LEGAL PERSPECTIVES ON THE STREAMING INDUSTRY -

UK PERSPECTIVE

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1. UK STEAMING ECONOMY

The UK approach to copyright emphasises its economic role as a system that compensates creators for their work, which would otherwise be a freely accessible commodity with no market value since it is easy to duplicate. From this perspective, copyright ensures that creators get paid for their work, which enables them to continue to create, and rightsholders can disseminate that creativity, knowledge and culture; thus, benefiting society as a whole. As such, the quintessential role of copyright is to encourage, by way of remuneration, control and recognition, the creation and dissemination of music.

On the one hand, the UK's digital music income was estimated to be over 1 billion in 2020 alone.[1] IFPI's data demonstrated that streaming subscription music listening increased by 51% in 2021.[2] Spotify, the second largest music streaming platform worldwide,[3] reported 381 million listeners and 172 million subscribers

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[1] Music Industry in the United Kingdom—Statistics & Facts at https://www.statista.com/topics/3152/music-industry-in-the-united-kingdom-uk/#dossierKeyfigures

[2] IFPI, Engaging with Music 2021 at https://www.ifpi.org/ifpi-releases-engaging-with-music-2021/

[3] YouTube is the most popular music streaming platform, with more than 2 billion music listeners; L. Cohen, Why marketers should care about the music industry's latest transformation at https://www.thinkwithgoogle.com/marketing-strategies/video/music-industry-changes/; H. Nguyen, The Most Popular Music Streaming Platforms in Key Markets Globally at https://yougov.co.uk/topics/media/articles-reports/2021/03/18/services-used-stream-music-poll

in the third quarter of 2021.[4] Netflix is still the most popular audio-visual streaming service in the UK, with an estimated 14 million subscribers.[5] Therefore, in its goal to encourage and reward the dissemination of music, copyright is seen to be succeeding.

However, creators have argued that they are not being fairly remunerated. For example, in the music industry, the Ivors Academy reported that 8 out of 10 songwriters earn less than £200 a year from streaming.[6] UK Music criticised YouTube for the 'shameful rates' paid to the music industry for digital music consumption.[7] This was recognised by the then Minister for Digital and the Creative Industries, Margot James MP, who stated that she was not satisfied with the current remuneration that platforms offer artists in her evidence to the DCMS select Committee on Live Music in 2019.[8] This limited capacity for earning from music was, of course, exasperated by the COVID-19 pandemic which reduced other revenue streams for music creators, such as live performance.[9]

Therefore, copyright is arguably failing in its duty to encourage and remunerate music creators in the streaming era. In order to reach its goal, copyright must balance the rights of relevant stakeholders by granting certain privileges with appropriate limitations. Whether the regulation strikes this balance fairly is a question that needs to be considered frequently, because the context of creativity and access to creativity is always evolving with technology and cultural development, and in response so should the regulation.[10]

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[4] Spotify Form 6-K US Securities and Exchange Commission at https://d18rn0p25nwr6d.cloudfront.net/CIK-0001639920/987e6532-2973-492e-a32e-a0101893920f.pdf

[5] M. Sweney, Netflix Could Lose 750,000 UK Subscribers as Disney Takes Control of Hit Shows https://www.theguardian.com/media/2022/jan/24/netflix-could-lose-750000-uk-subscribers-as-disney-takes-control-of-hit-shows#:~:text=Netflix%20is%20still%20the%20most,million%2C%20according%20to%20Ampere%20Analysis

[6] 8 out of 10 music creators earn less than £200 a year from streaming, Ivors Academy at https://ivorsacademy.com/news/8-out-of-10-music-creators-earn-less-than-200-a-year-from-streaming-finds-survey-ahead-of-songwriters-and-artists-giving-evidence-to-a-select-committee-of-mps

[7] UK Music, *Securing the Talent Pipeline* (September 2018) 3 and 12.

[8] DCMS Committee Oral evidence: Live Music HC 733 (Wednesday 5 December 2018) Margot James MP Q366 at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/live-music/oral/93357.pdf

[9] 'Live music and teaching are the main ways in which music creators make a living from music.' D. Hesmondhalgh, R. Osborne, H. Sun and K. Barr, *Music Creators' Earnings in the Digital Era* (UK Intellectual Property Office, 2021), 34; in 2020, the music industry's contribution to the UK economy decreased by 46% from £5.8 billion in 2019 to £3.1 billion. *This is Music 2021* (UK Music, 2021), 5.

[10] H. Bosher, *Copyright in the Music Industry*, Edward Elgar, 2021.

1.1. THE REGULATION OF STREAMING UNDER UK LAW

Under UK law, streaming is not defined per se, and there is no legislative reference to streaming as a specific technology. This is intentional, as the intention of the law is to be technological neutral so that it may remain relevant in light of technology developments. However, UK copyright law does, of course, apply to streaming activities under the reproduction right,[11] communication to the public and making available.[12]

2. UK REGULATION OF LEGAL STREAMING SERVICES

For the purposes of this section 'legal streaming services' refers to internet providers that offer access to a catalogue of musical or audiovisual works with the proper authorization of copyright holders, such as, for music, Spotify, Deezer, Apple Music, KuGou Music, and for movies and tv series, Netflix, Amazon Prime, Youku, Disney+. They are offered by providers either for free in advertising-based models or on upon a monthly subscription fee.

2.1. MANAGEMENT OF COPYRIGHT ASSETS BETWEEN RIGHTSHOLDERS AND LEGAL STREAMING SERVICES

Copyright holders licence the use of their rights or catalogues of rights to legal streaming services via contracts. These contracts are subject to non-disclosure clauses and therefore the specifics of these agreements are unknown.

In the music industry, the rightsholders then distribute royality payments to the creators of the music, but the data around and calculations of these payments is mostly unknown. TikTok is an example of a legal streaming platform that did not originally seek to make such agreements with music rightsholders for the use of their music on the social media platform. TikTok was making an impact on music discovery and pushing songs up the charts, to the degree that rightsholders began to include TikTok campaigns in their marketing strategies. The UK Music Managers Forum signed a partnership deal with TikTok, so that managers can work directly with them.[13] However, at the same time, industry organisations were try-

[11] Copyright, Designs and Patents Act 1988, section 17. (Hereafter CDPA).
[12] *Ibid*., s.20.
[13] A. Paine, TikTok teams with Music Managers Forum (Music Week 2020) https://www.musicweek.com/management/read/tiktok-teams-with-music-managers-forum/079854

ing to negotiate and secure licensing deals with TikTok and threatening legal action against the social media platform for copyright infringement in the absence of such an agreement.[14]

Despite some initial push-back from TikTok, in July 2020, it signed licensing deals with independent distributors, and came to an agreement with the US National Music Publishers Association (NMPA), giving NMPA members the ability to opt-in to a licensing framework that allows them to benefit from their works included on TikTok.[15] Since then TikTok has become a legal streaming service, although, as previously mentioned, the terms of these deals are unknown.

