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The Re-Intermediation of the Music Industries Value Chain: Market Definition, Streaming Gatekeepers and the Control of Data

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Keywords: music streaming, earnings, market definition, competition law, copyright, data portability

Abstract

This Opinion responds to the Consultation by the Competition and Markets Authority (CMA) for its proposed market study on the ‘Music and streaming market’. Three key areas are identified that require particular attention:

- (1) the definition of ‘music streaming market’, in particular understanding audio in a wider context, and where music streaming is a complementary but secondary component of business models;
- (2) the relationships between self-release creators/micro-producers and music streaming services, in particular the role of established and new-entrant gatekeeping intermediaries, such as collective management organisations (CMOs) and artist and label (A&L) services;
- (3) the control, interoperability and portability of data, in particular content identifiers, content metadata (such as ownership) and data associated with the digital identity of artists (such as their followers and other information about users and use).

The Opinion draws on empirical research from legal and socio-cultural perspectives examining Intellectual Property issues in artist labour markets, along with research in the field of Competition Law in the context of multisided platforms.

Introduction: The Music Streaming Debate

In October 2020, the House of Commons Digital, Culture, Media and Sport (DCMS) Select Committee announced it would examine the impact of streaming on the future of the music industry. Responding to longstanding complaints that the boom in streaming services was not matched by sustainable royalty payments, Committee Chair Julian Knight MP said:

“We’re asking whether the business models used by major streaming platforms are fair to the writers and performers who provide the material. Longer-term we’re looking at whether the

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economics of streaming could in future limit the range of artists and music that we're all able to enjoy today.”¹

The resulting inquiry took a wide range of evidence, offering in the process a revealing (while contested) picture of the economic impact of music streaming on artists, record labels and the sustainability of the wider music industry. The final report of the DCMS Committee, running to 118 pages and relying on 214 written evidence submissions, was published on 19 July 2021.² It called for, “a broad yet comprehensive range of legislative reforms and regulatory interventions”, including measures regulating copyright contracts (“a right to equitable digital music remuneration, a right to recapture the rights to works after a period of time and the right to contract adjustment if their works are successful beyond the remuneration they receive”), provisions “placing greater licensing obligations on [user generated content] UGC-hosting services”,³ as well as taking advice from the Competition and Markets Authority “as to whether competition in the recorded music market is being distorted”.

The UK Government’s response to the Report, published on 22 September 2021, directed the Committee’s recommendation for a market study to the Competition and Markets Authority (CMA) with the proviso that, “[a]s an independent competition authority, 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.”⁴

On 27 January 2022, the CMA published its Statement of Scope for a ‘Music and streaming market study’, summarising that “the DCMS Select Committee report on the ‘Economics of music streaming’ argued that the major music groups – Sony Music Group, Universal Music Group and Warner Music Group – ‘dominate’ the industry and have consolidated their market position by becoming the largest asset owners of recording and song rights. The report also pointed to commentary that the major music groups are experiencing historic

¹ DCMS Committee press release of 15 October 2020, available at <https://committees.parliament.uk/work/646/economics-of-music-streaming/news/120055/dcms-committee-examine-impact-of-streaming-on-future-of-the-music-industry/>. All web citations in this article were checked on 1 March 2022.

² CREATE, the UK Copyright and Creative Economy Centre based at the University of Glasgow, had submitted evidence to the inquiry (cited in the final report), with a focus on the differences between platforms’ online business models and on the need to reassess life of copyright contracts. Kenny Barr and Martin Kretschmer, “Copyright contracts and the economics of music streaming” (2020) Submission by CREATE (EMS0189) to the Parliamentary Inquiry by the Digital, Culture, Media and Sport Committee into ‘The economics of music streaming’, available at <https://committees.parliament.uk/writtenevidence/15406/html/>.

³ DCMS Committee, *Economics of Music Streaming* (Second Report of Session 2021–22, HC 50 incorporating HC 868 2019-21, at p. 4), available at <https://committees.parliament.uk/work/646/economics-of-music-streaming/publications/>. The European Union had just introduced related interventions with Directive (EU) 2019/790 on Copyright in the Digital Single Market (CDSM Directive). Article 17 contains new obligations for Online Content-Sharing Service Providers (OCSSPs) whose “main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes” (Art. 2 definition). Articles 18 to 22 introduce provisions for the “Fair remuneration in exploitation contracts of authors and performers”, discussed by Séverine Dusollier, Valérie-Laure Benabou, Lionel Bently, Estelle Derclaye, Marie-Christine Janssens, Martin Kretschmer, “Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market” (2020) 11 *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* (JIPITEC), 133. Information relating to adoption and implementation of the CDSM Directive is catalogued here: <https://www.create.ac.uk/policy-responses/eu-copyright-reform/>; <https://www.create.ac.uk/cdsm-implementation-resource-page/>.

