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Competition and Markets Authority
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By email only:
[redacted]

19th August 2022

Re: Music Streaming

Dear [redacted]

We write on behalf of Hipgnosis Song Management Ltd ("Hipgnosis") in relation to the CMA Market Study Update concerning Music Streaming published on 26 July 2022 and further to our call with you and your colleagues on 28 July. We note the CMA is "aiming to gather more evidence and test and refine its thinking, and to identify where intervention might be most necessary and appropriate."

This letter is Hipgnosis' response to the consultation. We wish to emphasise that Hipgnosis is a UK music and investment company offering investors exposure to Songs and associated musical intellectual property rights. Hipgnosis advocates for songwriters' interests and other creators. It has industry-wide importance.

Introduction

As we set out below, there is much in the CMA interim report which we welcome and many places it sets out the problems clearly.

Nevertheless, whilst the report recognises the structural failure in the market[1], as a result of 3 major record labels both owning and controlling the 3 major publishers and the relationship with the DSPs, it fails to recognise that this is driving an inequitable split of revenue at the expense of Songwriters.

The major labels are structured and incentivised to use their control over the major publishers to attribute as much revenue as possible towards recorded music, where they currently

[1] For example, at 5.85 the CMA recognises that the majors have high and stable shares of music streams in the UK, and their combined share has been consistently over 70% since 2015 (see Table 3.2)

capture 80% of the income with an 80% gross margin and 40% net margin. The CMA may not have appreciated the way that co-publishing deals, which are prevalent in the industry, operate in practice. Perpetual contracts ensure there is no ability for the Songwriters and Artists to procure fairer terms. This is important as it is a misunderstanding of the competitive position, and needs to be revisited.[2]

We believe the ideal solution to deliver full and true competition would be to split the publishing and recording parts of the labels, either through a full separation / breakup or by virtual separation with the use of 'Chinese Walls' etc. to deliver genuine competition. The CMA should further consider the benefits of this option as it continues its study. Failing this, the CMA should consider what actions short of this can ensure that a fair level of value pertains to Songwriters – without whom there would be no music industry.

We have noted below where we believe evidence, preferably from statistically robust market research or consumer surveys, should now be obtained by the CMA.

We note the interim report confirms 'persistent market concentration' of the 3 majors labels but fails to provide any compelling evidence in the report which could have led to an assessment 'that outcomes for songwriters and artists are largely unrelated to the high degree of concentration'.

On the contrary, there is evidence that this concentration entrenches the lack of transparency in data and compounds the issues resulting from perpetual contracts. These 'unfair contracts', signed by songwriters and artists prior to the current market structure, at a time when there was no concept of streaming, allow major record labels and major publishers to collect rent from assets they have accumulated (often through consolidation of independent companies) and for which they are not providing support or promotion which would benefit the owner/creator of the song.

Labels are abusing this concentrated power to take the unexpected windfall from catalogue streaming – at the cost to the Songwriter and Artist A – and using it to develop new artists - effectively paying Artist B from Artist A's earnings. The rate of pay for Artist A and effectively the Songwriter is set by the recorded music label.

As most Songwriters and Artists have no "Right to Switch", labels have no incentive to share the proceeds of catalogue streaming in a way which is either equitable or based on the market value or the true costs associated with management of this Artist's work.

By hiding behind NDAs, the labels are also abusing their concentration of power to deny/refuse fair and equitable remuneration to Songwriters and Artists as well as meaningful statements to the vast majority of them.

In your report you maintain that 'artists are provided with information such as the number of streams and the rate per stream' and this assertion appears to be based on "positive examples of labels presenting this information in a user-friendly way"

[2] The songwriters and artists are locked in to perpetual contracts that are typically called co publishing deals through which the majors own the songs. Where the CMA refers at 5,113 to the ability of songwriters to move - and the cross reference to the EU Sony/EMI – is economically irrelevant as the songwriters hits don't move around. The premise of the CMA's analysis here needs to be revisited in the light of these facts. We would be delighted to explain how co-publishing deals work in practice.

We welcome the CMA's proposal in the report that 'information be presented to help creators better understand how they are paid for streaming and the sources of their income.'

Hipgnosis' experience across more than 150 catalogues of some of the most successful Artists is that this information is NOT being made available despite a few examples reported to the CMA.

It is not sufficient for songwriters to rely on the goodwill of labels to provide random and sporadic information.

For the purposes of evidence gathering and recommendations the CMA needs to recognise that Songwriters and Artists are micro businesses and recognise that Songwriters and Artists are unfairly impacted by barriers placed in their way as a result of the market concentration.

The CMA report acknowledges the market power of the major labels compared to Artists. It is a long-standing principle that the relative power of the parties to a contract can make the terms of that contract unfair.

For many Songwriters and Artists, they find themselves locked into contracts with publishers and record labels who are not proactively promoting their material – like professional football players they are 'benched'. The difference is that the latter continue to be paid while songwriters are not even allowed basic crucial earnings information on streams preventing them from having information crucial to making essential business decisions.

Streaming is an enormous benefit to the entire value chain in the music industry. However, current market structures, as endemic features of the concentrated market, enable major labels to reap the rewards rather than these being equitably shared between the labels and the Artists.

Therefore, contrary to conclusions in your interim report – the market is not working and competition in the promotion particularly of legacy artists by major labels is weak.

We believe the CMA should make good on its intentions in the interim report and deliver action where the CMA 'expect(s) that songwriters and artists have relevant information about the basis for calculating their earnings'.

We urge the CMA to make use of its statutory powers to enable consistent and effective transparency of data by introducing a mandatory code of conduct on labels to provide this information.

Secondly, as the Songwriter and Artist bears the brunt of the anti-competitive impact of the market concentration, this could be remedied by introducing a Songwriters / Artists' "Right to Switch" labels (timeframe to be negotiated with the labels). This could also bring innovation to the market in enabling a new market for legacy Artists' music benefitting Artists, music consumers and the wider industry.