2.2. INITIATIVES THAT AIM AT ENSURING A FAIR SHARE OF AUTHORS AND PERFORMERS IN THE REVENUES YIELDED BY STREAMING SERVICES

The UK Government currently offer some intiatives that aim at ensuring a fair share of remuneration for authors and performers. For example, there is a tax relief system that provides about 20% of a film production budget, if the entire film is made in the UK. Government funding is also available, such as around 11 million pounds for BBC Films and about 15 million pounds for the BFI. However, this investment is significantly lower than that of major streaming platforms such as Netflix. In 2019, Netflix produced 221 projects, including 153 originals and a budget exceeding $1bn in Europe, and a budget of $13bn worldwide.[16] The Creative Industries Federation argues that more needs to be done because research shows that entrepreneurs in the creative industries find it harder to secure finance from mainstream lenders and investors than those in other sectors.[17]

2.3. THE UK ECONOMICS OF STREAMING INQUIRY

One area of significant developement that is ongoing in the UK at present, is the consideration of amendments to copyright law in order to address the economics of streaming in the music industry.

[14] Music companies threaten to sue TikTok over copyright (Financial Times, 2020) https://www.ft.com/content/1b3b78ea-32a3-4237-8b79-3595820eeb63

[15] C. Rosenbaum, TikTok and NMPA Reach a Global Partnership Agreement: Exclusive (Billboard, 2020) https://www.billboard.com/articles/business/9422985/tiktok-nmpa-global-partnership-agreement-music-publishers

[16] R. S. Gibson, Entertainment Streaming Platforms Are Affecting the UK Film Industry https://www.hg.org/legal-articles/entertainment-streaming-platforms-are-affecting-the-uk-film-industry-52917

[17] Unleashing Creative Innovation Policy Paper and Recommendations (Creative Industries Federation, 2021).

In October 2020, the UK Government Digital, Culture, Media and Sport (DCMS) Select Committee launched a formal inquiry into the economics of music streaming. Nearly 300 pieces of written evidence were submitted, and further witnesses were called to provide oral evidence including artists, songwriters, producers, music companies, trade bodies, collecting societies, government ministers and streaming platforms. Thereafter, the DCMS Committee published the Economics of Music Streaming Report in July 2021, proposing an assortment of momentous recommendations that could have transformative consequences for the music industry. These included (amongst other things) that the Government should implement legislative measures providing equitable remuneration for streaming, contract adjustments and rights revocation, that the Competition Markets Authority (CMA) should launch an investigation into the major labels and the Advertising Standards Agency (ASA) should regulate playlist curations.[18]

The UK Government published its response in September 2021,[19] which acknowledged a concern that the UK's regulatory framework have not kept pace with the changes brought about by streaming. Whilst stating that the Committee's Report provided invaluable insight, it also noted that more targeted research and evidence is needed to inform the action that it should take. As such, there were three main pillars to the Government's response:

(1) Establish a music industry contact group with senior representatives from across the music industry to drive action and examine stakeholder views on the key issues, including equitable remuneration, contract transparency, and platform liability.

(2) Establish two technical stakeholder working groups. The first will work to agree standards for contract transparency and establish a code of practice for the music sector and the second to address data issues and develop minimum data standards for the industry.

(3) Launch a research programme, alongside stakeholder engagement.

In November 2022, the DCMS Select Committee called together music industry experts and stakeholders (including the author) to examine the progress of these actions.[20] Subsequently, the Select Committee published an report which called for further progress on the implementation of their recommendations. They committed to keeping this work under review.[21]

[18] This is not an exhaustive list, see Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 103–108.

[19] Digital, Culture, Media and Sport Committee Economics of Music Streaming: Government and Competition and Markets Authority Responses to Committee's Second Report (HC 719, 22 September 2021).

[20] H Bosher, 'Progress report on UK Economics of Music Streaming Recommendations', The IPKat, https://ipkitten.blogspot.com/2022/11/progress-report-on-uk-economics-of.html

[21] DCMS Select Committee, Economics of music streaming: follow-up (January 2023).

At the same time, the Copyright (Rights and Remuneration of Musicians) Bill[22] was presented by Kevin Brennan MP to the House of Commons and the Second Reading debate took place on 3 December 2021. The Bill aims to address some of the legislative needs raised by the Inquiry and recommended by the Committee. The Government are unlikely to take this Bill any further until the outcomes of the further research are published, or any agreements from the stakeholder groups are made. Nevertheless, the Inquiry, the recommendations and the Bill all contributed to the discourse around fair copyright remuneration for creators in the streaming era, with the potential to actualise beneficial change for creators.

The following subsections discuss the recommendations of the Select Committee, which also appear in the Bill, in more detail.

2.3.1. Equitable remuneration for streaming

Equitable remuneration (ER) is an international legal concept in copyright law, that typically seeks to effectuate creator's rights in situations where the transaction costs would make an exclusive right impractical.[23] The purpose of this law is to enable the creator to receive a reward that corresponds to a fair share of the revenue generated by the exploitation of their work.[24] It is a statutory reward, in place of a performer's exclusive rights that they have assigned or transferred, which presupposes that the ordinary working of the market is insufficient, and as such ER is required to protect creators who are inevitably in a weaker bargaining position at the point of transferring their rights.

ER is provided for at international level by the art. 12 of Rome Convention,[25] which states that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Similarly, the WPPT[26] provides ER for performers and phonogram owners.

At EU level, arts 5(1) and 8(2) of the Rental Rights Directive[27] make provisions for ER, where the rental right has been transferred or assigned, and where a

[22] A Bill to make provision about the rights and remuneration of musicians and other rights holders and for connected purposes at https://bills.parliament.uk/bills/2901

[23] P. Goldstein and P. B. Hugernholtz, *International Copyright Principles, Law and Practice*, OUP, 2019, 100.

[24] Laddie, Prescott and Vitoria, *The Modern Law of Copyright*, LexisNexis, 2018, 2163.

[25] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961.

[26] WIPO Performances and Phonograms Treaty (WPPT) 1996 arts 9, 13 and 15. See also World Copyright Treaty art.7(3).

[27] Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property [1992] OJ L346/61.

phonogram is published for commercial purposes, or a reproduction of such phonogram is used, broadcast, or communicated to the public, respectively.

