is the ideal tool to investigate such issues. It has previously identified and remedied features of markets where, similarly, there is a group of small businesses that should be protected alongside the consumer, like suppliers in the groceries supply chain. The Ivors Academy urges the CMA to refer the markets that are relevant to music and streaming to an in-depth market investigation.

The major music companies form a tight oligopoly

- 3.3.** The music industry now features far fewer major music companies and far fewer business models than when digital music was first emerging. The Ivors Academy is concerned that these market developments mean that record labels are able to coordinate on certain terms, to the detriment of artists and songwriters. In particular, The Ivors Academy is concerned that the market structure of published and recorded music is conducive to coordination on issues where there is sufficient transparency such that they can opt for a strategy of avoiding or limiting competition between them, which we refer to further in 3.7 and 3.8 below.
- 3.4.** As the Competition Commission recognised in *Aggregates*, coordination arises when, as a result of repeated interaction with rivals, suppliers in the market opt for a strategy of avoiding or limiting competition between them because they are aware and take into account that competition with rivals

(for example, to undercut their prices in order to win more business) will lead to competitive responses by rivals, with the result that their profits will ultimately be lower than if they avoided or limited competition. The result of coordinated behaviour is that prices are higher (or the quality aspects of firms' offers are lower) than would otherwise be the case.¹² Of course applying those principles to a market where the collectively dominant firms are *purchasers*, the price they extract from the suppliers (creators) would be *lower* than would be the case absent the coordination.

- 3.5.** As is well-known, there are now just three major music companies in the world, Universal, Warner and Sony. All three operate both a recording unit and a publishing unit. Although there were previously six major music companies, a number of high-profile transactions have reduced the number to just three. These three major music companies now dominate the downstream markets for the licensing of recording and publishing rights, as is clear from their combined market shares. As the CMA found in its final report in relation to the *Sony/AWAL* merger, the majors' music streaming shares amounted to 70-80% in 2021.¹³ In other words, the major labels represented the recording rights for 70-80% of songs streamed in the UK in 2021. Their share of publishing rights is smaller but is still around 60% for the market as a whole.¹⁴ Moreover, market power is increased when the same three companies hold both recording rights and publishing rights (see above). Finally, the major music companies' relative market power compared to others in the value chain (primarily independent labels, publishers and artists) is clear from the significant increase in profit margins enjoyed by the major music companies, from 6-9% in the "CD era" to 16-22% today (see paragraph 2.2(b) above). It can therefore be concluded that the relevant markets are characterised by a **high level of concentration**. As a result, the majors also dominate the upstream market, where they offer their services to creators and performing artists.
- 3.6.** This high level of concentration is partly a result of merger control decisions failing to properly understand how the market would develop after digitalisation and overestimating the diversity in the market that this brought. The relevant parts of merger decisions from the 2000s read like a graveyard of once exciting but long-gone ventures like Yahoo Launchcast and Musiwave Smart Radio.¹⁵ Unsurprisingly, this also led to a brief period that saw an increasing diversity and complexity of pricing structures and agreements, leading competition authorities to conclude that the risk of coordination was low.¹⁶ However, the markets have developed to a world where streaming is king and constitutes the dominant business model in music. This has **significantly reduced complexity** in the competitive environment.
- 3.7.** In addition, the music industry has always been characterised by **frequent interactions** between the major music companies, and with only three left, those interactions increasingly occur between the same players, reducing uncertainty. Major music companies interact in several different ways, including through the fact that often publishing and recording rights are owned by various different creators, some of whom might be clients of the publishing arm of one major or the recording arm of another. There is further scope for an increase in the frequency of interactions between the majors as a result of their shareholdings in streaming services, and the fact that they often share common shareholders. This increases the number of interactions between majors in different fora. 

¹² Competition Commission, Final Report in the *Aggregates, cement and ready-mix concrete market investigation* (hereafter: *Aggregates*), paragraph 21(b).

¹³ CMA Final Report of 16 March 2022 in relation to *Sony/AWAL*, Table 12.

¹⁴ Source: Statista.

¹⁵ See e.g., Decision by the European Commission of 3 October 2007 in Case M.3333 *Sony/BMG*, paragraphs 59-64.

¹⁶ *Id.*, paragraph 122.