⁴ The DCMS Minister of State for Digital and Culture and BEIS Minister for Science, Research and Innovation wrote to Andrea Coscelli, Chief Executive of the CMA, requesting “that the CMA gives consideration to the Committee’s recommendation” (Economics of music streaming: Government and Competition and Markets Authority Responses to Committee’s Second Report, Second Special Report of Session 2021–22, HC 719, published on 22 September 2021, p. 2).

levels of profitability. In contrast, it is argued that songwriters and performers receive only a small proportion of revenue.”⁵

This Opinion is based on CREATE’s submission to the CMA consultation on its Statement of Scope for the Market Study. It addresses three questions:

- Are there areas within the stated scope of the market study that the CMA should particularly focus on, or any important areas it has missed? (key question 4, p. 36)
- Are there any key technological or other changes anticipated in the music industry, particularly anything that could impact competition in the future, either between music companies or between music streaming services? (key question 3, p. 36)
- Whether there are any barriers to music creators switching and/or taking advantage of new type of deals or services to bring their music to market? (para 95(a), p. 31)

As nascent markets emerge and develop in the digital cultural industries, the rapidly changing technological and business-model landscape presents opportunities but also considerable challenges, not least in terms of defining markets and evaluating how these emergent markets are functioning for participants. This is particularly apparent in the streaming sphere. Two aspects of the ongoing debate around music streaming deserve particular attention: challenges contingent in defining the music streaming market; and the role played by legacy and new-entrant intermediaries in the music streaming value chain.

It is noted that some themes of particular interest to the authors of this Opinion and CREATE as a research centre are beyond the proposed scope of CMA’s Market Study, namely the regulation of copyright contracts and the application of a right to equitable remuneration.⁶

Defining the (music) streaming market

The first main proposition in this Opinion is that the market study ought to consider the relevant market in more depth. It is essential to engage in a process of market definition. The extent of this market definition exercise may vary and be more or less formal depending on the context of the analysis, but it is crucial to identify the competitive landscape and understand the interactions between different economic actors in the market.⁷ A definition of the market determines the focal products (goods/services) at the different levels of the supply chain, and the relationships between economic actors in the supply of those focal products.⁸

⁵ Competition & Market Authority (CMA), *Music and Streaming Market Study, Statement of Scope*, paragraph 5, available at <https://www.gov.uk/cma-cases/music-and-streaming-market-study>.

⁶ The Statement of Scope says at paragraph 105 (under *Areas where the CMA does not intend to focus*): “These are important matters of wider policy that the CMA considers the Government and the IPO [Intellectual Property Office] are best placed to examine via their ongoing programme of research. For example, as part of this work the Government will assess different remuneration models, such as equitable remuneration and the artist growth model; and the IPO has recently published research on creators’ earnings in the digital era”.

⁷ See Magali Eben, “The Antitrust Market Does Not Exist: Pursuit of Objectivity in a Purposive Process” (2021) 17 *Journal of Competition Law and Economics*, 586-619; Miguel Sousa Ferro, *Market Definition in EU Competition Law* (Cheltenham: Edward Elgar, 2019) 30.

⁸ See Magali Eben, *Addressing the Main Hurdles of Product Market Definition for Online Services: Products, Price, and Dynamic Competition* (2019) PhD thesis, University of Leeds, available under restricted access at: <https://etheses.whiterose.ac.uk/26343/> (monograph with Hart Bloomsbury Publishing forthcoming); Magali Eben and Viktoria H.S.E. Robertson, “Digital Market Definition in the European Union, United States, and Brazil: Past, Present, and Future” (2021) *Journal of Competition Law and Economics*, advance access, available at <https://doi.org/10.1093/joclec/nhab018>

In its Statement of Scope, the CMA proposes that the study will cover the “music streaming value chain”, encompassing in particular the supply “via music streaming services” (paras 82-83). This limitation of the scope raises two crucial questions: what is ‘music streaming’, and is music streaming part of a broader (audio) streaming product? We submit that a narrowing of the study purely to ‘music streaming’ without first considering these questions runs the risk of overlooking competitive constraints and/or competitive concerns.