ER had existed in the UK since 1934,[28] but following the implementation of the Rental Rights Directive, there are two rights to ER under UK Law. First, for the exploitation of sound recording of performers rights, and second, for the rental of copyright and performers rights. Under the Copyright, Designs and Patents Act 1988 (CDPA) s.182D, the performer is entitled to ER when the sound recording is played in public, or the recording is communicated to the public. In relation to the rental right, ER is provided under the CDPA ss.93B (for copyright) and 191G (for performers rights). These rights are unwaivable and non-transferable, except to a collecting society for the purpose of enabling it to enforce the rights.[29] In practice, this means that when a sound recording is broadcast or communicated to the public (other than making available) or where the creator has transferred their rental right, Phonographic Performance Ltd (PPL)[30] collect a royalty payment from the user of the work and pays it equally to the performer and the rightsholder. PPL currently has the right to licence the online transmission of radio, television, and certain types of online streaming services, including live streaming and customised streaming.

However, PPL does not licence music services that offer downloads or on-demand streams of individual music tracks, such as Spotify and Apple Music, or services that enable the upload of content by the general public, such as YouTube and social media platforms. This is because ER does not currently apply to the making available right, meaning by way of on-demand services, and therefore excludes streaming.[31] This was the fundamental issue raised in the Inquiry. Some evidence argued that the law unnecessarily distinguishes between broadcast and communication to the public on the one hand (which includes radio) and on the other hand, on-demand technology (including streaming). The basis for this argument was first, that the streaming market is replacing that of radio, and secondly, that in some ways streaming can be akin to radio, particularly when the user passively listens to an algorithmic playlist, although it is different when the user makes their own selection.

From a technical perspective, both radio broadcast and online stream transmission are two different technologies but from a copyright law perspective, both are

[28] When PPL agreed to pay 20% of its net revenue to named artists, and later 12.5% to the Musicians Union in 1946 for session musicians, after considerable lobbying from performers who sought to be entitled to a share of the income generated from the public performance and broadcasting revenue. R. Arnold, *Performers' Rights*, Sweet & Maxwell, 2021, 109.

[29] CDPA 1988, s.93B.

[30] British music copyright collective for performers and recording rightsholders.

[31] CDPA 1988 s.182CA(1), the two words 'otherwise than' preclude equitable remuneration from applying to making available.

captured by copyright under communication to the public.[32] In fact, the origins of communication to the public are found in the development of the copyright holder's right to restrict performance of their work. The WIPO Copyright Treaty 1996 which rationalised and synthesised this protection by establishing full coverage of the communication right, intended to provide a technology-neutral right, where the technical means by which the communication was made was irrelevant, in order that any future technical development be included within the provision.[33]

As such, much of the evidence from creators argued that ER should apply to streaming, so that on top of the existing arrangement between the labels and the platforms, and the labels and the artists, PPL can collect a royalty payment when a song is streamed, and distribute it 50/50 between the artist and the label. The mechanism would circumvent the label agreement and therefore avoid being lost in any un-recouped debt, creating a new income stream for artists from streaming. On the other hand, companies including the major multinational record labels Universal, Sony and Warner and independents such as Jazz Re:freshed, as well as the trade bodies representing these stakeholders BPI and AIM, argued that streaming should be classified as 'making available', thereby excluding it from ER.

Previously, however, European Commission research argued that, as a result of economic and technological developments, the making available right covers an increasingly wide array of forms of exploitation which increases its weight in the overall bundle of rights held by creators and therefore a rebalancing is required. They suggested a number of ways to do this, including introducing an unwaivable right to obtain ER for making available, based on the same rationale behind the adoption in the Rental and Lending Rights Directive.[34] Likewise, the European Commission acknowledged that creators require appropriate remuneration in return for the transfer of their rights as 'a prerequisite for a sustainable and functioning marketplace of content creation, exploitation and consumption.'[35] Otherwise, granting exclusive rights to creators without securing appropriate and proportionate remuneration for the exploitation of their work means as much as granting them no rights at all. Unsurprisingly therefore, the introduction of the DSM Directive[36] included a provision that Member States shall ensure that where authors

[32] CDPA1988 s.20(2)(a) 'communication to the public by electronic transmission, and in relation to a work include—(a)the broadcasting of the work'.

[33] H. Bosher, *Law, Technology and Cognition*,Routledge, 2019,123 and 128; Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 9, referring to H. Bosher, Written Evidence to the Streaming Inquiry at https://committees.parliament.uk/writtenevidence/18852/pdf/

[34] Europe Economics, L. Guibault, O. Salamanca and S. van Gompel, *Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances*, EU Commission, 2015, 154.

[35] EU Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules', COM(2016) 593, 5.4.1.

[36] Directive 2019/790 on copyright and related rights in the digital single market and amending directives 96/9 and 2001/29 [2019] OJ L130/92 art.18.

and performers licence or transfer their exclusive rights for the exploitation of their works, they are entitled to receive appropriate and proportionate remuneration.

The Association of European Performers Organisations argued that this is best implemented by Member States as a right where a performer has transferred or assigned the exclusive right of making available on demand, and independent of any agreed terms for such transfer or assignment, the performer shall have the right to obtain an ER to be paid by the user for the making available to the public of their fixed performance,[37] thereby implementing ER for streaming.

The Select Committee disagreed with the evidence of the companies, stating that the classification of making available, as it currently exists under UK law, does not consider the complexities of streaming that sets it apart from other modes of consumption. The Select Committee therefore recommended that the Government addresses these inconsistencies and incongruities by exploring ways to provide performers with a right to ER when music is consumed by digital means, stating that 'given that the benefits from streaming have disproportionately accrued to the record labels it is unsurprising that many contributors to our inquiry have called for a right to equitable remuneration to be applied to streaming.'[38] To implement this, the Report recommended that the Government legislate in order that performers enjoy the right to ER for streaming, by *'amending the CDPA 1988 so that the making available right does not preclude the right to equitable remuneration, using the precedent set by the co-existence of the rental right and right to equitable remuneration in UK law.'*[39] The Report nominated the remuneration to be paid by the rightsholders, (i.e. the record labels) rather than the streaming services, to the performers through their collecting societies.

In its response, the Government stated that this is a complex area and that it takes the concerns of music creators seriously. Therefore, it will launch work to better understand the issues of fairness in creator's and performer's remuneration.[40] Ultimately, this means that further research will be undertaken to assess how ER might be implemented and ascertain its potential effects on different parts of the music industry. Depending on the outcome of this further investigation, the Government could implement legislation to introduce ER for streaming. As Tom Gray has stated, this would mean 'suddenly, for the first time in history, money

[37] Political Guidelines for the implementation of Article 18 of the 2019 Copyright Directive (2019) AEPO-ARTIS.

[38] Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 34.

[39] Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 43.

