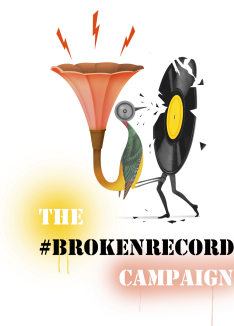


#BrokenRecord Campaign response to CMA interim report:



## Music and the Streaming Market Study

### Summary

We would, once again, like to express our gratitude for the decision to undertake this study. This is an historic opportunity to remedy issues of weak competition in a market which ought to be characterised by creativity and innovation but is instead notable for its sclerotic power.

We are grateful to note some useful and eye-catching data has been surfaced which may help the advancement of regulatory reform. We realise there may be mitigating factors - we know this report is unusual because the CMA did not have the typical preparation time, but unfortunately, at this time we do not believe the CMA have dealt reasonably with the available evidence. Important and relevant facts have gone unaddressed. Considering how 'authoritative' one might hope such a report to be, we find too many assumptions which have no basis in fact. These assumptions, in our view, favour the very interests this study was intended to hold to account. Worse still, because of the CMA's decision not to make an MIR, this report is presently being cited as a 'clean bill of health' contrary to much of its findings: it is empowering those same interests.

We are concerned that there are too many contradictions between this report and other, recent CMA reports. Particularly regarding the 'bottle-neck power' of platforms, and the need to enforce transparency for the purposes of 'price and performance'. Creator SMEs do not appear to be afforded the same protection as software companies and advertisers. We note creators are also not afforded the same protection as dairy farmers, for whom the Groceries Code Adjudicator was introduced when no such 'excessive profits' existed in the supermarket business.

We are yet to understand the report's rationale as to why the major music groups would not use their market power to favour rights which produce a greater return for them. Indeed, the mitigating factor identified in the report appears unfounded. Therefore, at this point, the CMA has failed to establish whether the Majors have the ability and/or incentive to assert the value of the recording to the detriment of publishing and therefore, an authoritative decision to not make an MIR seems premature.

Broadly, it is problematic to accept that consumer and creator interests are at odds. This is solely founded upon price and remuneration. However, as regulation of intermediaries and different 'shares' could mean greater remuneration for creators - without a change in price - it is curious to solely reflect on consumers 'price' concerns.

Our Campaign performed research with YouGov and found that most consumers believe that artists and songwriters are being underpaid. Many consumers would be happy to pay more if they believed that creators are to be remunerated fairly. Therefore, in the report, there is an over-simplification of the consumer-creator relationship in music. I may not want to pay more for the same cup of coffee in two different shops, but I may want to make sure the person whose song I danced to at my marriage can afford a cup of coffee. Patronage plays a significant role that is being ignored. Does the consumer, in paying their subscription and listening to their favourite music, have the right to expect that they are funding their favourite creator SMEs? We believe that they do, and it is baked into the transaction. Are consumers getting the best value from music's intermediaries? Or do those intermediaries use market power to extract too much value between the consumer and creators? Are consumers happy with how much the intermediaries keep? Their answer we received was firmly 'no'.

In conclusion, a report requested to help creators and performed in the stated interest of music consumers fails to help either constituency and may, in its present state, even damage any progress of reform. We hope the CMA revisits much of its interim conclusions and seeks to make available interventions (we have attempted to set out a few on the following pages together with a more detailed overview of the themes and areas covered).