- 3.8. Furthermore, transparency in the value chain has significantly increased, partly as a result of this reduced complexity and these frequent interactions. There is, for example, a clear symmetry between the business models of the three major music companies, who all operate large recording and publishing divisions. The majors' involvement as former or current shareholders in streaming services gives an understanding as to the business model of those services.¹⁷ There is therefore a **significant degree of transparency** in these markets on certain issues.¹⁸
- 3.9. Finally, when determining whether a market may present features that indicate a risk of coordination, it is important to ascertain what commercial terms market participants might coordinate on. Indeed, coordination is more likely to occur where it is fairly simple to reach a common understanding on the terms of coordination.¹⁹ As explained below, The Ivors Academy is in particular concerned that there is at least tacit coordination in relation to the proportion of streaming revenue that goes to recording versus the proportion that goes to publishing. These proportions are well understood in the industry. Major music companies also understand that they stand to gain more profits if the relative proportion that goes to publishing is lower. The relevant markets are therefore characterised by the levels of concentration, transparency, frequency of interactions, and lack of complexity conducive to coordination,²⁰ and with the specific issue of allocation of revenues between recording and publishing, they would have a clear common issue on which to reach an understanding.

Interrelationships between the major music companies and streaming services

- 3.10. Where some elements of the streaming value chain are transparent, others are opaque. This concerns in particular the relationships between the majors and streaming services. The CMA has already attempted to explain the cross-shareholdings between Spotify, Tencent and the major labels. However, it is important to ensure that all such relations are clear to the CMA. For example, the CMA's statement of scope makes no mention of the fact that Access Technology Ventures, a venture capital and growth technology investment effort of Access Industries, which in turn owns Warner Music, is also a shareholder in Spotify and Deezer. At one step removed sits Baillie Gifford, an investor in Spotify, Tencent and Vimeo.
- 3.11. The CMA should investigate whether the common ownership that is seen in the music industry is having a dampening effect on competition, in the manner described in the CMA's State of Competition Report for 2022.²¹ For example, the question arises how hard a bargain Universal Music would drive with Spotify when it is itself a shareholder in Spotify, and it shares a major common shareholder with Spotify, namely Tencent Holdings. Similarly, it can be queried how likely it is that Tencent Music would compete vigorously with Spotify in European markets when both companies have Tencent Holdings and Baillie Gifford as shareholders.

¹⁷ This includes not just the shareholdings already identified by the CMA, but also for example the investments by Access Technology Ventures, linked to Access Industries (the owner of Warner Music), in Spotify and Deezer.

¹⁸ As discussed below, there is at the same time a significant lack of transparency on other issues, particularly issues relevant to artists and consumers.

¹⁹ European Commission Guidance on Horizontal Mergers, paragraph 42.

²⁰ Note that they meet the same conditions as were considered in *Aggregates*, see Final Report in *Aggregates*, paragraph 36.

²¹ CMA Report on the State of Competition 2022, Chapter 3.

- 3.12.** The CMA has on multiple occasions indicated how common shareholdings and cross-shareholdings can have an adverse effect on competition,²² and the Ivors Academy invites the CMA to investigate the role of the complex web of ownerships in the music industry through this lens. In particular, the CMA should investigate whether the various shareholdings and cross-shareholdings mean that the concentration levels in the industry should be adjusted, and whether the presence of common owners may mean that firms account for the implications of their actions on their rivals' profits.²³ In addition to this, the CMA should get a complete overview of the agreements and understandings that exist between these parties, and whether these agreements and understandings increase their interdependence further.
- 3.13.** The Ivors Academy is concerned that the combination of these shareholdings, cross-shareholdings, agreements, understandings, and the high levels of concentration in this market mean that the major labels are favoured on the main streaming platforms, in particular Spotify. For example, major labels accounted for large chunks of the most important Spotify playlists over the past few years: they accounted for more than 70% of the tracks added to Spotify's 'New Music Friday' playlist,²⁴ and more than 85% on the Rap Caviar, Get Turnt, Today's Top Hits, and Pop Rising playlists.
- 3.14.** Faced with the strong market power of the majors, one would expect that streaming platforms would seek to foster competition and therefore would give independent labels an equal chance at getting listed on this most valuable streaming real estate. Instead, the major labels are dominating these playlists. Consumers and artists and creators deserve to know why that is the case and, if this is a result of agreements or understandings between the majors and streaming services, then that should be made transparent. The CMA should also investigate why Spotify's own playlists are given preference on the Spotify platform, when its shareholders stand to benefit from the prominence of those playlists.²⁵ Many independent labels and other music companies create playlists, but these are not featured on the landing page of Spotify's platform, which only promotes Spotify's own playlists (which in turn appear to be skewed in favour of the major labels).
- 3.15.** Further, The Ivors Academy is concerned about the conflict of interest that exists between the majors representing and negotiating on behalf of artists and creators who have assigned or licensed their rights to the majors, and on the other hand owning shares in the streaming services, which could benefit from low royalties to those same artists and creators. While we do not wish to compare music to milk, this would be like a cooperative that represents farmers owning shares in supermarkets and therefore benefitting from unsustainably low prices for milk. There should, at minimum, be a code of conduct of sorts to ensure that this conflict of interest is managed in a way that respects artists' and creators' rights and interests.

