

## CMA Music and Streaming Market Study Update – BBC response to consultation

### Introduction

- The BBC appreciates the CMA’s continuing work in its music and streaming market study. In particular, we welcome the CMA’s recognition of the weak competition in the supply of music to music streaming services and the identification of threats to competition from integrated services, which lead to self-preferencing and potential foreclosure.
- We have the following concerns with the CMA’s emerging thinking in its update paper, as we believe that key competition issues, which we have previously raised with the CMA, have not been taken into account. These are:
  - The arrangements in place that allows rightsholders to unilaterally withdraw from rights agreements.
  - The lack of counterbalance by the Copyright Tribunal.
  - The impact of this, together with complex and difficult rights negotiations, on the ability of music streaming services, in particular new entrants and innovators to enter the market, grow and support new talent.
  - The real effect that smart speakers and in-car infotainment systems are already having on the ability of third party services to access listeners.
- The BBC set out these concerns in detail in its submission dated 12 July 2022. We recognise that, given the timing of this submission, the CMA may not have had time to consider it prior to its deadline to publish the update report. We therefore ask the CMA to take the BBC’s submission dated 12 July 2022 into account as part of this response to the consultation.
- Overall, we respectfully disagree with the CMA’s proposal not to make an MIR at the end of the market study. We believe that an MIR is necessary and appropriate, given the structural issues impacting competition in this market, which merit further investigation and remedies.
- In the event that the CMA continues to be of the view that an MIR reference is not appropriate, the BBC suggests that there is value in the CMA making recommendations to the IPO and Government at the end of the market study, to initiate much needed follow-up work regarding the jurisdiction of the Copyright Tribunal, the ability of rightsholders to unilaterally withdraw from rights deals and the treatment of digital rights.

- We remain available to discuss any of these points further with the CMA if this would be helpful to you.

**Issue 1: weak competition in the supply of music to streaming services, due to the substantial bargaining power of the majors**

We welcome the CMA’s preliminary finding that there is weak competition, particularly on price, to supply music to music streaming services.

The BBC believes that the harm from this position is exacerbated by:

- a. The arrangements in place that allows rightsholders to unilaterally withdraw from rights agreements; and
- b. The lack of counterbalance by the Copyright Tribunal.

The CMA does not appear to have fully considered these market features in its update report. In the BBC’s experience these have a major impact on the ability of music streaming services, in particular new entrants and innovators, to enter the market, and to grow and support new talent. The BBC explained this in more detail in its submission of 12 July 2022.

If the CMA remains of the view that an MIR is not appropriate, the BBC would urge the CMA to make recommendations to the IPO and Government in order to tackle these issues, particularly in terms of the jurisdiction of the Copyright Tribunal, where amendments to legislation would be required and so the process of remedying the issue should be commenced without delay.

**Issue 2: complex and difficult rights negotiations are impacting the ability to innovate and compete**

The BBC supports the CMA’s recognition that complex rights negotiations are a barrier to greater innovation but we respectfully disagree that these are an inherent part of the licensing process and, by implication, cannot be improved.

The ability of rightsholders to unilaterally withdraw from agreed deals and the exclusion of digital rights (both explained in detail – with examples - in the previous submission) are relatively recent developments and not an “inevitable” or “inherent” part of the licensing process. We are happy to discuss this further in more detail, including our experiences of negotiations with the Majors.

**Issue 3: threats to competition from integrated streaming services and the distortions caused by the control by integrated players of smart speakers and in-car infotainment systems**

We agree that integrated music streaming services have a competitive advantage over other providers and we recognise the types of self-preferencing behaviour that the CMA has identified. The BBC believes that these issues are a substantial and realistic threat to

competition and would welcome further investigation by the CMA. As above, we are happy to discuss this further with the CMA if it would be helpful.

**BBC Competition and Regulatory Legal**

**19 August 2022**

## **CMA Music and Streaming Market Study – BBC Submission on Appropriate Remedies**

### **Introduction**

- The BBC welcomes the CMA’s ongoing enquiry into the music and streaming market.
- This submission builds on and should be read in conjunction with our comments on the CMA’s statement of scope and in the meeting of 27 April 2022 between the BBC and the CMA.
- At that meeting, the CMA requested views from us on appropriate remedies to the harms to competition in this market.
- This submission summarises the harms to competition arising from the structure of the music and streaming market and then suggests appropriate steps that the CMA may take to remedy these harms.
- We would welcome the opportunity to discuss these remedies with you in more detail if this would be of assistance.