Technological and business-model innovation in cultural sectors presents considerable definitional challenges, to policymakers and regulators.⁹ Indeed, while streaming as a means of accessing recorded music has been widely available for well over a decade, the legal definition of music streaming remains fiercely contested.¹⁰ The answer may differ depending on the focus of the analysis, so that even if there were an accepted legal definition, it may not or only partially overlap with the focal product in a competition analysis.

To determine the focal product from the demand perspective, it is necessary to understand the consumer want a service satisfies. The Statement of Scope frames the term “music streaming services” as follows (paragraph 54), “A music streaming service is, for the purposes of this market study, defined as a service that allows consumers to legally stream recorded music on-demand”.

This assumes that consumers use streaming services particularly for their music content. As reasonable an assumption as this may be, it overlooks the increased diversity of the offering on streaming platforms. Undertakings, particularly in digital markets, are continuously aiming to stay relevant and attractive to consumers by differentiating and expanding their offering.¹¹ They may grow their service offer to include new components. This expansion makes it difficult to draw a hard line: are added services features of a broad focal product or are they products in their own right?¹²

The Statement of Scope recognises this diversity of services in principle, noting in paras 75-76 that music streaming is “part of a wider suite of services available to consumers”, but does not extend this reflection to audio streaming itself. Consumers may consider that ‘music streaming’ is the product they obtain when they use a streaming platform, or they may see it as part of a broader (audio) streaming package, which may also include podcasts or audiobooks or other audio streaming services. This, in turn, changes which platforms/undertakings they consider as alternatives.

The current competitive landscape is more complex than a focus on ‘music streaming’ may indicate. In a similar vein, current consumer demand may shift in the short or medium term, under the influence of changes made by platform operators. Providers of music streaming services operate in dynamic digital settings. Companies frequently bundle and unbundle

⁹ Cf. Barr and Kretschmer (2020).

¹⁰ David Hesmondhalgh, Richard Osborne, Hyojung Sun, and Kenny Barr, “Music Creators’ Earnings in the Digital Era” (2021) London: Intellectual Property Office, p. 94, available at <https://www.gov.uk/government/publications/music-creators-earnings-in-the-digital-era>; Intellectual Property Office (2007) CT84-90/05, available at <https://webarchive.nationalarchives.gov.uk/20140603101156/http://www.ipo.gov.uk/ct849005.pdf>

¹¹ Paul Belleflamme and Martin Peitz, “Growing a Platform” in *The Economics of Platforms: Concepts and Strategy* (Cambridge: Cambridge University Press, 2021) 130; Thomas Eisenmann, Geoffrey Parker and Marshall Van Alstyne, “Platform Envelopment” (2011) 32 *Strategic Management Journal*, 1270-1285; Peter Keen and Ronald Williams, “Value Architecture for Digital Business: Beyond the Business Model” (2013) 37 *Management Information Systems Quarterly*, 643-647; Eben (2019) 14.

¹² See ‘product-or-feature problem’, Eben (2019), 113-115.

online services, assembling the same services in different ways or combining them with wholly new services, with the same components in different ways, or with totally new components. This dynamism makes it difficult to pinpoint when the combination of several services means a new product has arisen, changing consumer demand and thus the competitive relationships in the industry. Not only is the current competitive landscape more complex than indicated, it does not take into account the potential changes in the short to medium term.

This raises questions not merely from the perspective of consumers and their wants, but also for the suppliers on every level of the supply chain. The revenue generation models of music streaming platforms vary, as do the models and shares of revenue creators can obtain from them. For services like Spotify and SoundCloud, music streaming is the core revenue-generating activity. Whereas in the case of many other major music streaming brands such as Amazon, Apple and YouTube, music streaming is a complementary but secondary component of business models reliant on other primary revenue sources.¹³ Where the product itself changes (as the bundle of services offered is modified), the (package) price paid by users covers more and/or different services. This may have consequences for the revenue models adopted and the share of the benefits the creators can derive from them. Moreover, it can have an influence on the position of the ‘majors’ (music groups such as Sony Music Group, Universal Music Group and Warner Music Group), as their bargaining power may vary depending on the relative importance of their input into the overall package offered to consumers.