## Artists

- The report accepts that transparency is a problem. But confusingly doesn't identify this as a competition issue. This, again, appears inconsistent. The CMA's recent 'Online Platforms and Digital Advertising Market Study' asserts the necessity for regulation where advertisers are struggling to understand price and performance. In the music space, transparency is clearly also a 'price and performance' issue (related to competition) and, as such, the CMA could make directions to require transparency for creator SMEs. Instead, the issue is directed to the IPO. Understandably, representatives of the companies who are failing to provide transparency are stakeholders in the IPO process. The CMA appears to have complete faith that such a process will have a robust outcome. Transparency has gone unregulated in the music market for its entire history. Advertisers (who have an industry regulator - unlike music) are supported by the CMA but British music-makers are left to negotiate from what is widely understood to be an extraordinarily weak position of power. This report illustrates that power dynamic but expects it to produce different results without enforcement. Why?
- This report itself was the direct result of parliament signalling a market failing for its creators, so we find it surprising there is so little investigation of the business reality for creator SMEs. This is perhaps best characterised by the report's confusing '16% artist share' for which we can find no real-world evidence. The figure does not appear to relate to royalty payments. We can only assume it is based on the best contractual share now available and not on any average of contractual % shares across a market which is 80% catalogue and involves music stretching back over 80 years (we know of royalties still being paid as low as 5%). Even then, a significant part of this 'artist share' will be recouped against recording costs (despite the company retaining the IP asset) so we must point out, this is an absurd interpretation of artist earnings. Where is the insight into how much these global giants are paying to artists via royalties? These royalties contribute directly to consumers' preferred creator SMEs being able to produce their work.
- When the Competition Commission initiated the creation of the Groceries Code Adjudicator to protect Dairy Farmers, there was no 'excessive profits' in the supermarket business and yet there was regulation. Why are 'excessive profits' now necessary? Surely a functioning market would be more balanced? Instead, we have SMEs who struggle to pay their rent while billion-dollar companies make 20% margin. We also note there is no review of the Majors' 20<sup>th</sup> Century profit margins in judging the 'excess' of their present results - a similar comparison is (loosely) made for songwriters and artists.
- The report simply notes that all the majors have either committed or signalled that they are forgiving pre-2000 unrecouped debts. This paints a much kinder picture than reality. We are not clear that all majors have undertaken these programmes as we can find no such evidence in the public domain. Universal state their programme is 'subject to certain conditions' but we can find nothing in the public domain as to what these conditions may be. In Sony's less-vague offering, forgiveness is caveated so that, if an artist had their option renewed after 2000, their debt remains. This means if an artist was profitable to the label at the turn of the century whilst under contract, they will still not be receiving royalties from work pre-dating 2000. In these circumstances - counter-intuitively - indebted artists, whose work made their label the most income, are still not receiving any royalties for their work. This is not 'debt-forgiveness' in the sense most people would understand it. Beggars Group, the UK's biggest independent, simply wipes the balance after a fixed period.

**Available solutions:** Enforced transparency; Regulatory contract-term limits; Minimum royalty rates; 'Use it or lose it' rights strengthened and enforced.

## Songwriters & Composers

- The report asserts that Major music groups would not limit the value of their publishing rights because, as a result, songwriters would move their rights to other publishers. We do not understand or recognise this assumption. Songwriters have no oversight of the percentage (of total streaming income) earned by their publishers. These figures are bound by NDA. This assumption of transparency where there is none (and the CMA has the power to enforce it) is particularly hard reading. Even if songwriters made their income public, wild variations in global streaming rates mean there is no useful comparator to be found in payments. As there is a limited 'pie' of total income in the subscription market, asserting the value of the recording rights is going to impact the value of publishing. When such a clear conflict of interest lies at the centre of this industry, we are alarmed that this assumption is used to sidestep a core issue affecting British creator SMEs. Even if the CMA believed there was a possibility that the Majors could behave in this way (and many assert they do), it is within the CMA's powers to introduce "Chinese walls" or instigate the necessary transparency to overcome any such danger.

Thus far, the CMA has failed to establish whether the Majors have the ability and/or incentive to assert the value of the recording to the detriment of publishing.

- There is a summary assertion that it has always been tough for creators, but the report has no quantification or comparator for how 'tough' it used to be, nor does it question if it needs to be tough for quite so many: Record profitability for rights-holders tends to suggest otherwise. We believe this assertion has zero basis in fact and would welcome significant comparative data being introduced for such assertions to be made in the public domain. For instance, compare what a UK top ten songwriter earned in 1998 vs what they earn now. This data is surely available to the CMA.
- We find it strange that the report seeks to compare what it sees as an 'artist share' (which, again, we reject as a real-world figure) and the publishing/songwriter share. We do not understand this comparison. Why not compare how much the publishing earns with what the DSP earns? Why not compare what the publishing arms earn compared to the recording rights? This appears to be a decision to try and make creator earnings appear 'rational' when they are anything but. In the digital era, most production and creation costs are now sitting with the writer-producer SME. The report does not reflect at all on costs for creators SMEs. The whole concept that songwriters and artists are competing stakeholders is false, although often stated by the Major rights groups. There are multiple data points to evidence that most artists are songwriters and would benefit from a rise in the publishing share. Not least because they have better contractual terms with publishers than labels.