A right to switch is a right that exists in other industrial sectors and is a well-known tried and trusted competition remedy in a concentrated market. The songwriter and artist should be able to move his business from one service provider /supplier to another under certain conditions.

Outline response to the consultation: More Work To Do.

We outline below our views on where we endorse and support CMA findings as well as suggesting areas for gathering further evidence.

We identify below the issues on which we see further work being required.

We then suggest some "Next Steps" where we see that we should work together on solutions to the issues identified where we appear to agree there are matters that now need to be resolved.

Overall, we believe that the CMA has not provided sufficient evidence in the interim report to either support or reject a Market Investigation reference and that the conclusion not to proceed is largely based on anecdotal evidence and have therefore led to erroneous counterfactual assertions.

Further evidence gathering is required in order to assess whether the CMA rushed to a premature and unsupported decision on a market investigation reference and more importantly to address and remedy the key market failures which persist in the market as a result of concentration and dominance of the major labels which the CMA has conveniently swept under the carpet in this report as not valid.

Support for CMA initial findings

(i) Weak bargaining position of songwriters and
(ii) Artists: the need for recognising the "Right To Switch".

We endorse and support the CMA finding[3] that one of the issues faced by songwriters and artists is due to their weak bargaining position vis a vis the major record labels. Whether at the beginning of their careers or at a later stage, they are thus constrained by contractual commitments that prevent them from switching labels. This is a limitation, as the CMA has put it, on competition between labels. The contractual restraint then limits the incentives of labels to compete and invest in promotion of artists over time. In effect they don't need to compete and invest to keep talent as they are locked into long term contracts. As the CMA notes:

"**5.101 Measures that support artists to renegotiate their contracts could in principle help address the apparently weak bargaining position they face earlier in their careers. We note that this is an area the government plans to consider further research on the practical experience of other countries that have given artists the rights to recapture their works and to adjust contracts**".[4]

[3] 5.100 One of the issues faced by artists is that due to the weak bargaining position that many face early in their careers, they may need to agree to long-term contractual commitments (eg to produce multiple albums) and assign the copyright to their work for a long period of time if they wish to secure a traditional record deal. Once they have achieved some initial success, their bargaining position may not necessarily improve due to these long-term contractual commitments. It can take many years for such artists to fulfil their initial contractual obligations and be able to negotiate improved terms.

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[4] https://committees.parliament.uk/publications/7407/documents/77629/default/

Reference is made to the DCMS Select Committee. That Committee does not disagree with the CMA's findings on the issue of long-term contracts.

Evidence has now been submitted to the CMA and is uncontested as the industry wide practice has continued for many years which has ignored competition law and the law on restraint of trade. No further evidence appears to be needed for the fact that there is a widespread practice of locking artists into perpetual contracts or that those contracts are imposed in a situation where the songwriters and artists have a weak bargaining position due to the market power of the major recorded music companies who also own and control the major publishing companies.

The Update seems to be influenced by the decision of the Major Labels to write off historical advances, as outlined in a letter to the DCMS Select Committee. However, this letter states that:

"**We have also already seen some voluntary action from industry, such as the decisions by the three major record labels, Sony Music, Warner Music Group and Universal Music, to disregard unrecouped advances in pre-2000 contracts, meaning that many legacy artists are being paid from streaming for the first time**."[5]

Forgiving the debt of Songwriters and Artists that were not successful is not the same as paying Songwriters and Artists fairly and equitably for their success in the streaming paradigm. Further to that this is also not the same thing as songwriters and artists having a freedom to switch; it is simply payment from an IP right holder and likely amounts to a decision not to recoup bad debts. Given that the labels will have long-since written off these advances and that even post this decision, they keep 80% of the income (rather than 100%). Therefore, whilst any improvement for Artists is to be welcomed the significance should not be overstated. Equally, it seems to have been misinterpreted as evidence of competition whereas in fact artists are, and will remain, locked in with no promotional investment or other activities to support them or boost revenue from their creation.

Work still needs to be done on how to alleviate the burden on songwriters and artists of being locked into perpetual contracts. We note that the CMA is looking to consult government on the issue. We do not see that as a route to resolving the issue. We believe **that the CMA has sufficient powers to address the issue itself in the course of the next phase of its study.**[6]

(ii) **Long term contractual restrictions: public recognition of the "Right to Switch**".

We agree that the long-term nature of contracts restricts artists freedom and limits competition and innovation. We attach in Annex 1 our views on such contractual restrictions and the need for the CMA to publicly recognise that the "Right to Switch" already exists. If that analysis were to be endorsed and the CMA were to publish its own assessment, that would support the interests of artists and help to address the weakness of their bargaining position.

[5] DCMS Letter to Julian Knight.
[6] Ref CMA update paper

(We make suggestions below on how this may be taken forward in the next phase of the CMA investigation where we address Next Steps).

(iii) Information discrimination

We also support the finding that "**However, we do expect artists to have relevant information about the basis for calculating their earnings**." [7]

This is information discrimination that arises from a structural problem: there is an oligopoly among the three major labels that have a range of contractual restrictions in place which limit the available information needed by artists, which limits competition between those labels.

Further work is clearly needed on the amount and structure of information provided to artists outside of NDAs if they are to understand how they can calculate their earnings and verify that they are being properly compensated by those labels. In its findings at 5.104/5.105 the CMA notes that there is an inconsistency in terms of the information that is made available to artists by major labels. In particular it is noted that:

"5.105: More information is made available to *established* artists. This can include granular information on their royalties and streams, in particular via the online royalty portals offered by the majors and detailed royalty statements. Through these portals, it appears possible to find out, or estimate, the average payment per stream to both the artist and record company. However, this was not consistent across all record companies, and there may be scope to improve the way this information is presented and used, and to offer more guidance on how to interpret the data. This could involve highlighting key financial information (e.g., on average earnings per stream for specific territories and streaming services), providing improved search functionality to help easily find financial data, providing clear data definitions, and explaining why earnings can vary (e.g., by service)."