No Chinese walls between publishing and recording

- 3.16.** Since the Sony/ATV merger in 2018, it has been the case that within all three majors, the publishing and recording divisions answer to the same top management and shareholders. This is problematic for the market, since each of these divisions is responsible for the pay-out of revenues to different groups

²² Most recently: CMA Report on the State of Competition 2022.

²³ Id., paragraph 3.2.

²⁴ N.B.: AWAL shares have been added to Sony's, following the CMA's clearance of the Sony/AWAL merger.

²⁵ In particular, Universal and Sony own shares in Spotify, and Tencent owns shares in Universal, Spotify and Warner.

of artists or creators. Their interests are therefore not aligned when it comes to the licensors they represent, and the terms they need to negotiate on those licensors' behalf, but they are aligned when it comes to maximising the profits of their corporate groups.

- 3.17.** This conflict of interest was recently highlighted by the Copyright Royalty Board in the US, where judge Barnett noted in dismissing a proposed settlement relating to mechanical royalty rates from the sales of physical music in the US:

“Conflicts are inherent if not inevitable in the composition of the negotiating parties. Vertical integration linking music publishers and record labels raises a warning flag. No party opposing the present settlement has evinced actual or implied evidence of misconduct, other than the corporate structure of the record labels on the one hand and the publishers on the other. While corporate relationships alone do not suffice as probative evidence of wrongdoing, they do provide smoke; the Judges must therefore assure themselves that there is no fire. The potential for self-dealing present in the negotiation of this proposed settlement and the questionable effects of the MOU are sufficient to question the reasonableness of the settlement at issue as a basis for settling statutory rates and terms.”²⁶

- 3.18.** As the majors therefore manage the royalty fees to both artists and songwriters/composers (from which they retain a share), but have a single profit-maximising objective, they have an incentive to increase the flow of revenues to the category of income where the majors can retain the largest share. As explained above (Publishing rights are undervalued), the largest share of revenues is earned through recording rather than publishing rights. This has led to the publishing side and therefore songwriters and composers being underpaid relative to the recording rights. In other words, the song is undervalued compared to the master recording.
- 3.19.** Although there are copyright-related disputes in the industry that may lead to a higher compensation for publishing rights, it is important to recognise that the business model of the major labels is skewed in favour of recording rights and to the detriment of publishing rights. That is not an IP issue, but a feature of the market that is stopping it from operating in a fair and non-discriminatory manner, particularly when – as is the case – this is a simple issue to coordinate on.
- 3.20.** Since the major music companies represent two groups of artists and creators of music who, while they would never see themselves as each other's competitors, nonetheless compete for the same streaming revenue, the majors should operate on the basis of a clear separation of these two units, set up to maximise the earnings of each of the groups they represent independently. The Ivors Academy therefore calls for the introduction of structural separation between publishing and recording divisions of the major music companies.

Lack of transparency

- 3.21.** In addition, The Ivors Academy is concerned about the significant lack of transparency in the market when viewed from the perspective of artists, creators and consumers. There are several key issues which influence either the remuneration of artists and creators or the offering available to consumers

²⁶ Copyright Royalty Board, Determination of royalty rates and terms for making and distributing phonorecords (Phonorecords IV), 37 CFR Part 385.

which are not transparent, and which therefore negatively impact artists' and consumers' ability to make informed decisions.

- 3.22.** For example, the inclusion of songs on playlists is something of a mystery at the moment, both for artists and creators and for consumers.²⁷ However, whether a song is included or not makes a huge difference in terms of the number of streams a song gets (and therefore an artist's or creator's remuneration from streaming).²⁸ Consumers, in turn, expect that the playlists they listen to are compiled in a fair and non-discriminatory manner. They do not assume that record labels can influence placement on playlists that are presented as independent playlists compiled by the relevant streaming service.
- 3.23.** Further, the issue of streaming revenues that are not paid out to the relevant creators (Black Box, see paragraphs 2.11-2.13 above) is another example of where a lack of transparency is having a detrimental impact.
- 3.24.** More generally, as explained in paragraph 2.3 above, there appear to be various economic benefits that are granted to major music companies that are not shared with artists and creators. Those benefits depend on the assets that artists and creators create, yet they have very little transparency over how major music companies reap benefits off the back of these assets.
- 3.25.** CMA market investigations have often introduced more transparency in markets to the benefit of consumers and weaker market participants. The Ivors Academy urges the CMA to address the transparency issues outlined above.