[40] Digital, Culture, Media and Sport Committee, Economics of Music Streaming: Government and Competition and Markets Authority Responses to Committee's Second Report (House of Commons, 22 September 2021) HC 719, 3.

goes directly into the pockets on the first stream, irrespective of what awful contract terms an artist has … This produces an income from stream one for artists and an income for our entire music community'[41] (since it provides for non-featured artists, who typically transfer their rights in exchange for a one-off session fee rather than a royalty). How the right will be presented in law and in practice will also be determined in view of the research to be undertaken.

Further research was commissioned by the UK intellectual property office but experienced a delay, and as of early 2023 we are still awaiting the report. In the meantime, music industry groups were set up by the UK IPO and have made some progress on issues such as transparency and minimum data standards but have not negotiated on the issue of remuneration.

2.3.2. Recapture rights and contract adjustments

As mentioned above, in order to effectively achieve its function, copyright must balance the rights of each of the stakeholders through limitations such as scope, term and exceptions. Another way that copyright can be restricted to balance stakeholder interests is through limitations on freedom of contract.[42] Concern for the position of creators has prompted some countries to regulate the remuneration clauses in copyright contracts.[43] As demonstrated by the EU Commission research,[44] problems arise for creators who are locked into long contracts, with relatively unfavourable terms, that they cannot re-negotiate if their position improves. This was also addressed in the DSM Directive, which requires Member States to ensure that where creators licence or assign their rights, they are entitled to 'appropriate and proportionate remuneration.'[45] Furthermore, inspired by the German 'best seller' clause,[46] subsequently adopted by the Netherlands,[47] the Di-

[41] Digital, Culture, Media and Sport Committee Oral Evidence: Economics of Music Streaming, HC 868, 24 November 2020 (House of Commons, November 2020) Q10.

[42] See L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, Kluwer Law International, 2002.

[43] P. Goldstein and P. Bernt Hugernholtz, *International Copyright Principles, Law and Practice*, OUP, 2019, 251, e.g. French law prohibits lump sum payments in all but limited situations and requires that the creator benefit proportionally through royalties in the work's revenue, French Intellectual Property Code art.L.131-4.

[44] Europe Economics, L. Guibault, O. Salamanca and S. van Gompel, *Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances*, EU Commission, 2015, 139.

[45] Directive 2019/790 on copyright and related rights in the digital single market and amending directives 96/9 and 2001/29 [2019] OJ L130/92 art.18(1).

[46] German Copyright Act art.32a.

[47] Netherlands Copyright Act art.25c(1).

rective provides that additional remuneration can be claimed when the remuneration originally agreed upon turns out to be disproportionately low compared to the subsequent revenue derived from the exploitation of the work.[48]

The Committee Report stated that the music industry market is oligopolistic, meaning that the market is dominated by a small number of large buyers, which concentrates demand and keeps prices down at the expense of the sellers. As a result, the terms under which the major music groups, in particular, acquire the rights to music favour the majors at the expense of the creators, resulting in the majors disproportionately benefiting from music streaming relative to creators overall.

The labels' evidence emphasised that performers are presented with more choice than ever before regarding the terms under which they can release their music. However, academic evidence argued that contracts agreed before, and even during, the advent of the streaming era do not sufficiently reflect the consequences of streaming on revenue sources for artists. There is also the broader issue of uneven bargaining power in these contractual relationships, as the Musicians Union argued, a right to contract readjustment would better correlate remuneration to proven market success and ensure more ethical business practices in the industry as a whole.[49]

Other jurisdictions already provide contract restrictions, for example, under US law creators can, in certain circumstances, terminate a transfer or assignment of their copyright after 35 years.[50] For songs created on or after 1 January 1978, the creator can send a notice and terminate the agreement. This is a unique rule under US law and does not apply in any other country, although other types of contract restrictions exist elsewhere. Likewise, the DSM Directive introduced contract adjustment mechanisms for creators, which already existed in certain Member State including a 'use it or lose it' clause to allow creators to have their rights returned to them if their work is not being exploited.[51]

The Committee recommended that the Government expand creator rights by introducing into the CDPA both a right to recapture works and a right to contract adjustment, where an artist's royalties are disproportionately low compared to the success of their music.[52] The Report suggested that the right to recapture should occur after a period of 20 years, which, it stated, is longer than the periods where many labels write off bad debt, but short enough to occur within an artist's career.

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[48] Directive 2019/790 on copyright and related rights in the digital single market and amending directives 96/9 and 2001/29 [2019] OJ L130/92 art.20(1).

[49] Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 66.

[50] US Copyright Act 1976 s.203.

[51] Directive 2019/790 on copyright and related rights in the digital single market and amending directives 96/9 and 2001/29 [2019] OJ L130/92 art.22.

[52] Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 67.

The Report also urged Universal and Warner to waive unrecouped debts of legacy contracts, in line with some independent labels which already had a policy of forgiving debts after a certain period of time. Since giving evidence in the Inquiry, Sony announced that it would pay through on existing unrecouped balances for deals made before 2000.

Again, the Government responded that further analysis would be required on this issue and therefore it will commission research, particularly by looking into countries that have implemented similar measures. Depending on the outcome of this research, this could mean that legislative measures are implemented into the CDPA that provide creators with new abilities to recapture their rights, and for successful creators with a statutory right to additional remuneration when their initial payment, agreed under the contract, is disproportionately low compared to subsequent revenues derived from the exploitation of their creations. In the UK, copyright and contract are traditionally separate bodies of law and therefore introducing specific copyright contract regulation would be a significant reform. However, as mentioned, it would also keep the rights of UK creators in line with those of their EU counterparts following the DSM Directive. The result of these reforms could therefore provide creators with greater leverage when negotiating contracts with music companies, ensure a fairer distribution of wealth for creators and prevent UK creators from being disadvantaged compared with creators in other jurisdictions.

This research was commissioned by the UK Intellectual Property Office and is expected to be published in early 2023.

2.3.3. Launch competition and markets authority investigation

The Inquiry highlighted that the major music groups currently dominate the music industry, both in terms of overall market share in recording and (to a lesser extent) in publishing, but also through vertical integration, their acquisition of competing services and the system of cross-ownership. Evidence suggested that the majors' share of the UK recording industry is more concentrated than the global market, despite being US-based companies. AIM stated that the independent community accounts for 25% of the UK recording market, thereby putting the majors' share at 75%. The Report also referred to the recent *TuneIn*[53] judgment which stated that Warner and Sony 'account for more than half of the market for digital sales of recorded music in the United Kingdom, and about 43 percent globally.' Naturally, this was disputed by the labels in their evidence submitted to the Inquiry.

[53] *Tunein Inc v Warner Music UK Ltd* [2021] EWCA Civ 441; [2021] Bus. L.R. 1119.