**Available solutions:** Chinese Walls between publishing and recording arms; Enforce limits on market share of ownership of publishing balanced against recording market share; In light of the CMA's acceptance of monopolies operating in the market, create a counter-balance by creating an exception in UK competition law to allow CMOs greater leeway in using their natural monopoly position to press for higher valuation of rights for creators; Enforce transparency in labels, publishing and CMOs so creators can assess value and performance and 'shop around' service providers.

## The Platform

- Much of the report fails to question what 'streaming' is and, in doing so, chooses to regard streaming in terms the major music groups have consistently used, but creators have consistently questioned. DSPs do not operate in retail; they are suppliers and distributors operating in a communication medium. Creator SMEs (via secondary distributors) and labels are upstream suppliers of music.
- We perceive an inconsistent approach in concern for upstream suppliers and the exploitation of 'bottleneck market power' when set against those set out in some of the CMA's most recent studies. Streaming platforms are primarily music distributors and, as such, have 'bottleneck market power'. A consumer subscribes to one and is effectively captured (in all cases, but most especially where the music service is a bolt-on to combined services). The CMA's 'Mobile Eco-Systems Market Study' states 30% is too high for app stores to charge. But in this interim report the CMA identifies platforms climbing their share to 32% but finds no issue. We believe these positions are contradictory.
- The report presently states that the platforms' bottleneck power only results in low margins, but there is no investigation of monies used to invest in growth and new formats. According to our calculations, in 2021 Spotify has approximately 21% return on capital (with much of this investment described as 'income expense' in its accounts). We can find several physical distributors operating similar profit margins but can find very few examples with such a high return on capital. We believe these investments are funded by music. Upstream suppliers are underwriting platform expansion and artists, at the end of the value chain, are the worst affected. When Joe Rogan received a huge exclusive buy-out deal was that an advance on earnings or does music effectively absorb Spotify's risk of entry into the podcast market?
- The report seems to assume that 'user' playlists are much the same as 'editorial' playlists and compares them quantitatively. However, a platform's editorial playlists are often where consumers discover music for the first time (and how artists & labels first access the market). There is also no interrogation of how editorial playlists go on to influence algorithmic recommendation and 'radio' playlisting. There is a real implication that if a work does not first gain a position on an editorial playlist, it is unlikely to eventually appear on any user playlist because the consumer has never been exposed to it. The power of editorial playlisting and the amount the 'majors' are favoured in this process of discovery is not covered by the report and yet it clearly affects consumer access to new music - a part of the industry that desperately needs our help.
- The price of streaming has stayed the same since 2001 when Rhapsody was introduced for \$9.99. At what point in this market's existence might we determine that the consumer's price 'interests' are actively working against their cultural interests? Where is a market with a comparable fixed price over 21 years? Where is a market where the amount of a product increases every day without price variance? Millions of songs added every year available for one ever-unchanging price.
- We believe the 'pro-rata' model of payment is significantly more 'winner takes all' than the historic music market was for professional music creators. The 'pro-rata' model comes from radio licensing, but radio has two important levers upon its per-play distribution: duration and audience size. Put simply, in radio music that plays longer and is heard by the greatest number of people is paid more. In the pure pro-rata model favoured by streaming, one person listening a thousand times to the first thirty seconds of a song earns the same as a thousand people listening once to a ten-minute track. This has introduced an enormous distortion in the valuation of music. Hyper-listening and 'spin fraud' both weighted. A hyper-listener can extract £30-£40 of paid streams from a £9.99 subscription. Most consumers are subsidising the listening of this subset, whilst the music they may love - especially longer form genres such as Classical and Jazz - receives little remuneration.

**Available solutions:** Creation of an adjudicator with powers to adjust price/remuneration; Regulate the DSPs' financial share to counter 'bottle-neck power'; Regulate playlisting (similarly to advertising) to ensure access to market for new music and increase overall market competition/eliminate present danger of 'payola' entering system.