Significant bargaining power creates fundamental imbalance

- 3.26.** The issues outlined above create a fundamental imbalance between the major music companies and streaming platforms on one side, and individual artists and creators on the other. Indeed, the business models and the fiduciary duties that the relevant boards owe to their shareholders are such that the publishing rights created by creators are always squeezed. For example, the Board of Universal Music Group are expected to create maximum value for their shareholders, as is the Board of Spotify. However, at these hugely important levels of the value chain there is zero incentive to maximise royalties for publishing rights.
- 3.27.** While individual artists and creators who are successful may occasionally have a strong bargaining position with respect to the music companies, the reality for the vast majority is that this is not the case. These artists and creators face multi-billion-pound companies who dominate the most important playlists. When artists or creators sign up with a major label or publisher, they are often tied to that label or publisher for a long time for a good part if not all of their creative output. The majority of recording artists will be signed to a record label for a period of time in order to produce a minimum number of recordings but the rights in all those recordings will usually remain with the record label for the full period of copyright protection, and the artist will be entirely dependent upon that label for promotion and exploitation of (and thus income from) those recordings. Similarly, on the publishing

²⁷ See also the submission by D Antal and P Ormosi, *Competition concerns in the music streaming market. Consultation response to the CMA's Music and streaming market study*, 16 February 2022, page 2.

²⁸ L Aguiar and J Waldfogel, *Platforms, promotion, and product discovery: Evidence from Spotify playlists*. National Bureau of Economic Research (2018).

side, the writer will be signed up for a period to produce a minimum number of works but the rights in the works will vest in the publisher usually now for a fixed period of years rather than the life of copyright, but that period will still be potentially decades.

- 3.28.** The idea that, in order to sign up with a major music company, young artists and creators have to sign away the rights in their works for very long periods of time is a clear example of the fundamental imbalance referred to above.²⁹ The investment major music companies make in the marketing of these young artists' and creators' works is not a sufficient justification for such long periods of exclusivity. Yet young artists and creators at the start of their careers often do not understand the full consequences of such deals. They are also made to understand that these deals are "industry standard" and cannot be negotiated. Major music companies meanwhile get far more for their investment than would be justified by the size of that investment, or than they would be able to obtain if there was proper competition in the markets for publishing services to creators and for recording services to performing artists.
- 3.29.** This, in turn, means that whole catalogues of music are effectively sitting on the major music companies' shelves, without the relevant artists or creators being able to explore new ways of monetising their catalogue. Limiting these periods of exclusivity or introducing some form of rights reversion whereby after an initial period of exploitation by the major music company, the rights in the relevant song or master recording return to the creator or artist would invigorate back catalogues, creating a market for catalogues, and opening up new business models for monetising those catalogues. The current model limits competition for the assets that recording artists and songwriters create. Those assets, which represent some of the best expressions of art in the United Kingdom in recent history, should not sit idle on major music companies' balance sheets, but should be freed up.
- 3.30.** Finally, as mentioned above, the market power of the majors is enhanced because they have both a publishing division and a recording business. As a result, they have control over a larger set of tracks and/or songs for which they can threaten not to license music publishing rights and/or recording rights to online platforms (hold up). This reduces the impact independent labels can have in the market. In most cases, either the publishing rights or the recording rights related to a stream will be at least partially owned by a major label or publisher. As a result, new ways of generating revenues from streaming can be blocked by the majors. Countervailing strategies against the majors' market power will therefore fall flat and are rarely attempted. An example is the small and niche streaming service, SonStream, which operates a more flexible pay-as-you-go model for consumers, but the service has found it impossible to obtain licenses from the major companies because it does not operate on a "market share" basis.
- 3.31.** As a result of the high levels of concentration in the market, the interconnections between majors and streaming services, the lack of transparency on core issues, and the lack of viable countervailing strategies, there is a fundamental imbalance between individual artists and creators and the music industry as dominated by those major music companies. Music creators and artists aim to make something inspiring that will be listened to by consumers, but in between those two end points there is a severe lack of competition which is detrimental to creators and artists at all stages of their careers. Creators and artists are the direct victims of that lack of competition. Any measures that the CMA

²⁹ Although PROs are supposed to protect the collective rights of artists, this model does not work effectively (see Appendix 1).

could adopt, whether to deal with the specific issues outlined above or the more general lack of competition that exists in these markets would be welcomed by them.