The Committee recommended that the CMA should undertake a full market study into the economic impact of the majors' dominance. To which, the Government responded that the CMA is an independent regulator, but that it had directed the Committee's recommendation to the CMA, although it is for the CMA to decide how best to use its resources to deliver its objectives in making markets work well for consumers and businesses.

The CMA announced that it would undertake a market study into the major labels. In a letter dated 19 October 2021, the CMA stated that it would conduct a market study, and that in light of the concerns it will prioritise it to be the next market study that the CMA launches.[54] A CMA market study is an examination into the causes of why a particular market may not be working well. One possible outcome of a market study is a market investigation reference.[55] If, following a market investigation, the CMA does find an infringement of competition law, it can impose penalties and/or make directions to end the infringement.[56] If the CMA further investigates and finds that there have been agreements between the labels to fix prices, share markets, rig bids or limit output at the expense of the interests of customers, this could lead to prosecution for the criminal cartel offence, the maximum penalty for which is five years imprisonment and/or an unlimited fine.[57] The intervention of the CMA In the structural system of the music industry could see a rebalancing of the power dynamic and thus impact the creators' ability to control and be remunerated for the use of their copyright work.

The report was published in November 2022. The CMA concluded that 'whilst outcomes are good for consumers and generally improving for creators, we note that to some extent changes in the sector, precipitated by streaming, have made it harder for some creators'. Nevertheless, the CMA decided not to take any further action, stating: 'While there is limited potential for a competition intervention to improve outcomes, there remains a broader policy debate about the optimal distribution of existing revenues. We think it is a matter for Government and policy-

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[54] Letter from Dr Andrea Coscelli CBE Chief Executive of the CMA, dated 19 October 2021 at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026435/Letter_from_Andrea_Coscelli_on_music_streaming.pdf.

[55] 'Market studies and investigations—guidance on the CMA's approach: CMA3' at https://www.gov.uk/government/publications/market-studies-and-market-investigations-supplemental-guidance-on-the-cmas-approach.

[56] In these circumstances, the CMA will issue a Statement of Objections and a Draft Penalty Statement which will be sent to the concerned parties, the parties are able to make representations and the CMA can issue an infringement decision against them and impose penalties and/or such directions as the CMA considers appropriate to bring the infringement to an end, see "CMA 8: 10. Investigations of outcomes" at https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases#investigation-outcomes.

[57] Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013.

makers to determine whether the current split is appropriate and fair, and to explore whether wider policy interventions are required, for example those relating to the copyright framework and how music streaming licensing rates are set.'[58]

2.3.4. Regulating playlists

Playlists have an important role in the discovery and consumption of digital music and consequently in creators' remuneration. There are three main types of playlists: user-generated, editorial and algorithmic. In each case, the method of song selection and extent of paid-for activity is currently undisclosed, and the influence of behind-the-scenes agreements is unclear. Neither the users nor the creators are informed of the playlist curators' earnings, benefits or deals which are made in order for certain songs to be selected for a playlist.

In the Inquiry, several creators argued that editorial playlists favour those signed to major labels, claiming that 85% of music on Spotify is major-owned and comprise 90% of editorial playlists.[59] In fact, one performer asserted that some playlist curators offered to promote independent performers for a fee, creating a black market for playlisting. Evidence submitted by the author recommended that since curators earn revenue by creating playlists that directly impact the discovery of music and therefore creator and rightsholder earnings, they should be classified as influencers and therefore regulated under ASA standards. Subsequently, the Creators Earnings Report recognised that the importance of playlists is increasing for music creators' success and earnings,[60] stating that in their data collection, an artist said that the most influential playlists can only be accessed by the labels.[61]

The Select Committee recommended that where curators are paid, or receive benefits in kind, for playlisting, they should be subject to a code of practice developed by the ASA, similar to social media influencers, to ensure that the decisions they make are transparent and ethical.[62] The Government agreed with this recommendation and has already engaged with the ASA, which has highlighted that every instance of the interaction of commercial and editorial expression requires consideration on its own merits. The Government has also engaged with Ofcom

[58] Competition Markets Authority, Music and streaming market study: final report https://www.gov.uk/government/publications/music-and-streaming-market-study-final-report

[59] Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 78.

[60] D. Hesmondhalgh, R. Osborne, H. Sun and K. Barr, *Music Creators' Earnings in the Digital Era* UK Intellectual Property Office, 2021, 91 and 92.

[61] ibi.), 93.

[62] Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 78.

and is working with the DCMS on further research in relation to algorithmic playlisting.[63]

The ASA currently provides specific guidance for influencers,[64] which says that the code applies to branded content posted on social media when the person is paid in some way, regardless of how many followers the person may have. It specifies, and to some extent enforces, that influencers must be transparent about their sponsorships and partnerships by ensuring that advertisements are clearly labelled as such. As a result of this recommendation, the way that playlists are curated and presented to users could change. It is likely that a similar transparency system would be implemented, whereby playlist curators and publishers must declare the relationship between themselves and the choice of tracks on their playlists.

Another interesting legal discussion that has recently transpired in a UK case, was wether a Spotify playlist infringed a compilation album. A dispute arose after dance record label Ministry of Sound took legal action against Spotify claiming copyright infringement for their compilation albums. Spotify argued that Ministry overestimated the creative process behind creating its music compilations and that they were therefore not protected by copyright. The case settled out of court and so no judicial decision on the matter was made.[65] However Bonadio and Lucchi suggest that it does not seem far-fetched to argue that a DJ set might constitute a collection of works protectable, for example, under the EU Database Directive, which accords copyright protection to *'databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation.'*[66] They believe that the originality requirement would probably be met if, through the selection or arrangement, the disc jockey expressed their creative ability in an original manner by making free and creative choices.[67]

3. ILLEGAL STREAMING SERVICES

For the purposes of this section 'illegal streaming services' refers to websites that provide access to streams of musical or audiovisual works without any authorization from copyright owners, including peer-to-peer platforms (e.g. Emule,

[63] Digital, Culture, Media and Sport Committee, Economics of Music Streaming: Government and Competition and Markets Authority Responses to Committee's Second Report (House of Commons, 22 September 2021) HC 719, 7.

[64] 'An Influencer's Guide to making clear that ads are ads' at https://www.asa.org.uk/static/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf.

[65] *Ministry of Sound Group Ltd v Spotify Ltd* (2014) HC13C03860.

[66] See art.3(1) of Directive 96/9 on the legal protection of databases.

[67] E. Bonadio and N. Lucchi, 'How far can copyright be stretched? Framing the debate on whether new and different forms of creativity can be protected '(2019) 2 *I.P.Q.* 115-135, 124.

Limewire), BitTorrent websites, and websites hosting content (e.g. MegaUpload, WatchSeries, CouchTuner).