"5.106: Issues around what information is made available to artists and how this information is presented to them may weaken competition to sign artists. In light of these concerns raised with us, we plan to share our findings with the IPO for its work on a transparency code of practice."

We have the following observations on contractual restraints issues:

- Hipgnosis represents a considerable number of songs and songwriters' interests, many of whom are established artists including:
    - 67 out of 271 songs in Spotify's Billions Club Source.[8]
    - 52 of Rolling Stone's The 500 Greatest Songs of All Time Source[9]
    - 13 of the top 30 from YouTube's Most Viewed Music Videos of All Time[10] and
    - 4 of the Top 5 Billboard Songs of the Decade[11].
- We do not recognise the reference to more information being made available to established artists or songwriters for that matter. The fact that the CMA considers

[7] 5.103 CMA Update Paper.
[8] Spotify, 8 July 2022
[9] Rolling Stone, Sep 2021
[10] YouTube, May 2022
[11] Billboard magazine

that the information that may be available can include a range of data shows only inconsistency by major labels in the levels of their exploitation of artists and does not address the issue of asymmetry of information and bargaining power. If anything, the evidence presented to the CMA serves to emphasise how the labels make use of their dominant position, since this strongly suggests that the data is both available and can be shared when the labels view it as in their interest to do so. For the limitation on competition between record labels to be addressed this asymmetry of information requires the full disclosure of granular information that enables payments per stream to be verified and the relevant meta data to be supplied to all artists.

- We see the issue as one where market power over suppliers is being exercised in the interests of the major labels and their chosen distributors, not unlike the situation in UK supermarkets, where, absent a code of practice and controls over the exploitation of suppliers by stores, competition was not considered to be working well. We would be keen to work with the CMA on developing a code of practice that operates as a remedy to the information asymmetry and provides redress for artists.
- The IPO has no experience of competition matters. Its current work does not address these issues. It is not a competition authority and does not have the powers of a competition authority. While it may be of value for the CMA to share its findings with the IPO, it is for the CMA to develop its code of practice on what information needs to be disclosed and how that disclosure should operate in future, under CMA adjudication and enforcement powers.

Further work is clearly needed on the amount and structure of information provided to songwriters and artists if they are to understand how they can calculate their earnings and verify that they are being properly compensated by those labels. We consider that these matters require a competition remedy subject to CMA discretion and process and cannot be delegated.

Further work and evidence

(iv) Contractual constraints

We agree that more work is required on issues that the CMA has identified particularly where it has identified contractual constraints that operate to limit competition. Two fundamental questions need to be asked about such contractual constraints before proceeding further:

If they are not needed, then why are they in the contract?

As they have been included what is their effect on competition?

The CMA can assess the extent and scale of each contractual restriction in terms of its effects against a counterfactual world which does not contain the contractual constraint. Given that the CMA has accepted that competition is weak, it should also be born in mind that a small reduction in weak competition over services to artists in a concentrated market has a more significant impact than the same reduction in a robustly competitive market. So, for example:

- Supply of recorded music: how users find music. The update report is light on how this is done, noting the role of some automated playlists and some user-set playlists, as well as searching for content. In the context of the cumulative contractual restraints among the major labels, the incentives to compete are limited. For

example, absent a pro rata revenue limitation, or an MFN, if a label has an approx. 1/3 market share, it has limited incentives to increase the amount of listenership via investment because if it increased its investment this investment will simply be matched by other majors and competed away, resulting in increased costs but the same revenue. It is a classic oligopoly problem. This also affects the supply of recorded music (issue (a)) because it means that less recorded music is supplied. Increases to total listenership, as we believe is now possible in the growing market, would increase with increased promotional investment, as listeners discover more artists and listen to their music more.

- One additional issue is sometimes referred to by the shorthand of the "infinite record store," referring to the idea of a vast online music repository. The problem with this metaphor is that there is always a need to find where things are in the record store, especially when it is so large. As the CMA is well aware[12], online systems are subject to default bias and are frequently subject to subtle alteration (dark patterns) to nudge consumers in a direction that is profitable for suppliers. The outcome of the infinite choice record store is nevertheless, still, that most the profitable artists are from the major labels. Further investigation on the role of competition in promotion of artists by major labels and links to the structure and functioning of user operated, but DSP designed, and owned search systems is thus now worth investigating.
- When considering the supply of services to artists, we consider that MFNs and pro rata revenue sharing agreements with DSPs limit competition and hence disincentivise labels from competing with each other for volumes of sales. Absent such restrictions, labels could in their own interest seek to obtain a greater share of sales in the "all you can eat buffet" offered by DSPs to consumers. This would not undermine the business offer of DSPs, but competition between labels would be increased so that the proportions of sales from each supplier and hence from different artists that are represented by different labels, can vary over time. The components of the buffet actually consumed can vary by end user and artist even if the business model is an all you can eat one.
- The effect of MFN and pro-rata revenue sharing lower incentives for each label to promote its artists and to generate more streams. They reduce total demand, limit volume of streams, and limit the proportions of content from each label being supplied and hence limit changes to incomes for each artist through the labels.
- We agree with the CMA's "initial analysis of the majors' licensing and marketing arrangements with music streaming services would seem to indicate that the majors do seek to influence the placement and prominence of their repertoire on music streaming services" (see Chapter 4). This includes some use of contractual clauses that base a major's representation on playlists on its share of streams. Further investigation of the extent of the self-promotion of Major Labels at the expense of truly independent labels, and the impact on artists not frequently represented by the major labels is possible. At present the buffet is limited and there is a high hurdle for independents and artists they represent and a limited reason for the major labels to promote other than their lucky few artists. Put another way, promotion of a larger number of acts would be possible if a broader range were on playlists.
- They increase barriers to entry from Independents. The current Update may assume an artist is on each song and each label which overlooks the number of artists who collaborate on many different songs on many different labels and the incentives on major labels to promote only artists that they represent. Limitations in contracts

[12] See for example the discrimination and default bias in Google Search and the discussion of dark patterns and nudge techniques in the CMA's Final Report Online Markets and Digital Advertising July 2020. [https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf]

between each of the major labels thus limits opportunities for different artists with different tracks on different labels. Multiple artists are involved in each song and greater choice of label and promotional alternative that each label represents would not only increase opportunity for independents but also to increase opportunity for all artists represented as they are on multiple labels. This would increase innovation.