4. Interim conclusion

- 4.1.** The Ivors Academy wants to see a flourishing music streaming market; it is vital for the future livelihoods of the creators of music that the Academy represents. There are two fundamental issues that therefore need to be resolved. Creators of music are not individually in a strong bargaining position when licensing their rights to those who exploit their music. They need strong representation to ensure they receive a fair and commensurate return on their own investment and skill, which in turn will help maintain a vibrant music market for the benefit of consumers. Consequently, publishers must be free from the influence of labels and working well within the CMO network. We believe that it is not in the interests of a well-functioning market for the major music groups to continue to own both recording and publishing businesses, or at least not without some fundamental reform. Change is required to allow those with the responsibility for licensing publishing rights to clearly and unambiguously represent the creators who sign their rights in songs and compositions to them.
- 4.2.** We also believe it is very important that all creators of all genres of music should have equal access to digital services and are extremely concerned that the dominance of the major music groups gives a self-perpetuating advantage to them and the mainly mainstream repertoire they represent. We agree whole heartedly with the concerns raised by D Antal and P Ormosi, in their submission to you, “Competition concerns in the music streaming market. Consultation response to the CMA’s Music and streaming market study, 16 February 2022”.
- 4.3.** We therefore urge the CMA to launch a full investigation into the structures and behaviours of the major music groups and their interactions with the digital service providers with the aim of securing appropriate structural reform.

APPENDIX 1

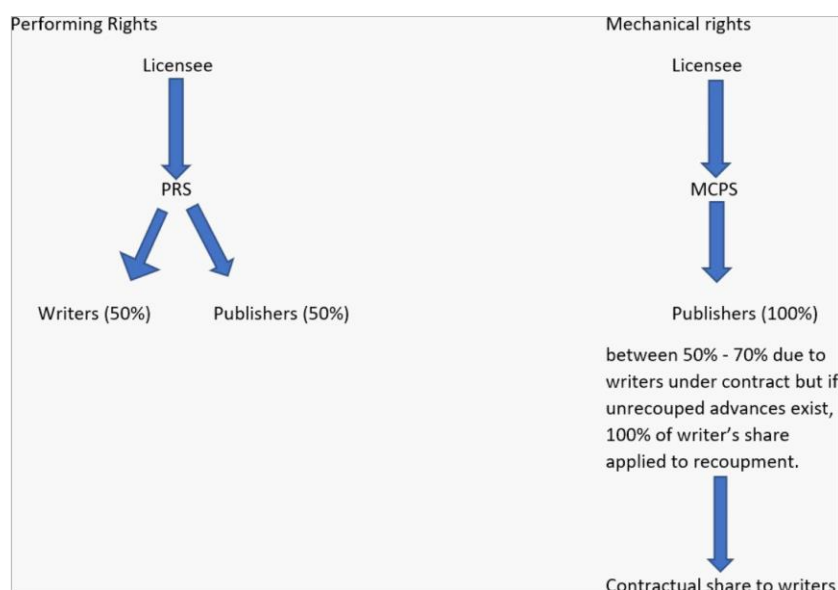
1. The rights concerned in licensing musical works

- 1.1. The authors of musical works (songwriters and composers) are the first owners of the copyright in their works (which comprises a bundle of different exclusive rights). These rights give the authors or their successors in title the exclusive right to authorise the exploitation of their works by digital services.
- 1.2. The restricted acts that require consent by such services loosely fall into two “categories” of rights – to use the standard business terminology:
 - Performing rights – which cover all communication to the public including “making available”; and
 - Mechanical rights - which are rights of reproduction, which for digital services includes copies on servers to facilitate streaming by service users, downloaded copies, and the temporary copies made in the service which may have economic significance, and often in the case of User Generated Content (UGC) services, synchronisation rights.
- 1.3. These two categories are relevant to understanding who owns the right to consent and, therefore, how the money flows back to the authors.