### **Adverse effects on competition and appropriate remedies**

#### AEC 1: Market concentration of music companies Universal, Sony and Warner (the Majors) with lack of counterbalance or redress

The market is distorted due to considerable market power being held by a concentrated group of large record labels and music publishers, referred to as the Majors. We note that Spotify have also raised these concerns in their public regulatory filings.<sup>1</sup>

- The rights in musical works can be owned by multiple parties and works with split ownership of publishing shares require multiple licences. An owner of any share, even a minority share, can veto the licence of a work. Majors have acquired minority shares in a significant number of compositions. Holding percentage shares in multiple compositions gives control of the musical works being licensed, and significantly increases market and negotiating power. This allows the Majors additional control over a very substantial part of the market.<sup>2</sup>
- Barriers to entry and expansion due to limited functionality being agreed. Market structures may be hindering entry and expansion and therefore insulating the incumbent music streamer(s) from competition. Such structures include minority

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<sup>1</sup> Annual report 2021 (page 15).

<sup>2</sup> Spotify noted this as a risk to its business in its annual report 2021 (page 15): “publishers’ fractional ownership of shares of musical works enhances their market power. As a result, the loss of rights to a major publisher catalogue would force us to take down a significant portion of popular repertoire in the applicable territory or territories, which would significantly disadvantage us in such territory or territories”.

holdings by Sony and Universal in Spotify. While we understand that the shareholdings themselves are each less than 5%, the shareholdings are valuable financially<sup>3</sup> and this may skew the incentives of these Majors and (due to the Majors' level of influence) the CMOs to negotiate with other streaming services and content providers.

- There is a lack of counter-balance provided by the Copyright Tribunal (the Tribunal) as its jurisdiction has become limited in the following ways:
  - digital rights in particular (see AEC 3 below)
  - If a UK CMO and a UK user have a dispute about existing or proposed licensing terms where the licence is multi-territorial, or it is an ex-UK licence involving non-UK copyrights, the user does not have the ability to refer the issue to the Tribunal (or any dispute resolution body), following a High Court decision in 2018<sup>4</sup>.
  - Majors have agreed contractual arrangements with MCPS (a CMO) which allows them to withdraw their digital rights from blanket licences, at the point a Tribunal reference is issued (contrary to the statutory provision that the licence continues<sup>5</sup>) or withdraw all rights at the point the licence terms are determined by the Tribunal, if the Major does not approve of those terms.

### Appropriate remedies

The BBC considers that the following remedies mitigate the problems identified and provide as comprehensive and proportionate a solution as reasonable and practicable:

1. To achieve greater independence between the Majors and CMOs, the CMA should consider:
  - a. Limiting Majors participation in the Boards of CMOs and powers of veto.
  - b. Transparency obligations requiring CMO's to publish all contractual terms governing the CMO / rightsholder relationship, in particular to reduce the ability and incentives to agree unfair terms.
  - c. Preventing terms which permit withdrawing from existing licences agreed by CMOs for the duration of any Tribunal reference for an expiring licence, for example by making such contract terms null and void.<sup>6</sup>

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<sup>3</sup> See DCMS Committee report on the Economics of Music Streaming, paras 107-108 and also press article [Universal's stake in Spotify is worth over \\$1.6bn... but it's got no plans to sell up - Music Business Worldwide](#)

<sup>4</sup> BBC & BBC Worldwide Ltd v MCPS and ors [2018] EWHC 2931 Ch

<sup>5</sup> See s126(3) Copyright Designs and Patents Act 1988 (CDPA 1988) "A licence in respect of which a reference has been made shall remain in operation until proceedings on the reference are concluded".

<sup>6</sup> See s126 (3) CDPA 1988

2. Review of the jurisdiction of the Tribunal (which both Mr Justice Arnold<sup>7</sup> and the Copyright Tribunal itself<sup>8</sup> have said is needed) with recommendations from the CMA that the relevant sections of the CDPA 1988 should be amended to ensure that:
  - a. where a Rightsholder indicated it wished to withdraw rights from a CMO (see AEC 2 below) this would permit a Tribunal to value and determine that part of a CMO's licence and allow an easy transition to a direct licence or licence via another CMO.
  - b. Tribunal jurisdiction should not be limited to just UK licensing arrangements as this is no longer fit for purposes in a global digital world and this limits protection on licences that have an ex-UK licencing element. It should not be controversial for the Tribunal to make an assessment of the value of ex-UK rights, as this has been done in patent cases where the court undertakes a FRAND assessment, even where the portfolio is licensed on a worldwide basis.<sup>9</sup> The Tribunal has also accepted jurisdiction at first instance (subsequently overturned on appeal to the High Court). Jurisdiction should apply where any party: CMO (or contributing CMO for joint CMO enterprises such as ICE) / Applicant is a UK party, and the copyrights are UK or exclusively foreign copyrights or a combination of both.

#### AEC 2: regulatory issues: unilateral withdrawal of rights from CMO agreements

Rightsholders have the ability to unilaterally withdraw their rights from CMOs, which has the effect of withdrawing those rights from any licence agreed between the CMO and a licensee, even during the fixed term of the licence agreement. The ability to withdraw was originally intended as a protection for rightsholders to protect against possible exploitation by the CMOs. However, the implementation of this protection has had unintended consequences and a detrimental effect on licensees and ultimately consumers.