It is the contention of this Opinion that the market study ought to be used as an opportunity to fully explore the dimensions and dynamics in audio streaming. To comprehensively identify potential competitive concerns, the scope of the study might have to be expanded, by querying whether the focal product is broader than ‘music streaming’, either now or in the foreseeable future.

The nature of relationships between self-release creators/micro-enterprises and music streaming services

The second main proposition advanced is: the market study should evaluate how the market is functioning for self-release music creators and micro-enterprises seeking to commercially exploit works in the music streaming market. Consideration should be given to two important factors that may affect these constituents’ ability to compete in the market. First, the role of third-party distributors in the re-intermediation of the music industries. Secondly, the effects of information asymmetry for those operating outside the corporate structures of large music/media companies.

The Statement of Scope explicitly identifies three key areas of interest that are reflected in the consultation questions. The first is, “competition between music companies” (paras 91-95), with a focus on the services recorded music companies provide to music creators. The second, “competition in music streaming services” (paras 96-98), places the focus on consumer issues. The third area is “agreements and inter-relationships between music companies and music streaming services” (paras 99-101). These are important elements of the value chain, but there is a danger that a key dimension of the market is not afforded

¹³ Barr and Kretschmer (2020).

sufficient attention: the highly mediated nature of music creator/micro-enterprise relationships with music streaming services.

The music copyright industries (music publishing and recording) are dominated by a small number of highly integrated conglomerates with many smaller operators on the margins. The global music streaming sector also displays a high degree of concentration, with a handful of services dominating market share.¹⁴ Similarly, ‘winner take all’ patterns are observable in the distribution of popularity of ‘superstar’ music creators and ‘hit’ works.¹⁵ Counterintuitively, in the streaming sphere where consumers have access to ever-growing catalogues of works to choose from, it has been argued that concentrations of popularity have become even more pronounced than was the case in previous eras.¹⁶ In music streaming, hit songs by superstar artists signed to major music companies remain dominant. In this respect, predictions that the digitally-induced ‘disintermediation’ of the music industries and the ‘long tail’ of demand would significantly correct these skewed patterns of popularity have failed to materialise.¹⁷

Yet it is clear that self-release creators and micro-labels now supply huge volumes of content to the mainstream market in ways that were not practicable in the pre-digital era.¹⁸ Moreover, there is some evidence of modest adjustments in the patterns of demand for works by a greater number of music creators, including those operating outside the major music company system.¹⁹ It is therefore vital that the CMA considers these significant constituencies of stakeholders in the market study and examines how they gain access to the mainstream market. Where services, such as YouTube and SoundCloud, permit user-uploaded content (UUC), other main services including Amazon, Apple and Spotify require individual creators and small-scale producers to engage with third-party digital distributors in order to place recordings on these services. A key role of digital distributors is assigning identifiers to works and administering content metadata, a matter that will be addressed in the third proposition of this submission. Securing entry to these markets invariably requires payment of an up-front fee to the distributor and/or a percentage of revenue generated from exploitation of the works.

Thus, a new class of intermediary, and arguably a new market, has emerged in response to the proliferation of music streaming. The Statement of Scope makes some reference to digital distributors, and artist and label (A&L) services that sit between digital distribution and traditional record companies in terms of level of service provided to creators. It is the contention of this Opinion that greater attention should be afforded to the position of these crucial components in the music streaming value chain.²⁰ Similarly, while the Statement of

¹⁴ Mark Mulligan, “Music subscriber market shares Q2 2021” (midiareserach.com, 2022), <https://www.midiareserach.com/blog/music-subscriber-market-shares-q2-2021>.

¹⁵ Sherwin Rosen, “The Economics of superstars” (1981) 71 *American Economic Review*, 845-858; Robert Frank and Philip Cook, *The winner-take-all society: How more and more Americans compete for ever fewer and bigger prizes, encouraging economic waste, income inequality, and an impoverished cultural life* (New York: Free Press, 1995); Martin Kretschmer, George Michael Klimis and Chong Ju Choi, “Increasing returns and social contagion in cultural industries” (1999) 10 *British Journal of Management*, 61-72, doi: [10.1111/1467-8551.10.s1.6](https://doi.org/10.1111/1467-8551.10.s1.6).

¹⁶ Emily Blake, “Data shows 90 percent of streams go to the top 1 percent of artists”, *Rolling Stone*, 9 September 2020, available at <https://www.rollingstone.com/pro/news/top-1-percent-streaming-1055005/>.