2. Rights flow and revenue flow

- 2.1. The vast majority of songwriters and composers sign contracts with music publishers, which, in turn, provide them with a royalty advance, and help to guide and promote their careers. In the UK, as with most of the territories based on the Anglo-Saxon legal concept of copyright, such as the USA, Canada and Australia, the authors usually assign to the publishers all the rights in their works – either for a fixed period of years or in some (but increasingly rare) cases for the full period of copyright (70 years following the author’s death). This assignment, however, is usually subject to the assignment by the writer of the performing rights to a performing right society, such as PRS for Music in the UK.
- 2.2. Consequently, the rights picture in the UK for most musical works is that PRS owns the performing rights and grants the associated licences. Under its rules, the resulting performing right revenue is paid 50% to the writer(s) directly and 50% to the publisher(s) (who will then pay a further share of these royalties to the writer subject to their publishing contract with that writer).
- 2.3. The mechanical rights, however, are generally owned by the publishers themselves and they have the right to license those rights. In many circumstances, they choose to allow a collecting society, such as MCPS in the UK, to act as their agent in granting licences and collecting royalties. Those mechanical royalties would be paid in full to the publishers who would then account (i.e. pay an agreed proportion) to their signed writers in accordance with their individual contracts.

Delineation of licensing of performing and mechanical rights



3. The model for licensing online services on a multi-territorial basis and “Option 3” or repertoire specific licensing.

3.1 Traditionally, via collecting societies the world’s musical repertoire was made available to licensees on a territorial basis. A territorial approach did not work for global or even multi-territorial digital services. The European Commission was particularly interested in forcing the creation of a model of pan territorial licensing to ensure a single digital market in Europe and held various hearings and consultations to see if new models could be agreed.

3.2 In 2005 the European Commission issued a Recommendation as to how songwriters’ and composers’ rights should be licensed to the new multi-territorial digital services across Europe (Commission Recommendation 2005/737/EC of 18 May 2005 on collective cross-border management of copyright and related rights for legitimate online music services (Official Journal L 276 of 21 October 2005, p. 54-57).

3.3 At the heart of the Recommendation was a resolution as to how to force music collecting societies to move away from their traditional national monopolistic structures and introduce an element of competition across the single market of the EEA. In considering the way forward the Commission considered 3 options.

- 1) to do nothing; or
- 2) to procure that all music collecting societies have the rights to license all repertoire and then the licensees or digital services could choose from which one to obtain their multi-territorial licence, and that licence would cover the whole of the global repertoire of works; or
- 3) that rightsholders could mandate one or more societies to undertake multi-territorial licensing of digital services and societies could then only license the repertoire for which they had received mandates.

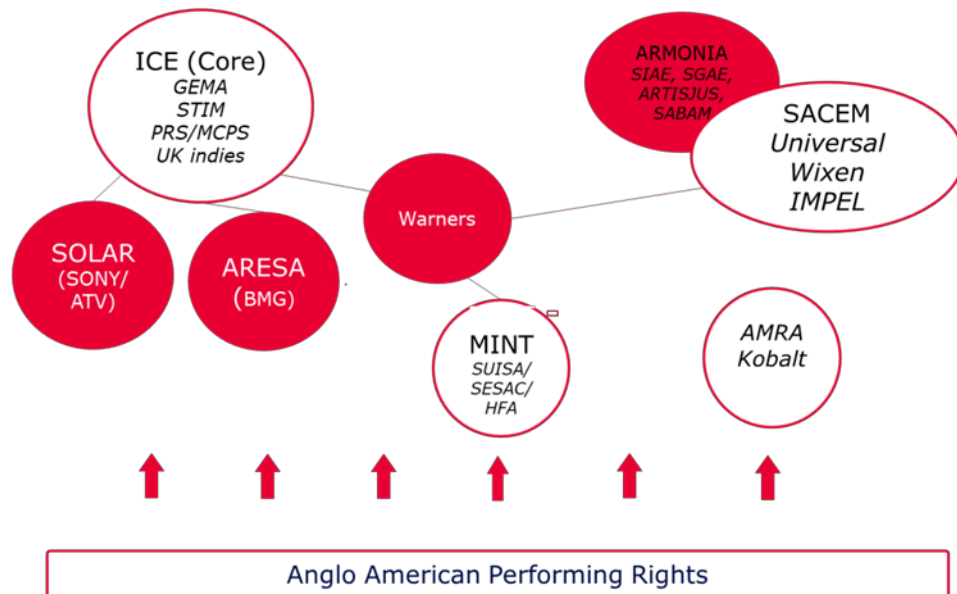
- 3.4 Option 3 was supported by UK writers and their publishers as it was an important means of ensuring improvements in the standards of service and efficiency of societies but also, and most importantly, of safeguarding the value of copyright. Since its implementation it has been argued by music publishers and collecting societies that this outcome has been achieved.
- 3.5 However, there have been some negative impacts, specifically affecting UK writers. The use of music in digital services involves the exercise of two rights which are included in the bundle of rights comprising copyright in a musical work; first the right of reproduction (the mechanical right) and secondly the right of communication to the public (the performing right). As a result of the historic development of copyright law in the Anglo Saxon countries, as mentioned above, for what is referred to as Anglo-American repertoire (which is the main repertoire with international appeal), the ownership of these two rights is different; music publishers own and control the mechanical rights and the performing rights are administered on behalf of writers by performing right collecting societies (such as PRS).
- 3.6 The major publishers adopted the principle of the Recommendation by placing the multi-territorial digital mechanical rights they owned with one or more licensing entities. While the Recommendation envisaged that established collecting societies would be appointed, the major publishers wanted their rights to be licensed separately and on terms and conditions they either negotiated directly or in conjunction with the licensing entities. Thus, several special purpose vehicles (SPVs) owned and administered by established societies were set up for these purposes.