#### Appropriate remedies

The BBC respects the rights of rightsholders to control the exploitation of their works through their choice of CMO and to unilaterally withdraw their membership. However, the BBC believes that rightsholders should honour the term of any licences for their rights agreed by the CMO, for the duration of the licence. Once the licence expires, rightsholders are free to re-negotiate under new arrangements, including via an alternative CMO. This would represent a fair and reasonable compromise between all the rights and interests involved, as it would protect the rightsholder against exploitation but also protect the value to the licensee and mitigate the detrimental impact on the market (and ultimately the consumer) caused by this uncertainty.

#### AEC 3: exclusion of digital rights

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<sup>7</sup> See para 116 BBC & BBC Worldwide Ltd v MCPS [2018] EWHC 2931 Ch

<sup>8</sup> For Tribunal position see para 50 BBC & BBC Worldwide v MCPS CT129/16 Decision dated 26 April 2018

<sup>9</sup> See for example Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd [2020] UKSC 37

Digital rights, ie the rights to use music on digital services delivered over the internet (which includes both linear broadcasts of audio visual and audio and making content available for on demand) have increasingly been separated out in our negotiations with music rights holders. We are concerned that the treatment of digital rights is distorting the market

- We have concerns that with digital rights being separated from the CMOs and held with the publishers and record labels this circumvents protection afforded by the Tribunal under the CDPA 1988, as this is primarily designed to mediate between the collecting societies and any licensee.
- Equitable remuneration for performers is not currently mandated for in digital rights payments made pursuant to the making available right, in contrast to payments for broadcast rights.

#### Appropriate remedies

The BBC considers that the following remedies provide a comprehensive and proportionate solution to the problems identified:

1. The Tribunal should have jurisdiction over all categories of rights licensed by CMOs (including the reaggregated digital rights), through ensuring rights cannot be withdrawn during application of the Tribunal's jurisdiction.

We support equitable remuneration but not at the expense of the licensee or the consumer.

#### AEC 4: transparency

If licence terms end up the subject of a Tribunal claim, the CMO must disclose comparable terms but many licences do not get this far and this is inefficient in any event.

#### Appropriate remedies

To mitigate these issues, a comprehensive and proportionate solution would be the publication by CMOs of general market rates, which could be expressed as a range, for certain classes of rights (the rates may need to be tiered according to scope, functionality etc). Such transparency will allow a fairer negotiation and help mitigate the influence of Majors in negotiations, while maintaining competitive dynamics which account for the value of the particular rights to the particular licensees.

It would not be unprecedented in the industry to publish tariffs or generalised market rates. The CMOs have published tariff rates for Live Pop and Classical.<sup>10</sup> In addition, a previous Tribunal judgment set out streaming rates, referred to in the judgment as “the Royalty Table” which were in essence a summary of what had been agreed in settlements and were used by other parties to the dispute.<sup>11</sup>

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<sup>10</sup> See PPL PRS website which publishes tariffs [here](#).

<sup>11</sup> CT84-90/05 BPI and ors v MCPS, PRS and BAC, see para 90 and table on page 30.

### AEC 5: self-preferencing

Smart speakers and in-car infotainment systems are playing an increasingly significant role in how consumers access and discover audio content. Global tech companies with vertically integrated business models are the key players in this area. In particular:

- Global tech companies own and operate smart speaker platforms (as with Google Home/Nest and Amazon Echo) together with the relevant voice service (Google Assistant and Amazon Alexa); and
- Global tech companies are also increasing their in-car presence. Users can connect their mobile phones to the car's dashboard screen using Apple CarPlay and Android Auto in order to display and use apps which are already installed in an app-based environment. As cars themselves become more connected (independently of connecting to a mobile phone), Google is moving rapidly into this space with its Android Automotive Operating System.

As we have outlined in past submissions, we have concerns that such vertical integration is leading to self-preferencing of platform owned services and content where these compete directly with the BBC and other third party providers such as Spotify. This is damaging the BBC's ability to fulfil its Mission and Public Purposes, and will make it harder for audiences to discover a wide range of content, encounter new talent, and broaden their listening horizons. This will in turn make it more difficult for new and less mainstream artists to break through and find the audiences they need to fund their creativity.

### Appropriate remedies

An effective and comprehensive solution is an order to the vertically integrated platforms that they must comply with the simple principle of giving fair, reasonable and non-discriminatory treatment to rival services as compared with their own content and services.

The European Commission required this of Google to end its self-preferencing of its own comparison shopping service.<sup>12</sup>

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<sup>12</sup> Case AT.39740 Google Search (Shopping) 2017.