(v) Switching evidence is important to measure the nature and extent of competition

CMA indicates concerns about switching both by consumers and by artists. We agree as discussed above that songwriters and artists are locked into perpetual contracts which prevent them from switching so further evidence of the scale and extent of artists subject to such contracts is likely to be unnecessary, but survey evidence could be obtained from ourselves and other artists and artists management companies.

Consumers' ability to shop around may similarly be limited in practice through the difficulty of switching from an existing supplier. Here, there may also be an issue of market power assessment that has not been fully investigated. Percentage change of total volumes of sales over time by each label and DSP indicates only the increase in volumes of sales and increasing demand over time. It does not indicate switching taking place between DSPs or the increases or decreases of songs being supplied by or through each DSP by each label.

We understand from the evidence that we submitted that volume of users on each DSP has increased over time, and there appear to be some shifts in volumes that might suggest switching between different DSPs. We consider this to be unlikely given the contractual constraints that limit content - the same content is available on all platforms and prices are also fixed, the MFNs limit incentives to invest and promote and prorate arrangements therefore also limiting any incentive to invest and promote.

[Redacted]

The CMA could obtain evidence of the extent to which customers shop around by conducting a customer survey not unlike the type of survey that has been conducted for supermarket shopping in the past.

(vi) **Evidence on the extent and nature of competition from independents**.

On the assessment of independent label competition, the CMA has seen some evidence of growth, but that growth does not appear to be exerting competitive pressure on the major labels.

[13] [Redacted]

There is a concerning reliance on the fact that independent labels have an increased market share over time.[14] This seems to be taken to imply competition, but it is not clear evidence of a strong competitive constraint because:

1. Major labels still have a 98% top 1000 songs share.
2. Only two independents have a market share over 1%, meaning that they are very unlikely to constrain the major labels.
3. The figures are likely to overemphasise the role of small uploads of little competitive impact.
4. Even if this were itself evidence of strong competition, it would still be necessary to allow back catalogue switching for artists to benefit from it.

[Redacted]

[Redacted]

This would compete with majors in both (i) promotion of catalogue and (ii) for streams of content (since catalogue appears to be competing with new content, or at least, is increasing its share of total listening). This is highly listener and musician friendly as it opens up more music to be actively promoted unlike the situation today where major labels focus their resources on a small proportion of their acts. [Redacted]

[Redacted]. This further supports the argument that there is growing consumer demand for catalogue streaming. Moreover, the demand is chiefly for musicfrom the last decade, meaning that the right to switch would give immediate and visible benefit

[14] 2.26 CMA market update study.

to recent acts who are no longer promoted, by allowing them to work with independent labels who are willing to promote them.

In summary, statistics from both reports strongly suggest that the competitive relationship between newer and older content, and that between major labels and independents as regards investment in promotion, should be thoroughly investigated.

The outcome is less competitive than a counter factual where the contractual and other constrains were not imposed on the market. As it we agree with the CMA that:

"**5.98: The music streaming market is dominated by a relatively small number of artists who account for the vast majority of music streams. Research commissioned by the IPO indicates that in 2020 the top 1% (approximately 4,200 artists) accounted for in excess of 75% of total streams.**"

(vii) evidence of capacity constraints

In different places the CMA refers to a finite amount of time spent by listeners on streaming[15] and the lack of capacity constraints.[16]

Capacity is less of an issue when frequency is considered. Contracts that limit or require frequency of play alter the extent of the exposure of a broader range of artists per listener. Any control over frequency of play is highly important to promotion, consumer experience and artist exposure and we are highly sceptical that playlists cannot be broadened, and the listening experience expanded beyond the offerings of the major labels.

The CMA also notes that new devices such as Alexa make it possible for users to stream in different places and different times than in the past – which could indicate that the total time being spent streaming and listening is potentially increasing. (This expansion makes little difference if consumers are constantly played a limited range of songs though).

When it is considered that music streaming is now frequently one of the easily accessible options for modern in-car stereo systems ***the total demand*** for streaming services may well be increasing and substituting for radio broadcasts.

Listening to the DSP on Autoplay, without interruption, is a similar experience to end user to uninterrupted radio play – such as the BBC. Consumer playlists provide a similar uninterrupted but self-curated experience. The CMA should gather evidence of total demand and the extent of substitution between streaming and radio listening services by consumers. Again, this could be obtained from market research or survey evidence.

We also believe all of sections 5.74- 5.82 that the CMA identifies as "future issues" are in fact in many ways old issues that have already impacted the market and continue to impact the current market – they are not over the horizon in any way – but are features of the current market dynamic. All would benefit from up-to-date market research and evidence gathering,

[15] 2.29 and 3.48 CMA update paper.
[16] Para 2.7. increase in supply and increase in the amount of time spent listening suggests that there is no capacity constraint in the market and that its expending in terms of volume of sales: The success of streaming can be shown by the number of people using streaming services. In December 2021, there were 39 million monthly active users of music streaming services in the UK. In total, tracks were streamed more than 138 billion times in 2021." How does that compare to pre-streaming?

preferably from current consumer surveys of actual user behaviour. For instance, cars equipped with digital access (a headphone jack) for Android and Apple phones which play on in-car stereos have been in existence for many years, Spotify is more than 10 years old, Alexa was launched in 2014 as were the widely used voice activated devices and systems such as Siri on iPhones.