## The Medium

- Streaming cannibalises both music sales and its broadcast market. It is a whole new thing. Many of the report's assumptions do not take this into account. Indeed, the report notes that publishing-related income has risen from 8 to 12%. This is set out as a pay rise. But 8% in physical sales represents solely the mechanical right, whereas 12% in streaming, combines remuneration for both a mechanical *and* a performing right. This is significant because the performing right only exists in communication. Streaming is a communication medium.
- Songwriters earn 50% of music licensing in radio, but only 12% in streaming. Not such a pay 'rise' if linear broadcast continues to decline thanks to streaming's expansion. Similarly, historic artist contracts make no mention of a 'making available' right (the exception that allows labels to exploit their exclusive rights through communication) and yet artists are paid contractually on a 'physical' rate. The determination, contractual characterisation and interpretation of 'streaming' has all been controlled by those with the most power: the major rights groups. For this report to merely follow in their tracks, is to completely ignore the lack of a regulatory framework that engenders creativity and innovation for creators and consumers alike. We believe the real question is not why does publishing receive 12%, but why, considering this is a new medium with none of the associated costs of physical, is it not considerably more?
- Streaming arrived alongside other digitisation innovations such as the iTunes store in 2001 (Rhapsody). It was not in response to or, a result of, piracy. On the other hand, it did take the Major music groups seven years to realise its utility and to take stakes in Spotify. Most of the loss of income in the music market in that period can be identified by the almost overnight loss of mark-up on physical product. Piracy had been ever-present throughout the 80s and 90s in the form of tape cassette recordings and then CDRs. We believe that accepting the notion that streaming was simply a panacea against digital piracy is to fail to examine the Majors' inertia and lack of innovation in reacting to the changing digital landscape at the time. The 'one size fits all' pro-rata licensing system which is now applied to every emerging technology can hardly be described as adaptation.
- The report makes no attempt to delineate the professional creator market within streaming from the start-up, 'prosumer' or consumer ones that exist within streaming. We don't believe it is difficult for DSPs to roughly identify this segmentation for the CMA to make more valuable insights about how the market is truly performing.
- Spotify is unquestionably a music distributor. With the introduction of streaming, we have seen the distribution costs of the Major music groups go from a significant share of costs to somewhere around 2-3% (which may only account for their remaining physical sales). However, self-releasing creators (professional or amateur) require another intermediary 'distributor' to service music to Spotify. These services are often paid via %, a one-time payment, or a subscription. The study does not reflect how much of this market is primarily a consumer market. Are the consumers in this market well-served? This report doesn't begin to tell us, e.g., if a consumer sees 32% go to a DSP and then pay a further 20% to a 'digital distributor' they have already lost a huge amount of any return. What do they get for that?

**Available solutions:** Recommendation for stronger legal definition of streaming within copyright law so that power ceases to define the market solely on its terms; Enforcement of contract renegotiation by an industry adjudicator; Regulatory contract-term limits to give artists greater freedom and diminish 'catalogue' power.

## Conclusion

Overall, although we are happy to see some useful data being surfaced, we are very disappointed by this interim report. It accepts many untested assumptions. If the scope ruled out different available paradigms, then something more significant may have gone awry. We believe it is entirely credible to set out a wholly different rationale and make recommendations based on the available evidence.

Consumers and creators alike have a shared interest in a richer, more diverse, and more innovative music space: weak competition is holding that back; poor creator remuneration is leading to an inexorable decline in music-making opportunity. Simply regard how many artists who are successful now were already successful before 2011. Something is going wrong, the DCMS Select Committee identified it, but the CMA have yet to find it. Creators are SMEs, upstream suppliers, consumers of services and make the lives of British citizens significantly better in many ways beyond how light they are on the collective pocket.

We have that learnt that, since the publication of this interim report, certain parties - who looked to be committed to reform through the IPO process - may be stepping back from progressive steps. To some, this report represents a 'clean bill of health' despite the market failing British artists, musicians, songwriters, and composers. We can only speculate that interests - unambiguously set out as monopolies in this report - may believe they have little reason to reform without the possibility of regulatory intervention. Indeed, they may have already concluded that the MIR decision is a vindication of their sclerotic power. We can't find enough authoritative evidence for that decision in the existing report, though we appreciate available time may have been an important factor in that decision. We hope the CMA can reflect on its role as a regulator of 'market power' and act in the interests of those with very little say but whose invention, entrepreneurship and talents power its entire existence.

Please look again.

Thank you.

#BrokenRecord Campaign