3.1. COPYRIGHT INFRINGEMENT BY ILLEGAL STREAMING SERVICES

As mentioned, UK copyright law applies to streaming activities under the reproduction right,[68] communication to the public and making available.[69] As Efroni explains; 'in the course of streaming media process, two types of temporary reproduction usually takes place. First RAM buffer internal reproductions occur in the computer of the end user. Additionally, external reproductions occur on network servers … reproduction occurs automatically and they are imperceptible to end users, who are often completely unaware of those intermediate technical steps.'[70]

For the purposes of infringement, case law demonstrates that the work need not actually be consumed. There appears to be no requirement that any transmission actually takes place as the restricted act requires only that members of the public 'may' access the work.[71] In other words: 'The independence is lacking in the case of exploitation in a digital environment. In order to make a work available, the work needs to be stored, and in order to enjoy the work it needs to be copied and made perceptible to the end user.'[72] Depreeuw described this overlap as a cause for concern, as it creates legal uncertainty and further complicates copyright regulation.[73]

In the UK, both platform operators and users of these illegal streaming services have been found to be infringing copyright.[74] For example, in a recent UK case, Justice Adam Johnson stated that 'the streaming process causes the user's computer or device to create copies of the content in the memory of the device, which is an act of infringement under section 17(1) CDPA.'[75] The judge referred to the

[68] CDPA 1988, s.17.
[69] *Ibid*., s.20.
[70] Z. Efroni, *Access Right: The Future of Digital Copyright Law*, Oxford University Press, 2011, 210.
[71] N. Caddick, G. Davies and G. Harbottle, *Copinger and Skone James on Copyright*, Sweet & Maxwell, 2005, para 7.
[72] S. Depreeuw, *The Variable Scope of The Exclusive Economic Rights in Copyright*, Kluwer Law, 2014, 485.
[73] *Ibid*., p. 484.
[74] *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure (a trading name), David Richardson, AV Station Plc, Malcolm Chamberlain, Michael Madden, Sanjay Raval, David Greenslade, SR Leisure Ltd, Phillip George Charles Houghton, Derek Owen* [2008] EWHC 1411 (Ch).
[75] *Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Netflix Studios, LLC, Paramount Pictures Corporation, Universal City Studios Productions LLLP, Warner Bros. Entertainment*

key case, *FAPL v. British Telecommunication*[76] where the court granted a blocking injunction that required six internet service providers to block customer access to streaming servers which were infringing the copyright of the Football Association Premier League by streaming live match footage without permission. In this case, Arnold J explained that the users of the streaming service infringe copyright by way of copying; 'in the course of streaming the [copyright protected] Works, users who access a stream cause their computer, mobile device or set-top box to create copies of the Works in the memory of those devices…Such copying obviously takes place in the UK insofar as users are located in the UK.'[77] He goes on to say that the operators of the streaming websites infringe copyright by way of communication to the public.[78]

3.2. INJUNCTIONS AGAINST INTERNET INTERMEDIARIES AND NOTICE-AND-TAKE-DOWN MEASURES

3.2.1. Blocking Injunctions

UK law provides for blocking injunctions under section 97A of the CDPA 1988, implementing Art 8(3) of the EU Information Society Directive,[79] providing the court with the discretion to grant an injunction against a service provider in the battle against online copyright infringement.

The cost of the implementation of the blocking injunction is to be decided at national level. In the UK, the position was set out by the Supreme Court in 2018, in the *Cartier* decision.[80] Reversing the *Cartier* decisions of the Court of Appeal and High Court – and all other previous cases – which had all ruled that ISSPs should bear the cost of compliance in full, Lord Sumption held that rights holders should indemnify ISSPs against the reasonable cost of complying with blocking orders.[81] In this judgment, Lord Sumption stated that website-blocking injunctions are wholly directed for the protection of rights holder's legal rights and 'the

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Inc. v British Telecommunications PLC, EE Limited, Plusnet PLC, Sky UK Limited, Talktalk Telecom Limited, Virgin Media Limited [2021] EWHC 3438 (Ch), 16.

[76] *FAPL v. British Telecommunication* [2017] EWHC 480 (Ch).

[77] *Ibid*., 31.

[78] *Ibid*., 33-38.

[79] Introduced by reg.27 of the Copyright & Related Rights Regulations 2003.

[80] *Cartier International AG & Ors v British Telecommunications Plc & Anor* [2018] UKSC 28.

[81] The costs of implementing the blocking order also include: (i) the cost of acquiring and upgrading the hardware and software required to block the target sites and (ii) the cost of managing the blocking system, including customer service, and network and systems management. The ISSPs do not complain about having to bear these two types of costs. The Supreme Court observes that these two costs would be incurred in any event for other reasons, for example to block access to child abuse images or to provide facilities for parental controls. *See*, *ibid*., 5.

protection of intellectual property rights is ordinarily and naturally a cost of the business which owns those rights and has the relevant interest in asserting them.'[82]

3.2.2. Notice and Takedown

The notice and takedown (NTD) system is considered an effective supplementary way of dealing with online copyright infringement. It appears that NTD has been primarily utilised by big trade associations, for example in a study looking at NTD behaviour in relation to DMCA,[83] it was noted that between 2008 and 2012, 58.6% of the notices came from three trade associations, led by the UK recording industry association, the British Phonographic Industry (BPI), together with the International Federation of the Phonographic Industry and the Recording Industry Association of America.[84]

YouTube's Content ID technology, which was launched in 2007, is a copyright management system that allows rights holders to effectively manage their content online. Utilising the system, rights holders are able to identify user-uploaded videos that contain their copyright content and then decide how they wish to proceed. For example, a rights holder can request that a video be blocked, access data around the video or monetise the video with advertising (over 90% choose this option).[85] In Google's most recent report, they establish that the Content ID technology scans videos uploaded to YouTube against more than 600 years of audio and visual reference content. with over 98% of their copyright issues resolved via this system.[86] In relation to music in particular, 99.5% of reported claims were generated and resolved automatically with the copyright holders' preferred action. This meant that the copyright holder only had to intervene in 0.5% of cases.[87]

One of the criticisms of Content ID is that the technology cannot recognise the purpose of the use and therefore copyright exceptions are not secured. Therefore, only users who are knowledgeable and proactive enough to submit a counter notification or dispute a Content ID claim can benefit from a copyright exception[88]. However, in the vast majority of cases, the parties do not have the same bargaining power and the procedure tends to favour the rightsholder. This is because the user has only limited opportunity for dialogue with the rightsholder to try to persuade

