

**The UK economics of music streaming inquiry**  
**Dr Hayleigh Boshier, Brunel University London**  
**For publication: Entertainment Law Review 2022, 33(2), 50-56**

Keywords: *Copyright; Inquiries; Music industry; Select committees; Streaming media*

## Introduction

Following Tom Gray's #BrokenRecord Campaign<sup>1</sup> and #FixStreaming,<sup>2</sup> a campaign led by both the Ivors Academy and Musician Union, the UK's parliamentary Digital, Culture, Media and Sport (DCMS) Select Committee launched an Inquiry into the impact of music streaming on artists, record labels and the sustainability of the wider music industry. Subsequently, the Committee's Recommendations called for "a complete reset" of music streaming and the need for significant change within the music industry.<sup>3</sup> The Government responded<sup>4</sup> to these recommendations with steps for further investigation, meanwhile a Private Members' Bill has been brought forward, by Kevin Brennan MP, attempting to legislate on the issues raised by the Inquiry. This article considers why the investigation was launched and provides an overview of the Streaming Inquiry, the subsequent DCMS Committee recommendations and Government response, whilst discussing the potential impact of such reforms in the context of copyright utility in the streaming era.

## Does copyright serve music makers in the streaming era?

Broadly speaking, the Anglo-American justification for copyright emphasises the economic role of copyright 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. As such, 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. Hence, the quintessential role of copyright in the music industry is to encourage, by way of remuneration, control and recognition, the creation and dissemination of music. On the one hand, the major record labels are reporting record-high profits,<sup>5</sup> and the UK's digital music income was estimated to be over 1 billion in 2020 alone.<sup>6</sup> IFPI's data demonstrated that streaming subscription music listening increased by 51% in

---

<sup>1</sup> Written evidence submitted by Tom Gray (#BrokenRecord Campaign) (PEG0181) at <https://committees.parliament.uk/writtenevidence/10156/pdf/> [accessed 10 December 2021].

<sup>2</sup> Musicians' Union, "It's Time to Fix Streaming and Keep Music Alive" at <https://musiciansunion.org.uk/campaigns/fix-streaming-and-keep-music-alive> [accessed 10 December 2021].

<sup>3</sup> Digital, Culture, Media and Sport Committee Economics of Music Streaming Second Report of Session 2021–22 (HC 50, 15 July 2021) 25 and 103.

<sup>4</sup> 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).

<sup>5</sup> T. Ingham, "Sony Music's Quarterly Streaming Revenues Burst Above \$1bn for the First Time" Music Business WorldWide 28 October 2021 at <https://www.musicbusinessworldwide.com/sony-musics-quarterly-streaming-revenues-burst-above-1bn-for-the-first-time/> [accessed 10 December 2021].

<sup>6</sup> "Music industry in the United Kingdom—statistics & facts" at <https://www.statista.com/topics/3152/music-industry-in-the-united-kingdom-uk/#dossierKeyfigures> [accessed 10 December 2021].

2021.<sup>7</sup> Spotify, the second largest music streaming platform worldwide,<sup>8</sup> reported 381 million listeners and 172 million subscribers in the third quarter of 2021.<sup>9</sup> Therefore, in its goal to encourage and reward the dissemination of music, copyright is seen to be succeeding.

However, music creators (including performers) have argued that they are not being fairly remunerated. For example, the Ivors Academy reported that 8 out of 10 songwriters earn less than £200 a year from streaming.<sup>10</sup> UK Music criticised YouTube for the “*shameful rates*” paid to the music industry for digital music consumption.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

The growing dissatisfaction with musicians’ earnings and impact of the pandemic on the music industry led to the DCMS Select Committee’s decision to examine the economics of music streaming. This is discussed in the following sections, together with the Government response in respect of the recommendations made by the Committee.

## The DCMS streaming inquiry and Government response

---

<sup>7</sup> IFPI, Engaging with Music 2021 at <https://www.ifpi.org/ifpi-releases-engaging-with-music-2021/> [accessed 10 December 2021].

<sup>8</sup> 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/> [accessed 10 December 2021]; 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> [accessed 10 December 2021].