This development had several practical impacts:

- Repertoire became much more fragmented and licensing much more complicated than perhaps envisaged by the Commission and those who supported the Recommendation.
- To help alleviate further fragmentation, and partly because the Option 3 regime was implemented at a time when downloads were the dominant model (which meant that the mechanical rights were the more dominant right), performing right societies such as PRS for Music agreed that the writers' performing rights should follow the licensing undertaken by the publishers or their SPVs of the mechanical right. So, for example, a creator who is a member of PRS, assigns his performing rights to the society but for digital services and those works which are published by Sony ATV, PRS will allow those performing rights to be licensed by the entity to which Sony ATV has entrusted its digital mechanical rights.

The following diagram shows the licensing model for copyright music for digital services in Europe, but it is also used for much of the old Eastern bloc, Africa and key territories in Asia.

Hubs in the EEA in 2020



- 3.7 While this model has doubtless increased some efficiencies there are some concerns on the part of the creators. Firstly, the fragmentation of the global repertoire results in multiple negotiations relating to the rights of writers and their publishers with the same service providers. For reasons of commercial sensitivity and competition law this means that the deals reached have to remain confidential and subject to draconian non-disclosure agreements. This has led to opacity as to rates and confusion, particularly for writers. Even more crucially, the effect of the policy of allowing the performing rights to flow with the mechanical rights has been to erode the role of performing right collecting societies such as PRS because while they still have an important function to play in oversight and the review of licence requests, it has become custom and practice for the performing rights to flow alongside the mechanical rights at a rate set by the publisher/publishers' chosen licensing vehicle. Thus if the major publishers are constrained in how they negotiate by their record label counterparts this is no longer mitigated against by the collecting societies who are independent.

APPENDIX 2

**The Division of Revenue between Songwriters and Performers: A Plea for Better Data Joel Waldfogel
University of Minnesota November 4, 2020**

Please see overleaf.

The Division of Revenue between Songwriters and Performers: A Plea for Better Data

Joel Waldfogel
University of Minnesota
November 4, 2020

The creation of a piece of recorded music requires two broad inputs, a performer and a songwriter.¹ The respective payments to songwriters and performers are generally determined by legally-enforced customs.

One can imagine a variety of reasons for paying different shares for writing and for the creation of the recorded performance. One possible reason is the differential importance of songwriting vs performing talent in determining the extent of sales. For example, suppose that all songwriters were equally good at creating saleable songs. Then if one were to compare the success of different songs – each of which has a different performer-songwriter combination, the variation across songs success would be explained entirely by the identity of the performer.

Another reason relates to the investment and risk borne by the respective parties. It is possible, for example, that a song can be written in a few weeks by an individual working in isolation, so that the investment is simply the earnings foregone by writing as opposed to doing whatever other potentially remunerative activity that writer might have undertaken. The owner of the sound recording, on the other hand, might need to invest in the use of studio time, skill labor for recording and mixing, as well as marketing expenses for products that often fail. Indeed, the IFPI has described the recorded music business as one of the most investment intensive industries.² While IPFI's claim of investment intensity seems an accurate description of the pre-digital world, technological changes over the past few decade have made it possible to produce and distribute music – and for consumers to discover it as well – at much lower cost than was required a few decades ago. Hence, the amount of capital placed at risk by the owner of the sound recording may have fallen in relation to the investment undertaken by the songwriter.