We contend that what the CMA has identified these "future issues" are in fact current competition issues. What is now needed is to gather the evidence on each of them and how they operate in practice. Consumer survey evidence would likely be best.

(viii) issues concerning the reasons why the CMA provisionally found limited concerns

The CMA referred to the following as a basis for reasons for not making a Market Investigation Reference:

- People are listening to more music than before, at a relatively stable and affordable price point; however, an increase in listening is consistent with a wide variety of levels of competition. Even monopoly supply can be associated with increased consumption, especially where, as here, there is a technological innovation. In our meeting, we noted the example of early television, which was initially offered on a monopoly basis by the BBC. Viewing increased, but it was still helpful to introduce competition in television over the years.
- Major labels are making reasonable and not excessive profits, while the oligopoly structure is accepted to create weak competition. There is significant emphasis on the relatively low profitability of both streaming services and record majors.
- The assessment of profits in a multination is notoriously difficult. This is particularly so where the business involves weightless assets such as intellectual property and technology networks. Intercompany loans and payments for finance or intellectual property can be agreed between companies in the same group, as part of tax efficient supply management. Payments can be made and optimised for use of intellectual property, technology, knowhow, and software as used in platforms. Different accounting treatments can be given under different accounting policies used in different parts of the world that allow different treatments of operational expenditure and assets. These may legitimately be optimised between and among companies created in different jurisdictions to flatter costs and depress profitability in ways that are primarily designed to limit tax liability. We are not suggesting wrongdoing – only observing that the CMA's attempts to assess profitability may have underestimated the challenge in doing so.
- The entire assessment of profitability may not be relevant to the issue of competitive foreclosure and innovation in promotion raised by the contractual restrictions and lock in of artists described below: companies may not be efficient or highly profitable while they limit entry and prevent investment by others. The Major labels may not show much of a profit when stopping others from doing business. The issue is not their profitability but the anti-competitive suppression of choice and limitation on alternative outlets for artists who are prevented from shopping around for promotion and distribution.

ix) no current, clear evidence of harm to innovation

It is surprising to see that there is thought to be no evidence of harm to innovation. This is not Hipgnosis' experience. There is a significant loss of potential innovation and investment in the promotion of new acts or older acts to new audiences. This issue can be tracked back to the lack of metadata. Allowing others to handle data and have access to data that supports interoperability and greater switching by suppliers would be equivalent to CMA remedies like the Banking Order (CMA9) and the ability of third parties to handle Reuters Instrument Codes following an EU competition law investigation. There is tremendous potential to address significant issues such as artists being paid different amounts for equivalent rights or being paid late or not being paid at all because of poor data flows, and the multi-million pound "black box" revenues. Unbundling the data to allow this innovation seems well worth further study.

Next Steps

We suggest the main areas for next steps:

1) A detailed analysis of the impact on Songwriters and Artists caused by the ownership of the publishers by the major record labels and the concentration within this sector. As set out in our original submission (Paragraphs 154 and 155), when Sony operated their Japanese publishing as an independent business the outcome for Artists significantly improved. This was reversed when management changed, and a Group-wide perspective taken. It is a startling demonstration that the current market is not delivering fair value to all participant due to competition failures.
2) We can see that a public recognition of the "Right to Switch" as outlined in Annex 1 would help to support and enable competition and alleviate the problem of lock in of songwriters and artists to long term supply agreements. It should also stimulate investments in promotion by publishers and labels of artists songs which have lain dormant. The CMA could review with us the Annex and its assessment with a view to a statement to publicly recognise that the "Right to Switch" already exists. If that analysis or something similar to it were to be endorsed and the CMA were to publish its own assessment, that would support the interests of artists and help to address the weakness of their bargaining position.
3) Development of a code of practice (like the groceries code) through which songwriters and artists (current and legacy) are contracted on fair, reasonable and not one-sided terms by the major recorded music companies; are provided with granular data on a timely basis from which is subject to swift adjudication and dispute resolution; and from which artists can assess their incomes more readily. Again, we would be delighted to work with the CMA in identifying the precise accounting and data and other information required but consider that the CMA needs to run the process – and be seen to do so – under its own powers whether that includes input from the IPO.
4) In response to the consultation, we have identified above various points of evidence that are needed to ensure that the CMA's understanding of the market is soundly based. If, as we expect, the CMA were to reassess the markets in accordance with the evidence we have submitted, we would be likely to agree that independent labels do not provide much competitive constraint on the major labels and DIY publishing is likewise not having a major competitive impact on them.

Yours sincerely,

Tim Cowen

For and on behalf of **Preiskel & Co LLP**

Annex 1:

Re: Music and Streaming Market Study: a "Right to Switch"?

In reviewing proportionate remedies to the competition issues uncovered by this Market Study we suggest they should include consideration of a "**Right to Switch**" for creators locked into long term contracts with major labels. Such a change could be introduced as a contractual variation to enable switching, addressing an Adverse Effect on Competition arising from such contracts.

[Redacted]

We highlight below (i) that artists have a right to switch under the existing law, but which is currently not practically available; and (ii) the Adverse Effects on Competition arising from the continued operation of long-term contracts if left unaddressed. Both merit further investigation.

I. The right to switch

1. There is developed English contract law doctrine[17] concerning dormant content allowing artists to switch away from a perpetual term where there is no promotion of the asset.

2. [Redacted]

3. [Redacted]

4. A competitive market would force purchasers to account for this change, but a three-party oligopoly may have very little, if any, incentive to revisit the definition as the likely response is that the other two parties would simply match this competition, an instance of the classic oligopoly problem.