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[82] *Cartier International AG & Ors v British Telecommunications Plc & Anor* [2018] UKSC 28.
[83] In the US, the Digital Millennium Copyright Act 1998 (DMCA) provides a foundation for the notice and takedown procedure, whereas in the EU, E-Commerce Directive provides a legal basis for NTD procedure. D. Seng, 'The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices' (2014) 18 *Virginia Journal of Law and Technology* 369.
[84] *ibid.*, p. 393.
[85] *ibid.*, p. 27.
[86] *ibid.*
[87] Google, *How Google Fights Piracy Report* (Google, 2017), p. 26.
[88] H. Bosher, 'Key Issues Around Copyright and Social Media: Ownership, Infringement and Liability' (2020) 15(2) *JIPLP,* 123–133.

them and ultimately the decision to block or transfer remuneration from advertising lies with the copyright owners.[89]

Along with NTD, a common approach taken by copyright holders in recent years has been to manage the use of their work rather than chase every infringer, in order to benefit from their use. For example, copyright holders can offer the user a licence agreement and, in turn, monetise from advertising, or simply send a notice and takedown request or Letter Before Claim. YouTube has paid out over $2 billion to rights holders who have monetised their content, and over 90% of all Content ID claims across the platform result in monetisation, where rights holders have opted to leave the content up and monetise through advertising rather than make an infringement claim.[90] Another study that supports this is that of Erickson and Kretschmer, which concludes that 'high-quality and popular parodies might remain live on the platform because rights holders have determined that the revenue gains from monetizing those unauthorized parodies weigh against any potentially negative effects such as substitution.'[91]

Having said that, NTD has received criticism since such notices can be misused and can potentially erode other rights.[92] The lack of clear, codified procedures of NTD might also come as a shortcoming. Unlike the US or China, which employ codified NTD procedures, the EU and UK still remain without clear guidelines on the requirements of notices and the consideration of a requirement to include evidence. Such areas might require further clarification by way of constant negotiation with online platforms.[93] Nevertheless, NTD systems are a valuable part of the enforcement landscape, both through court injunctions and ISSP procedure.[94] However, these procedures need to account for copyright exceptions and the fundamental rights of all the parties involved.

4. SEMI-LEGAL STREAMING SERVICES

For the purpose of this section, 'semi-legal streaming services' are those that provide access to copyrighted works through streaming without requiring the need for an authorization from copyright owners, notably because they would be covered by an exemption of liability as host providers. They include video-sharing

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[89] S. Jacques, *The Parody Exception in Copyright Law*, OUP Oxford 2019, 208.
[90] Google, *How Google Fights Piracy Report*, Google, 2017, 6.
[91] K. Erickson and M. Kretschmer, 'This Video is Unavailable': Analyzing Copyright Takedown of User-Generated Content on YouTube' (2018) 9(1) *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 59.
[92] J. Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement*, Springer, 2018, 169.
[93] Under Article 13 of the proposed Directive on Copyright in the Digital Single Market.
[94] K. Garstka and P. Polański, 'Notice and search-down injunctions in online copyright enforcement: should they be embraced or forgotten?' (2019) 41 *European Intellectual Property Review* 155-162, 162.

platforms such as YouTube or Dailymotion, hosting services or other similar content providers.

4.1. LIABILITY OF SEMI-LEGAL STREAMING SERVICES UNDER UK LAW

As mentioned, YouTube uses a technology called Content ID, where rightsholders upload their material and the software scans the videos on YouTube for a match. If an infringement is detected, the rightsholder is offered options that they can take including to mute, remove, monetise from advertising or leave the video as it is.[95] One of the criticisms of this system is that the technology cannot recognise the purpose of the use within the video and so it does not know if a copyright exception applies.[96] Therefore, copyright exceptions are only used by users who are knowledgeable enough to submit a counter-notification or dispute a Content ID copyright infringement claim. Even then, in the vast majority of cases, the parties do not have the same bargaining power and the procedure tends to favour the rightsholder. This is because the user has limited opportunity to speak to the rightsholder to try to persuade them, and ultimately the decision to block or transfer remuneration from advertising is in the hands of the copyright owners.

Although the legal position of YouTube is not necessarily clear, and may change in the EU under the new Copyright Directive. There is an on-going issue in the EU, where the EU court has been asked to consider if YouTube infringes the communication to the public rights of copyright holders under EU law. The Advocate General's opinion[97] was that YouTube does not perform acts of communication to the public under EU Law[98] and is protected by another law that we call the hosting safe harbour.[99] The hosting safe harbour provides, in a nutshell, that platforms can avoid copyright infringement claims by putting in place certain processes such as the notice and takedown system on YouTube.

The CJEU held that a platform operator does perform an own communication to the public when it does not limit itself to providing physical facilities but rather

[95] https://support.google.com/youtube/answer/2797370?hl=en-GB

[96] S. Jacques, *The Parody Exception in Copyright Law*, OUP Oxford 2019, 208.

[97] *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH* (C-682/18), and *Elsevier Inc. v Cyando AG* (C-683/18) ECLI:EU:C:2020:586, opinion of AG Saugmandsgaard Øe.

[98] Information Society Directive, Article 3(1).

[99] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, Article 13.

performs a necessary and deliberate intervention that results in giving the public access to protected content.[100]

However, in the opinion the AG explicitly stated that his conclusion was decided under current EU law as existing prior to the adoption of the DSM Copyright Directive, therefore he was not applying Article 17 law, which created a new obligation that providers of online content sharing services perform an 'act of communication to the public or an act of making available to the public' (i.e. copyright infringement) when giving the public access to works protected by copyright or to other subject matter that have been uploaded by its users.[101] The effect of Article 17 of the Digital Single Market Directive[102] will depend on how the Directive is transposed into national law. It could change social media platform's ability to operate and self-regulate in the way that they currently do. Kivistö suggested that content identification technologies would suffice in meeting the requirements under the directive.[103] However, Rosati advocates that whilst the requirement of 'best efforts' could mean different levels of effort depending on the language, 'best' entails a qualitative assessment of one's own efforts such as in the phrase 'they did their best'.[104] This suggests that indeed the current levels of effort would suffice for platforms such as YouTube and perhaps even an extension of the self-regulation in the assessment of such efforts.

Semi-legal content streaming services such as YouTube have not been found to be infringing copyright under UK law, and the UK has stated that it will not be implementing the EU DSM Copyright Directive or an equivalent at this current time.

An emerging trend in this area is the self-regulation of such platforms. For example, in September 2019, YouTube amended its copyright policy relating to

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[100] *Frank Peterson v Google LLC, YouTube LLC, YouTube Inc., Google Germany GmbH* (C-682/18), and *Elsevier Inc. v Cyando AG* (C-683/18) ECLI:EU:C:2021:503.

[101] The reason the AG could not form his opinion based on this new law was because, technically whilst the DSM Copyright Directive is in force, it has not yet been transposed into national law.