<sup>9</sup> “Spotify Form 6-K” US Securities and Exchange Commission at <https://d18rn0p25nwr6d.cloudfront.net/CIK-0001639920/987e6532-2973-492e-a32e-a0101893920f.pdf> [accessed 10 December 2021].

<sup>10</sup> “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/> [accessed 10 December 2021].

<sup>11</sup> UK Music, “Securing the Talent Pipeline” (September 2018) 3 and 12.

<sup>12</sup> “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> [accessed 10 December 2021].

<sup>13</sup> “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.

<sup>14</sup> H. Boshier, *Copyright in the Music Industry* (Edward Elgar, 2021).

The DCMS Committee, chaired by Julian Knight MP, launched its examination of the impact of music streaming on artists, record labels and the sustainability of the wider music industry in October 2020. 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.<sup>15</sup>

The Government published its response in September 2021,<sup>16</sup> 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.

The following sections will consider in more detail some of the recommendations made by the Committee, including the Government response and the potential impact if the recommendations were to be implemented.

## 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.<sup>17</sup> 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.<sup>18</sup> 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.

---

<sup>15</sup> 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.

<sup>16</sup> 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).

<sup>17</sup> P. Goldstein and P. Bernt Hugernholtz, International Copyright Principles, Law and Practice (OUP, 2019), 100.

<sup>18</sup> Laddie, Prescott and Vitoria, The Modern Law of Copyright (LexisNexis, 2018), 2163.

ER is provided for at international level by the Rome Convention art.12,<sup>19</sup> 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<sup>20</sup> provides ER for performers and phonogram owners.

At EU level, the Rental Rights Directive arts 5(1) and 8(2)<sup>21</sup> make provisions for ER, where the rental right has been transferred or assigned, and where a 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,<sup>22</sup> 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.<sup>23</sup> 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)<sup>24</sup> 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.<sup>25</sup> 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

---

<sup>19</sup> Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 26 October 1961.

<sup>20</sup> WIPO Performances and Phonograms Treaty (WPPT) 1996 arts 9, 13 and 15. See also World Copyright Treaty art.7(3).

<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> CDPA 1988 s.93B.

<sup>24</sup> British music copyright collective for performers and recording rightsholders.

<sup>25</sup> CDPA 1988 s.182CA(1), the two words "otherwise than" preclude equitable remuneration from applying to making available.

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 captured by copyright under communication to the public.<sup>26</sup> 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.<sup>27</sup>

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:refreshed, 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.<sup>28</sup> 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.*"<sup>29</sup> 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<sup>30</sup> included a provision that Member States shall ensure that where authors 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

---

<sup>26</sup> 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".

<sup>27</sup> H. Boshier, *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. Boshier, "Written Evidence to the Streaming Inquiry" at <https://committees.parliament.uk/writtenevidence/18852/pdf/> [accessed 10 December 2021].

<sup>28</sup> 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.

<sup>29</sup> EU Commission, "Impact Assessment on the Modernisation of EU Copyright Rules" COM(2016) 593, 5.4.1.

<sup>30</sup> 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.

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,<sup>31</sup> 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.”*<sup>32</sup>

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.”*<sup>33</sup>

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.<sup>34</sup> 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 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”*<sup>35</sup> (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.

---

<sup>31</sup> “Political Guidelines for the implementation of Article 18 of the 2019 Copyright Directive” (2019) AEPO-ARTIS.

<sup>32</sup> Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 34.

<sup>33</sup> Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 43.

<sup>34</sup> 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.

<sup>35</sup> Digital, Culture, Media and Sport Committee Oral Evidence: Economics of Music Streaming, HC 868, 24 November 2020 (House of Commons, November 2020) Q10.

## 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.<sup>36</sup> Concern for the position of creators has prompted some countries to regulate the remuneration clauses in copyright contracts.<sup>37</sup> As demonstrated by the EU Commission research,<sup>38</sup> 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.*”<sup>39</sup> Furthermore, inspired by the German “*best seller*” clause,<sup>40</sup> subsequently adopted by the Netherlands,<sup>41</sup> the Directive 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.<sup>42</sup>

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.<sup>43</sup>

---

<sup>36</sup> See L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International, 2002).

<sup>37</sup> P. Goldstein and P. Bernt Hugenholtz, *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.

<sup>38</sup> 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.

<sup>39</sup> 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).