5. [Redacted]

[17] See below under **II - Dormant Content**.

6. [Redacted]

7. As Lord Denning crisply put it in relation to an early career agreement involving Fleetwood Mac: “They were composers talented in music and song but not in business. In negotiation they could not hold their own. That is why they needed a manager.”[18] But without the funds for a manager, and a lawsuit, their career would have been very different.

8. We consider that this discloses a potential AEC in that it results in a one-sided contracts for new content. A major label would presumably argue that recoupment of the initial investment is important to cover risk capital in other, unsuccessful acts. This is not sensibly in doubt. However, this frequently heard account omits an important point about the *later* opportunity for new listeners and sales in the life of music rights. As content ages, promotion declines. This harms the artist and the listening public, but it does not harm the major record labels as the lost listening from not promoting switches into their new acts.

9. The core question then becomes whether there is a consumer demand for older acts which is currently underserviced, and if so, any impediments it faces. There is strong statistical evidence that there is demand for the back catalogue. Sometimes even the majors invest in the back catalogue of previously successful songs and artists, just as classic films and music can be resold. [Redacted]

10. However, this is just the tip of the iceberg, and there is a powerful conflict of interest, akin to vertical foreclosure, in that the older content competes with

[18] *Clifford Davis Management Ltd. v WEA Records Ltd* [1975] 1 All E.R. 237 (C.A.)
[19] [Redacted]

listening for new songs, especially on streaming playlists. There is a further need to ensure that artists participate fully in the growing interest in back catalogue, both to ensure a reasonable distribution of the economic growth from innovation (streaming), and to encourage the creation of content over time since payment of back catalogue royalties is part of the incentive for new content at the point where it is made.

11. Even with the increasing interest, there is a much larger and diverse "unseen" back catalogue which could serve consumer interests, but which is not currently promoted or developed. This is changing only very slowly and is being held back by the incumbent major labels who face considerable challenges given their traditional business, conflicts between promoting older acts over newer signings especially regarding streaming "airtime", and differences in rates of return available from either.

12. Many more artists could gain more airtime, and thus more royalties, if a lower-cost or a more innovative promoter of content could enter the market and expand promotion, development and sales. This independent label would have the incentive to maximise listenership without regard to possible impacts on new acts. Moreover, the costs of promotion are lower online (e.g., promotion of streams online is cheaper than physical promotion of CDs), so there is ample scope to increase output.

13. The development of back catalogue sales could, in principle, be in the majors' interests, but the way the market is currently structured suggests that they have an interest in raising rivals' costs, through increasing switching costs and foreclosing access to content to promote.

14. We note that the CMA's merger investigation into Sony/AWAL and Kobalt uncovered the emergence of a layer of "mid-market" A&L (as opposed to A&R) operations to which many artists who could switch, did. This was seen to be a complement to the Sony A&R services because "full fat" A&R is not the same thing as lighter promotional services: the two serve different needs (and thus there was not a sufficient competitive overlap to justify conditions to the deal). However, to ensure that the wider market can benefit from this innovation requires that rights can be transferred and that creators have right to switch i.e. that there is not a perpetual right standing in the way.

II. Dormant Content

15. Recognising the issue with dormant content, English common law long ago arrived at the position that a failure to promote content **and** not to compensate for it, amounts to an unreasonable restraint of trade. As the content is thus "parked", the contract is akin to a worldwide non-compete of lifetime duration which would not be enforceable in analogous employment cases. A leading "trilogy" of cases arose in the 1970s-80s: *A. Schroeder Music Publishing Co. Ltd. v Macaulay ("Schroeder")*,[20] *Clifford Davis Management Ltd. v WEA Records Ltd.*[21] and

[20] [1974] 3 All E.R. 616
[21] [1975] 1 All E.R. 237 (C.A.)

O'Sullivan v Management Agency and Music Ltd.[22] The cases are united by the presence of a unilateral contract, that is, one in which the manager was not obliged to promote.

16. Thus, if as the *Schroeder* court memorably put it, the manager decided to "**put [the fruits of the contract] in a drawer and leave them there**,"[23] then there would be no competition over those rights (at least during contract term). The court stated:

> "**It appears … to be an unreasonable restraint to tie the composer for this period of years so that his work will be sterilised and he can earn nothing from his ability as a composer if the publisher chooses not to publish.**"[24]

17. However, the *Schroeder* court was careful to address only the narrow case of long-term non-promotion: "**If there had been … any provision [in the contract] entitling the composer to terminate the agreement in such an event the case might have had a very different appearance**."[25]

18. The case suggests that the restraint of trade doctrine at common law would limit the harm and adverse effect on competition that is arising, if each case were known and there were funds available to investigate promotion.[26] In practice, NDAs and audit data restrictions make this impossible, and many surprisingly prominent artists receive no promotion whatsoever.

19. Addressing this specific case with a narrowly tailored switching right is of immediate interest from a competition policy perspective as it is the case of an unused (dormant) asset to which access might be given without a risk of harming investment in the upstream market (that for new content).