[102] Directive (EU) 2019/790 of The European Parliament And Of The Council Directive on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[103] M. Kivistö, 'The DSM Directive: A Package (Too) Full of Policies in T Pihlajarinne', J. Vesala and O. Honkkila (eds) *Online Distribution of Content in the EU*, Edward Elgar 2019, 19.

[104] E. Rosati, 'DSM Directive Series #5: Does the DSM Directive Mean the Same Thing in all Language Versions? The Case of 'Best Efforts' in Article 17(4)(a)', The IPKat 2019: https://ipkitten.blogspot.com/2019/05/dsm-directive-series-5-does-dsm.html

how copyright holders can respond to infringements of their music on the platform.[105] The changes affect the way that copyright is enforced on YouTube and is a recent example of social media self-regulation.[106]

YouTube currently provides rights holders with tools to enable the enforcement of their copyright on the platform.[107] If an infringement is detected, the rights holders are offered options in action that they can take such as to mute, remove, monetise or leave the video with infringing content. One of the criticisms of this system is that the technology cannot recognise the purpose of the use and therefore copyright exceptions are not secured.[108] The benefit of a copyright exception is often only utilised on YouTube by users who are knowledgeable enough to submit a counter notification or dispute a Content ID claim. Even then, Jacques argues that in the vast majority of cases, the parties do not have the same bargaining power and the procedure tends to favour the rightsholder, although the user has limited opportunity for dialogue with the rightsholder to try to persuade them, ultimately the decision to block or transfer remuneration from advertising lies with the copyright owners.[109]

In mid-2019, YouTube released a statement explaining that they noticed a trend of aggressive manual-claiming of very short music clips used in monetized videos.[110] They explained that they felt that this was particularly unfair as the claim transfers all the revenue from the uploader to the claimant, regardless of the amount of music claimed. As a result, YouTube announced changes to their manual-claiming policy to improve fairness in the creator ecosystem, while still respecting copyright owners' rights to prevent unlicensed use of their content.[111] Previously, a copyright holder could make a claim on any video that uses their content without permission, regardless of how short the clip in dispute was. The claim enabled the copyright holder to either block the video or prevent the uploader from monetising the video, and choose to receive the full revenue from a video that included any amount of their content.[112]

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105 https://youtube-creators.googleblog.com/2019/08/updates-to-manual-claiming-policies.html . See also; H. Bosher, 'YouTube Takes Copyright Law into Their own Hands with new Policy on Music Infringement', The IPKat 2019: https://ipkitten.blogspot.com/2019/09/youtube-takes-copyright-law-into-their.html

106 Self-regulation concerns norm setting and enforcement by private actors, without the intervention of the state; P. B. Hugenholtz, 'Codes of Conduct and Copyright Enforcement in Cyberspace' in I. A. Stamatoudi (ed) *Copyright Enforcement and the Internet*, Kluwer The Netherlands, 2010, discussing the advantages and disadvantages of self-regulatory approaches.

107 https://support.google.com/youtube/answer/2797370?hl=en-GB

108 S. Jacques, *The Parody Exception in Copyright Law*, OUP Oxford 2019, 208.

109 *Ibid*.

110 https://youtube-creators.googleblog.com/2019/08/updates-to-manual-claiming-policies.html

111 *Ibid*.

112 https://support.google.com/youtube/answer/9142671#manual_claiming

However, under the new policy, enforced from September 2019 copyright owners will no longer be able to use the YouTube Manual Claiming Tool to monetise from creator videos that use very short or unintentional uses of music.[113] This change only applies to claims made with the Manual Claiming tool where the rightsholder actively reviews the videos and not claims made through the Content ID match system. Without the option to monetise from the uploader's video, YouTube's statement suggested that copyright owners can choose to leave very short or unintentional uses unclaimed.[114] However, since the new policy was triggered by a trend of aggressive manual claiming, this seems unlikely. It is more likely that copyright owners will instead choose to prevent monetisation of the video by the uploader or block the video altogether. YouTube acknowledged that the changes might result in more blocked content in the short-term, but that they felt that it was an important step towards striking the right balance over the long-term.[115]

In their statement YouTube mentioned several times how they felt and what they felt was fair and unfair. YouTube's feelings are representative of the movement towards platform control and enforcement of copyright rules.[116] Wang advocates for such self-regulating, arguing that currently Internet Service Providers are obliged to undertake too many responsibilities against copyright infringement on their platforms, which unjustifiably shifts the burden of enforcement from copyright owners to the ISPs, and this in turn stifles their freedom to operate..[117] However, the risk is that these rules do not necessarily correspond with the perimeters of the law. For example, what does YouTube deem to be 'very short' or 'unintentional'? Under the UK CDPA 1988 there is a copyright exception for incidental inclusion,[118] but using a very short clip could still constitute an infringement.

One of the present challenges is that YouTube can only have an all or nothing monetising rule. This does not reflect what would happen in a legal dispute, where the copyright holder would receive a percentage of the revenue. However, YouTube could invest in a proportionate system that does reflect the normal legal procedure whereby a percentage of the revenue is shared with the copyright holder. This could be operated through the same claim system but instead of transferring the full revenue from the video, the copyright holder could be limited to percentage share of the revenue that equates to the amount of work used. For example, if the copyright protected material makes up 10% of the video, then the copyright holder receives 10% of the revenue stream.

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[113] https://youtube-creators.googleblog.com/2019/08/updates-to-manual-claiming-policies.html
[114] *Ibid*.
[115] *Ibid*.
[116] P. B. Hugenholtz, 'Codes of Conduct and Copyright Enforcement in Cyberspace' in I A Stamatoudi (ed) *Copyright Enforcement and the Internet*, Kluwer The Netherlands, 2010, 304.
[117] J. Wang, *Regulating Hosting ISPs' Responsibilities for Copyright Infringement: The Freedom to Operate in the US, EU and China*, Springer 2018, 199.
[118] CDPA 1988, section 31.

The change in YouTube's manual claiming policy will likely be considered a positive step towards balancing the rights of the copyright holders by the users, but will no doubt be unwelcomed by copyright holders as it will result in a loss in revenue for them. Whilst the new policy seems to be fair, in some respects, the change reflects the reality of copyright infringement and enforcement being regulated by online sharing platforms which may or may not be aligned with legal principles, calling into question the legitimacy of their policies.

5. CONCLUSION

For the UK, it is a pivotal time in addressing the impact of streaming on the creative industries. Following the Streaming Inquiry, there have been calls from the Select Committee and those within the music industry for a more coherent national strategy for music. Streaming has presented new challenges for regulation but is providing an opportunity to rediscover the value and importance of the creative sector.