To the best of my knowledge, the current division of payments between songwriters and performers has two features. First, performers receive about five sixths of the total payments going to these two creative inputs collectively. Second, the division of payments has remained fairly stable over time, even as the structure of the music industry has changed substantially.³

¹ Some caveats: "Performer" could be an individual or a group, and a "songwriter" might be an individual or a group of individuals. Finally, I abstract from other inputs such as "producers."

² See, for example, https://powering-the-music-ecosystem.ifpi.org/download/Powering_the_Music_Ecosystem_poster.pdf.

³ I explore the effects of digitization on the cultural industries extensively in my 2018 book 2018, *Digital renaissance: What data and economics tell us about the future of popular culture*. Princeton University Press.

The appropriate division of revenue between songwriters and performers is a question of keen interest for many parties in the recorded music industry, so it would be of interest to develop evidence that could support sensible divisions.

My goal here is to offer some evidence to suggest a possible approach to the question. To be clear, I do not claim to have a suggestion of the answer. Instead, my claim is that some preliminary data that I can offer suggest that collecting better data could shed significant light on this question and should be a priority for a government body assessing the industry.

Suppose we had data on many songs. For each song, suppose we observed some measure of success, such as streams, sales, or revenue. Define q_i as the quantity/success measure for song i . Suppose further that we observed the identity of the writer and the performer. Define δ_w^i as an indicator that takes the value of 1 when song i is written by writer w , 0 otherwise; and define δ_p^i as an indicator that takes the value of 1 if song i is performed by performer p , otherwise.

Now, consider the following questions:

- 1) What share of the variation in success across songs (the variation in q_i) be explained by just the identify of the songwriters? We can answer this by regressing q_i on indicators for the each of the songwriters.
- 2) What share of the variation in success across songs (the variation in q_i) be explained by just the identify of the performers? We can answer this by regressing q_i on indicators for the each of the performers.
- 3) How do the respective shares explained by writers and performers relate to the share explained by the writers and performers together?

Ideally, one would have a very large dataset on song success, along with the identities of the performer(s) and songwriter(s) for each song. For example, one might have annual data on the volumes of streams for all of the songs at a major streaming service, along with names of performers and codes (ISRC, ISWC) that indicate the identities of the songwriters. It would be of particular interest to look at large numbers of remakes, i.e. songs with the same songwriter and different performers as well as songs with the same performer and different writers.

The preliminary data I offer below fall far short of the ideal. I have only a relatively small number of songs, those making the Billboard Hot 100 list in the US, weekly, 1980-2016. For each song, I observe only its weekly Billboard rank rather than a direct measure of success. For the preliminary purpose of exploring this idea, I transform ranks into “quantities” in the following way. If r_{it} is the rank of song i in week t , then I construct the success measure as $q_i = \Sigma(\frac{1}{r_{it}})$, where the summation occurs across weeks within each year. I then construct indicators for the first listed songwriter as well as the performer.

Table 1 reports the percent of the variation in song success (q_i) explained by indicators for performers, writers, and both, using a variety of regression approaches. The first row reports the R^2 from saturated regressions, i.e. including all indicators for first listed performers or

songwriters. Performers alone explain 28.52 percent of the variation; and songwriters alone explain 29.12 percent of the variation, while both together explain 45.22 percent of the variation. The intriguing result in the first row is that songwriters and performers explain essentially the same share of variation.

The second row repeats the exercise using LASSO regression, a procedure for variable selection designed to prevent overfitting. The LASSO procedure selects 455 performer indicators which collectively account for 10.43 percent of the variation outside of the estimation sample. By contrast, as the second row shows, the LASSO procedure selects 428 songwriter indicators which collectively account for 11.39 percent of the variation in song success. As with the saturated regression, the LASSO approach shows the songwriters explaining slightly more variation than the performers.

It's important not to over-interpret these data. I take these findings not to indicate that songwriters should receive the same compensation as performers but rather to mean that undertaking this approach with data more closely resembling the ideal would be a worthwhile step toward developing an evidence-based approach to dividing revenue between songwriters and performers. I encourage the DCMS Committee to use its influence and resources to obtain the relevant data that would support careful study of the division of revenue in the recorded music business.

	raw	LASSO		relative to both	
	saturated	R sq	variables	saturated	LASSO
performers	28.52	10.43	455	63.07%	62.16%
songwriters	29.12	11.39	428	64.40%	67.88%
both	45.22	16.78	583	100.00%	100.00%

Note: LASSO column reports out of sample R squared.