20. In a *Schroeder* scenario, the major label is not doing anything; and the best argument it could make is that it might, one day, do something. Passman captures the current situation colourfully: "Knowing this, various sleazeballs in our business have sunk their teeth into an artist and would not let go if they smelled that somebody might pay them for the privilege."[27]

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[22] [1984] 3 W.L.R. 448
[23] Schroeder at 621
[24] Schroeder at 622
[25] Schroeder at 622. It is notable that the only pushback on this principle have involved instances where artists, were, in fact, well paid, as in the noted *George Michael* case which dismissed the argument for restraint of trade on the grounds that the artist got a good deal.
[26] There are several factors suggesting concerns about failings in contracting in the "Trilogy" cases: there are take-it-or-leave-it terms; there is boilerplate; there is no evidence that this boilerplate aligns with a balanced or pro-competitive use of standard terms; there is a unilateral contract providing no reciprocal obligation on the part of the rights holder to do anything. It is also notable that the criticisms of the *Schroeder* right, such as its fixation on the mere presence of standard terms rather than evidence of their market impact, do not appear to apply in relation to an industry-wide AEC. A CMA-promoted right to switch could be fashioned: (i) where no promotional activity can be shown to have taken place for a set period (addressing the point that there is more to *Schroeder* than merely the presence of standard terms); (ii) for reasons explored below, it is highly plausible that allowing switching of dormant assets enhances economic efficiency with limited dynamic losses of the sort described in para 58 of the CC3 *Guidance* since the asset is currently dormant; and (iii) calibration of the intervention can be informed by evidence gathered by the CMA (investment levels; consumer welfare; prices; costs; payments to artists) using the full range of Market Investiga tion powers, whereas a court has a more static and limited ambit.
[27] Passman, ch. 10.

21. Even if the strategy is not always quite this contermacious, there is a clear incentive to sit on a back catalogue and hope that it increases in value, rather than to promote it, if promotion is competing with other listening that is 73% likely to go to a small number of oligopoly players.[28]

22. In a tight oligopoly, a single major investing in promotion might encourage switching to it; but in the medium term, this would likely be matched by the other majors doing the same, meaning that the classic "prisoner's dilemma" oligopoly problem arises. Thus, the majors would end up with the same proportion of their content being listened to, whether new content (as of today) or freshly promoted catalogue (following investment being matched by others). There is a clear risk of an incentive not to promote because of the oligopoly dynamics, which should be fully investigated.

23. This issue also compounds the existing problem of getting old and even new content released and promoted. Artists cannot generally compel promotion under their contracts.[29] This inactivity can be seen as a form of rent-seeking, as it does not relate to the production of new content or even fresh airtime for old content. Any asserted interest of this sort should be rejected by the CMA.

24. Intervention to allow switching where there is neither active promotion for a substantial period, nor the possibility of exit from the promotion contract, would therefore encourage competition and entry in promotion. As this new market attracts new capital, it does not undermine existing businesses or investment in A&R or A&L, at least to the extent that returns reflects investment and not rent-seeking, since there is nothing to stop major labels from investing to compete, even *with* a right to switch. The precise specification of the dormancy period could be carefully calibrated in a Market Investigation based on expert advice (e.g., financial and economic analysis).

25. This gives the CMA scope to consider a carefully targeted intervention based on existing legal rights. The *Schroeder* right is essentially to have the rights back if they are not promoted, but only where the contract is silent on what to do if the long-term deal is not working out.[30] This would be a "use it or lose it" requirement, and it is *already* the artist's right. The issue here is lack of knowledge about the legal position. An impecunious artist may not obtain advice and or have funds available to litigate the point, and even if they did, then the value of the dispute may outweigh any foreseeable return, especially as the majority of returns go to the major label.

26. In the context of NDAs, it would be difficult in any event to work out whether litigation would be profitable, even if it were available. By contrast, in applying a

[28] [Redacted]
[29] Passman, ch. 10.
[30] The point that deals might sometimes need to be revisited also accords with the availability of damages only, and not indefinite performance under English law, even for long term contracts. As Lord Hoffmann noted in *Co-Operative Insurace Society v Argyll Stores (Holdings) Ltd* [1997] UKHL 17, Heading 5: "From a wider perspective, it cannot be in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation. It is not only a waste of resources but yokes the parties together in a continuing hostile relationship. … This is wasteful for both parties and the legal system. An award of damages, on the other hand, brings the litigation to an end. The defendant pays damages, the forensic link between them is severed, they go their separate ways and the wounds of conflict can heal." It should be noted that the damages from unpromoted works may be a very small amount or even zero. Moreover, even if there were a legacy value, this could take the form of an access fee payment to use the rights based on non-promoted revenue expectations (i.e., the damages quantum from moving to a new provider) and the *additional* value from the new promotion could accrue to the party which had done that work.

"use it or lose it" remedy, the CMA would simply give low-cost effect to the existing common law, while enhancing competition by lowering switching costs.

27. This accords with findings of the Intellectual Property Office's Report *Music Creators' Income in the Digital Era* which found a large "long tail" of less listened-to musicians (7 million artists) who receive very little remuneration: just 870 artists out of 4.5 million received $1 million or more from Spotify; whereas 4.3 ***million*** of the 4.5 (95.6%) were paid less than $1000 per annum.[31] This accords with research by the Ivors Academy and Musicians Union finding that 82% of the 311 respondents to a survey of their members earned less than £200 per annum from streaming.[32] If even a relatively small fraction of the 4.3 million low-paid Spotify artists were to switch, this would strongly enhance competition; and the effect might well grow even larger as low cost switching tools take root.[33] These missing millions are the artists for whom switching will only work if it is low cost.

28. The reluctance of major labels to allow the exercise of *Schroeder* switching rights accords with retaining a large catalogue of works in perpetuity and only selling off those which have become valuable. Leaving this with the majors implies oligopolistic promotion of back catalogue (if at all) whereas switching would enable a range of smaller players to compete over promotion. As this would be done in competition for content, more would be invested resulting in more airtime, more payment to a wider range of artists, and more overall output. The beauty of the *Schroeder* rule is that it requires a major to demonstrate investment in promotion on pain of losing the rights.

29. There is also an important distributional impact: competition would bring promotion of a wide range of content, whereas "sit back and hope that something becomes famous" will only provide a return to a few select works. Better back catalogue promotion across a wider range of outlets (geographies; film and TV; online games; metaverse) will also drive more entry into new content since total returns to artists would then increase.