¹⁷ Chris Anderson, *The Long Tail: How Endless Choice is Creating Unlimited Demand* (London: Random House, 2006)

¹⁸ Tim Ingham, “Over 60,000 tracks are now uploaded to Spotify every day. That’s nearly one per second” *Music Business Worldwide*, 24 February 2021, available at <https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/>.

¹⁹ BPI. “More artists reaping the rewards of streaming, BPI data shows” (BPI, 2021), available at <https://www.bpi.co.uk/news-analysis/more-artists-reaping-the-rewards-of-streaming-bpi-data-shows/>; Hesmondhalgh et al (2021) 211.

²⁰ The Statement of Scope (at para 50) explains A&L services as rather benevolent: A&L services “are typically a scaled down version of A&R services provided to either artists or labels, and/or mass market digital distribution with limited

Scope states (at para 40) that the collective management organisations (CMOs) are in the regulatory ambit of the Intellectual Property Office (IPO), these institutions simultaneously represent individual creators and corporate rightsholders in the music streaming ecosystem.

In effect, CMOs are gatekeepers that cannot be circumvented by other music streaming market participants. Therefore, the role of these intermediaries in the music streaming value chain is a matter the CMA should also examine (as acknowledged in paragraph 82 of the Statement of Scope, where CMOs are tentatively bracketed under “other intermediaries”). In this new industry landscape, an array of routes into the streaming market are available to creators and small enterprises. Digital distribution and collective licensing are conduits that allow self-release music creators to place music on major music streaming services. ‘DIY’ operators can eschew the traditional record deal and still operate in the market alongside ‘superstar’ artists and ‘hit’ works. Decisions about what route to follow often amount to a choice of retaining ownership and control of copyright works versus seeking deals that invariably involve ceding some degree of control to a third-party rightsholder such as a record company or a music publisher.²¹

Aside from financial investment in production and promotion that often accompanies such deals, a perceived advantage of partnering with larger entities in the cultural industries is to gain access to informational advantages said to be available to horizontally, vertically and diagonally integrated operators.²² However, a significant and enduring impediment to informed commercial decision-making in this setting is the opacity shrouding the mechanisms that dictate what rightsholders are paid.²³ Therefore, the market study should consider the extent to which opacity might limit these small-operators’ capacity to compete in or enter the music streaming market, while at the same time considering the anti-competitive effect disclosure may have on the market as a whole. In effect, the focus of the study should accommodate an interrogation of experiences of stakeholders that are not engaged in, ‘agreements and inter-relationships between music companies and music streaming services’.

This proposition is closely related to the first (the challenge of market definition), since both require identifying the product and the market from the perspective of the affected actors. Where the concern is with the opportunities of creators and small enterprises, an analysis of the market may have to be refocused to consider their particular demands and concerns.²⁴

Control and Interoperability of metadata

supporting services (such as DIY platforms that allow artists to directly upload their music for distribution to streaming services). These more targeted services typically also offer different pricing models and contract durations and, unlike traditional A&R services, may not include music production or any transfer or licensing of music rights (meaning that the artist would retain these rights). Under an A&L deal the provider typically takes on lower risk and receives a smaller portion of earnings than would a traditional A&R provider. This means that the artist will typically retain a higher portion of earnings from distribution under an A&L deal”. It is noted that the CMA investigation of Sony’s acquisition of AWAL has significant resonance here. “The CMA has provisionally cleared Sony’s acquisition of AWAL, an ‘artist and label’ (A&L) services provider, following an in-depth merger inquiry”, CMA press release of 11 February 2022, available at <https://www.gov.uk/government/news/cma-provisionally-clears-sony-s-acquisition-of-awal>.

²¹ Kenny Barr, *Music copyright in the digital age: creators, commerce and copyright – an empirical study of the UK music copyright industries* (2016). PhD thesis, University of Glasgow, available at <http://theses.gla.ac.uk/7752/>.

²² Gillian Doyle, Richard Paterson and Kenny Barr, *Television Production in Transition* (London: Palgrave Macmillan, 2021) 99.

²³ Kenny Barr, “Theorizing Music Streaming: Preliminary Investigations” (2013) 3 *Scottish Music Review*, 3, available at https://www.create.ac.uk/private/uploads/20131127-161145_40-131-1-SM.pdf; Hesmondhalgh et al (2021).