<sup>40</sup> German Copyright Act art.32a.

<sup>41</sup> Netherlands Copyright Act art.25c(1).

<sup>42</sup> 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).

<sup>43</sup> Digital, Culture, Media and Sport Committee, *Economics of Music Streaming* (House of Commons, 15 July 2021) HC 50, 66.

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.<sup>44</sup> 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.<sup>45</sup>

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.<sup>46</sup> 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. 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.

The last two recommendations discussed in this paper relate to broader concerns than specific copyright regulation, but rather the context of the operation of copyright in the music industry, namely competition law and marketing regulation.

## 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

---

<sup>44</sup> US Copyright Act 1976 s.203.

<sup>45</sup> 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.

<sup>46</sup> Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 67.



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*<sup>47</sup> 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.

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 has since announced that it will indeed be undertaking 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup> 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.

## Regulate 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

---

<sup>47</sup> *TuneIn Inc v Warner Music UK Ltd* [2021] EWCA Civ 441; [2021] Bus. L.R. 1119.

<sup>48</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1026435/Letter_from_Andrea_Coscelli_on_music_streaming.pdf) [accessed 10 December 2021].

<sup>49</sup> “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> [accessed 10 December 2021].

<sup>50</sup> 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> [accessed 10 December 2021].

<sup>51</sup> Enterprise Act 2002, as amended by the Enterprise and Regulatory Reform Act 2013.

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.<sup>52</sup> 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,<sup>53</sup> stating that in their data collection, an artist said that the most influential playlists can only be accessed by the labels.<sup>54</sup>

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.<sup>55</sup> 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 and is working with the DCMS on further research in relation to algorithmic playlisting.<sup>56</sup>

The ASA currently provides specific guidance for influencers,<sup>57</sup> 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.

## Conclusions and next steps

---

<sup>52</sup> Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 78.

<sup>53</sup> D. Hesmondhalgh, R. Osborne, H. Sun and K. Barr, Music Creators' Earnings in the Digital Era (UK Intellectual Property Office, 2021), 91 and 92.

<sup>54</sup> D. Hesmondhalgh, R. Osborne, H. Sun and K. Barr, Music Creators' Earnings in the Digital Era (UK Intellectual Property Office, 2021), 93.

<sup>55</sup> Digital, Culture, Media and Sport Committee, Economics of Music Streaming (House of Commons, 15 July 2021) HC 50, 78.

<sup>56</sup> 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.

<sup>57</sup> "An Influencer's Guide to making clear that ads are ads" at <https://www.asa.org.uk/static/uploaded/3af39c72-76e1-4a59-b2b47e81a034cd1d.pdf> [accessed 10 December 2021].

As discussed, the Government response to the Select Committee recommendations included three main approaches: establishing a music industry contact group and two technical stakeholder working groups, as well as launching a research programme. In relative terms, things are moving along extremely quickly. The contact group has already been established, with the set-up of the two technical working groups underway. Likewise, the Government, working with the Department for DCMS and the UK IPO, have established four research projects to address the Government's responses highlighting the need for further investigation. As mentioned, the CMA and the ASA have also already been engaged by the Government in relation to the recommendations around competition law and marketing regulation.

At the same time, the Copyright (Rights and Remuneration of Musicians) Bill<sup>58</sup> has already been 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.

This article argued that whilst copyright is doing one part of its job, encouraging dissemination, very well, it is failing in its role to fairly remunerate creators in light of streaming. Luckily, copyright is not a natural phenomenon; it is human made, meaning that in places where it is not working, it can be changed. Copyright was not made to be static. It does, and must, constantly evolve to adapt to new technologies and consumption behaviours, in order to uphold a fair balance between stakeholders and achieve its purpose of encouraging, by way of remuneration, control and recognition, the creation and dissemination of creative works.

The Inquiry has advanced the conversation as to the need for copyright reform in light of streaming technology and music consumption. The recommendations of the Select Committee were seriously considered by the Government, which has agreed with many of the concerns and issues raised and has demonstrated tangible steps to move forward with further investigation into potential solutions, many of which are already underway. As such, there is a real possibility for updating copyright law to ensure for a fairer and more equitable music industry.

---

<sup>58</sup> 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> [accessed 10 December 2021].