III. Adverse effects on competition arising from longer term contracts

30. Long term contracts lock-in creators to a system that has limited investment in promotion after the initial period.

31. As described in our previous submissions, competition among and between labels currently appears to be limited. Over the past decade or more, vertical integration has taken place with many labels now owning publishers. Each label has had an interest in Spotify. Each has an interest in DSPs providing a full range of songs for consumers to sign up to on monthly ad funded and subscription contracts.

32. In these circumstances there is limited benefit for major labels in competing with other major labels, especially as the very widely-used auto play functions effectively channel business to them – unlike a record shop of old, where more

[31] IPO report, p.41.
[32] Ivors Academy 2020 survey, as reported in the ICO report at p.37.
[33] Similar to the CMA9 banking remedies. There will be no market for switching services without intervention.

footfall for record X would mean more shop visits, resulting in more record sales of *other* artists, introducing consumers to content from independent labels.[34]

33. [Redacted]

34. The position is particularly objectionable because the majors are not engaged in the type of promotion envisaged by the risk allocation, but have nonetheless retained the benefit of the agreements framed on doing this work (e.g., working with firms like HMV to move physical records, which no longer occurs). It is unclear whether the major labels are doing anything to replace the work that once took place in distribution of physical records, and this should be investigated.

35. All three majors benefit from similar historic terms in an oligopoly, and have no incentive to revisit the contracts to account for streaming and invest more, because other majors would simply compete away this new investment: a classic oligopoly problem.

36. It is in the interest of the major labels to minimise investment. Not investing in back catalogue, or omitting parts of the back catalogue from investment, drives up existing returns. [Redacted]

37. [Redacted]

38. There is further difficulty in obtaining information on revenues (e.g., audit rights exercise), and NDAs further undermine access to information needed to evaluate switching.

39. As a result, promotion of new content takes place, but promotion of catalogue may not reflect consumer demand because returns can be had anyway on the new content with which catalogue would compete. There can be no doubt that recoupment of "hits" is the appropriate reward of the investor in the band. The issue

[34] Passman, Introduction (pointing to this as the single most important change with streaming). As many as 95% of Spotify users rarely or never deviate from auto play: https://oeconomicus.fr/how-streaming-allowed-majors-to-take-back-control-on-the-recording-industry/ ("While the platforms' storage space is infinite, time that users can spend searching for new songs is not. Indeed, it has been proven that only 5% of the streaming services clients use the search bar when they connect to the app.") See also, Ahmed Kachkach (2016), "Analyzing user behavior and sentiment in music streaming services". A major question for investigation, therefore, is whether competition between platforms is sufficiently strong to ensure that auto play works in the consumer interest, e.g. by showing independent acts (when wanted by the consumer) even if in competition with major label assets.

[35] A full volumetric revenue analysis would need to be conducted (not least, as the total market still grew despite the market share decline, meaning that detailed econometric analysis is required to identify consumer impacts).

comes up later, when transaction costs are often too high to switch older content to a lower-cost provider of promotion more suited to legacy assets.

40. The only pro-competitive reason why a major label would favour the scenario of holding the asset without investment is if the investment is economically inefficient, but if this is true, then logically there should be no objection to transfer to a lower cost provider who *is* willing to take that risk (since the expected return from holding is zero). The only reason not to agree to such a deal, and thus to oppose a carefully defined switching right, is if there is a perceived threat of competition from that promotion.

41. An alternative and more competitive market structure is both possible and desirable. In the current circumstances new investment may be possible. With switching, there are opportunities to promote to new consumers who, as noted above, are increasingly listening to *some* (largely unpromoted) back catalogue. This would come from new forms of media (TV, games) or the promotion of older acts to new generations. Switching would drive new investment in new promotion and drive growth for listeners and creators.

42. [Redacted]

43. We understand that songwriters have, in aggregate, a limited "share of the pie" (as described by the IPO and the Broken Record campaign).[36] Where markets are not functioning efficiently, talent goes unrewarded, and consumers lose out on access to diverse and wide music choice. Songwriters, creators of all types in production and artists and band lock-in to perpetual contracts is a highly plausible Adverse Effect on Competition requiring further investigation.

IV. Most Favoured Nation ("MFN") and Rights of First Refusal clauses

44. [Redacted]

45. This results in a de facto price floor similar to resale price maintenance, and engages the same debates: distributors (e.g., major label-owned DSPs) may benefit but this is at consumer expense, as price competition is sharply impeded for a more cost-effective business (e.g., a cheaper DSP with a lower-cost business model). In the context of limited competition between the major labels, price matching clauses of all descriptions are likely to restrict competition and therefore need further investigation.

46. [Redacted]

[36] See IPO Report, op. cit., ch.1 and more broadly the awareness campaign from the Musicians' Union: https://musiciansunion.org.uk/news/announcing-the-brokenrecord-appeal-and-festival

V. Conclusion

47. This memorandum aims to assist CMA in its identification of the issues and in suggesting the collection from the majors of information on a crucial point, namely the status of those rights which are neither promoted nor switched.

48. In many ways, the most difficult competition policy question is what value exists in older content that could be promoted more, but where the inability to switch prevents investment. Such a market might never arise spontaneously given legacy contracts.

49. If the CMA were to enhance access to the existing common law **Right to Switch**, e.g. by expressly requiring its application by major labels, then the option could be placed in the hands of all creators. They would uncover and establish value by working with a wider range of independent labels, and would also promote their own content more as they would retain more returns from this work.

50. This value is currently unrealised as the existing contracts never envisaged the streaming world and did not set appropriate incentives for it.

51. Full market investigation would help to reveal whether there is a category of agreements which would benefit from the **Right to Switch** and, in time, enable more consumer choice on streaming platforms and deliver more royalties to creators.

52. Please do not hesitate to let us know if you would like to set up a call with us to discuss our findings or if you need any assistance in respect of the above, as we would be happy to assist.