²⁴ Cf. Eben (2021).

The final proposition of this Opinion is: the market study should closely examine the function of content identifiers, content metadata (such as ownership) and data associated with the digital identity of artists (such as their followers and other information about users and use). In our view, the control over data has become central for structuring the music streaming market. In terms of the Statement of Scope, this comment addresses key question 3 (p. 36, Box 1): “Are there any key technological or other changes anticipated in the music industry, particularly anything that could impact competition in the future, either between music companies or between music streaming services?”

There has been analysis why attempts to combine data between the two codes for works (International Standard Musical Works Code, ISWC) and recordings (International Standard Recording Code, ISRC) have failed repeatedly.²⁵ The industry still does not have single identifiers for what are in effect single files that are streamed. The DCMS Select Committee Report recognised that, “[t]hese data are fundamentally important to the economics of music streaming because they account for who is remunerated, by whom, how and on what terms”.²⁶

This is correct. However, we want to draw attention to a further aspect of data control that is pertinent to the proposed market study. There are severe data obstacles for primary creators to moving their output and digital ‘identity’ (including user information) to a different streaming service.

The first reason is contractual. Because of the nature of copyright agreements, creators often do not have any choice on which streaming platforms their music appears, nor can they withdraw it. Rights have been assigned to intermediaries, often for the life of copyright (in the UK, 70 years for sound recordings, and life of author plus 70 years for the underlying musical works).

The second reason is the ownership of data associated with a creator’s digital identity: knowledge about followers and listeners (who they are, where they access); knowledge about patterns of use (including the effects for playlist curation and recommendations). In the terms of paragraph 95(a) of the Statement of Scope, these are “barriers to music creators switching and/or taking advantage of new type of deals or services to bring their music to market”. Paragraph 103 helpfully seeks, “transparency around business practices such as how playlists are compiled and music recommendations made to consumers; and the collection and use of consumer data”.

²⁵ Attempts to establish a Global Repertoire Database (GRD) received substantial funding from the EU since 2008 but was abandoned in 2014. Negotiations under the umbrella of the DDEX (Digital Data Exchange) standards consortium are ongoing since 2006. Cf. Intellectual Property Office (Lyons, Sun, Collopy, O’Hagan, Curran, Jenner), *Music 2025: The Music Data Dilemma: issues facing the music industry in improving data management* (18 June 2019), available at <https://www.gov.uk/government/publications/music-2025-the-music-data-dilemma>, p. 8: “This multi-layered fragmentation of metadata and a preference for proprietary walled data silos, have inevitably undermined cross-system interoperability”. Senftleben et al. (2022) argue that publishing companies, record companies and CMOs have conflicting incentives to control relationships with suppliers and defend their own role in the industry structure. See Martin Senftleben, Thomas Margoni, Daniel Antal, Balazs Bodó, Stef van Gompel, Christian Handke, Martin Kretschmer, Joost Poort, Joao Pedro Quintais, and Sebastian Felix Schwemer, “Ensuring the Visibility and Accessibility of European Creative Content on the World Market - The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive” (2022) forthcoming *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, available at <http://dx.doi.org/10.2139/ssrn.3785272>.

²⁶ DCMS Committee report *Economics of Music Streaming* (Second Report of Session 2021–22, HC 50 incorporating HC 868 2019-21, at p. 50), available at <https://committees.parliament.uk/work/646/economics-of-music-streaming/publications/>.

To address the contractual barriers, we have recommended elsewhere that reversal of rights to primary creators should be considered after a set period of time (i.e. limiting the assignability of rights for life of copyright), and in any case rights reversion should be ensured in cases of non-exploitation.²⁷ Furthermore, the CMA may consider transparency, interoperability and data portability requirements, where these would alleviate concerns regarding the control of data. These interventions may be considered as remedies on competition grounds (in enforcement action or pursuant to a market investigation reference) if the market study results in findings that the market does not work in the interest of creators and consumers. They could also be implemented through codes of conduct or practice rather than primary legislation. Though there may be an overlap here with the activities of the Digital Markets Unit in case digital platforms were to be designated as having ‘Strategic Market Status’, as noted in the Statement of Scope paragraph 30, data obstacles may also exist on platforms without such designation.²⁸

To address the control of digital identities and user related data, lessons need to be learned from interoperability and portability interventions in other markets. For example, the CMA’s successful Open Banking remedy under the Retail Banking Market Investigation Order 2017 unlocked competition in retail banking.²⁹ A process of technological standardisation and governance enabled consumers and small and medium-sized enterprises (SMEs) to share their bank and credit card transaction data securely with trusted third parties. This facilitates the switching of providers and also incentivises new entrants to provide applications and services.

A less successful precedent is the ‘Right to data portability’ enshrined in Article 20 of the EU General Data Protection Regulation (GDPR, retained in the UK).³⁰ It allows individuals to obtain and reuse their personal data across different services, including copying or transferring personal data from one IT environment to another in a safe and secure way, without affecting usability.

We recommend that within the proposed market study, barriers to data interoperability and portability feature prominently. If the study finds that the market does not work in the interest of consumers, an Open Streaming intervention may offer a potential remedy, ensuring interoperability and independent governance of meta data and application programme interfaces (APIs) associated with key aspects of primary creators’ digital identity.

²⁷ Cf. Martin Kretschmer, “Copyright Term Reversion and the ‘Use-It-or-Lose-It’ Principle” (2012) 1 International Journal of Music Business Research, 44-52, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063759; Rebecca Giblin and Kimberlee Weatherall (eds), *What If We Could Reimagine Copyright?* (Acton: Australian National University Press, 2017); Ula Furgal, “Interpreting EU reversion rights: why ‘use-it-or-lose-it’ should be the guiding principle” (2021) 43 European Intellectual Property Review (E.I.P.R.) 283-291. In the Opinion “Getting Creators Paid: One More Chance for Copyright Law” (2021) 43 E.I.P.R. 279), Kretschmer and Giblin argue that “[r]ather than encouraging the accumulation and warehousing of rights, rights should sit where they can be put to most productive use”. An open letter published with the same Opinion supporting the introduction of a ‘Use-it-or-lose-it’ principle was signed by leading European academics.

²⁸ Magali Eben, The interpretation of a ‘Strategic Market Status’: A response to the public consultation by the UK Government on ‘A new pro-competition regime for digital markets’ (2021) CREATe Working Paper 2021/10, available at <https://zenodo.org/record/5575183#.Yh-UhxPP0QJ>; Martin Kretschmer and Philip Schlesinger, “The birth of platform neo-regulation in the UK” (2022). TechREG Chronicle (January), 25-29, open access version available at <https://pec.ac.uk/assets/publications/The-birth-of-neo-regulation-PEC-Policy-Brief-Nov-2021.pdf>.

²⁹ See CMA update report on Open Banking (5 November 2021): <https://www.gov.uk/government/publications/update-governance-of-open-banking/update-on-open-banking>.

³⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council. For guidance by the Information Commissioner’s Office (ICO) on the portability provision, see <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-data-portability/#ib1>.

Conclusions

This Opinion applauds the approach of the CMA's proposed market study as covering the whole 'music streaming value chain'. It is indeed appropriate that the study "will cover the supply of music to consumers and the supply of services connected with the supply of music to consumers" (para 82).

Our first recommendation is to take seriously the notion of connected services and refer to the latest academic work in defining markets for platforms. Our second comment recommends a focus on new intermediaries between self-release creators/micro-enterprises and music streaming services (such as A&L services), but with particular attention on the (unavoidable) old intermediaries of Collective Management Organisations (CMOs). Thirdly, we stress that control over data has become central for structuring the music streaming market. We recommend a focus on data interoperability and portability.

For reliable non-stakeholder driven information on the music sector, many academic researchers still refer to the studies by the CMA's predecessor, the Monopolies and Mergers Commission's reports from the 1990s on *The Supply of Recorded Music* (MMC 1994) and *Performing Rights* (MMC 1996).³¹ Understanding the music streaming market against these 25 year old benchmarks is an opportunity for the CMA to offer empirical insights of global relevance.

³¹ Monopolies and Mergers Commission, *The Supply of Recorded Music: A Report on the Supply in the UK of Pre-recorded Compact Discs, Vinyl Discs and Tapes Containing Music* (HMSO, 1994), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272098/2599.pdf; Monopolies and Mergers Commission, *Performing rights: A report on the supply in the UK of the services of administering performing rights and film synchronisation rights* (HMSO, 1996), available at https://webarchive.nationalarchives.gov.uk/ukgwa/20111202164943/http://www.competition-commission.org.uk/rep_pub/reports/1996/378performing.htm#full.