



16th October 2015

**House of Lords Select Committee on the European Union
Internal Market Sub-Committee
Inquiry into Online Platforms and the EU Digital Single Market**

About UK Music

1. UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.
2. UK Music exists to represent the UK's commercial music sector, to drive economic growth and promote the benefits of music to British society. The members of UK Music are listed in an annex.

General

3. The UK music industry contributes £3.8 billion to the economy, and saw a year on year growth of 9% in 2013. In addition the sector contributes £2.2 billion in exports and employees 111,000.¹
4. To maintain the industry's strong contribution, it is vital that a fully functioning legitimate digital market exists whereby rightsholders can derive the correct value for the use of their creative content in the online world.
5. UK Music welcomes the opportunity to contribute to the inquiry into online platforms and the EU Digital Single Market as initiated by the House of Lords Select Committee on the European Union Internal Market Sub-Committee.
6. Individual UK Music members are in a position to provide detailed evidence on the practical issues with online platforms and why music rightholders have been unable to benefit fairly from the massive consumption of music that is generating traffic online, and in some cases the vast revenues and high valuations to companies that use music.

¹ <http://www.ukmusic.org/research/measuring-music/>

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7. UK Music supports the position of our members who directly engage with online platforms. We confine our remarks to providing responses to questions 1, 2 and 4.

Specific Questions

Question 1

Do you agree with the Commission's definition of online platforms? What are the key common features of online platforms and how they operate? What are the main types of online platform? Are there significant differences between them?

8. In general we welcome the Commission's definition of online platforms. Its open-endedness ensures that it is technologically neutral and thus future proof.
9. Different and broad definitions throughout the EU framework creates problems. We are concerned about the changing terminology and definitions used - ISPs, online platforms, Internet access providers, information society services. Clarity in terminology and definition is of utmost importance for the functioning of the digital market and the constant introduction of new categories with new definitions is not helpful. E.g. the term internet access providers falls outside the scope of the definition of online platforms whilst they might fall within the definition of information society service in the e-Commerce Directive, in particular when offering additional bundled services as is often the case in practice.
10. The demarcation of terminology is relevant in the interplay between the limitations of liability provided in the e-Commerce Directive and injunctive relief provided in the Information Society Directive.
11. In addition, the lines between hosting service providers and content service providers engaging in the act of communication to the public of protected works under copyright rules have become more difficult to distinguish. This legal uncertainty could create distortions on the online content market where platforms that make content available to the public without a licence compete with licensed services for similar or equivalent services to the consumer. The unclear legal situation can also make it hard for right holders to licence their content with the platforms, or obliges them to accept licensing conditions that are below the potential value of the content.
12. Specifically, the hosting defence provided for under of the E-Commerce Directive applies to 'information society services' of a mere technical, automatic and passive nature that consist of storage of information – the defence protects such services from liability for illegal activity of their users.
13. As a result of ambiguity in the law, different European courts have taken different approaches as to whether services that are available generally to members of the public that offer a broad range of content uploaded by users (both

professional and amateur) as an entertainment package are active or passive and therefore whether they benefit from a limitation on their liability for acts restricted by copyright.

14. Where the defence has been argued to apply to sites enabling access to user-uploaded copyright content, the consequence is that the sites have been able to profit from giving access to content, doggedly avoiding taking responsibility for it. They either operate without a licence from rightholders or remain under licensed, because the uncertainty in the law has reduced the value of the licence. Rightholders and creators are often faced with the prospect of receiving no remuneration and have been left with the unpalatable option of either starting legal proceedings or playing an endless and dispiriting game of 'whack-a-mole' by attempting to have the infringing content taken down (only to see it pop up again immediately afterwards). These illegal services not only deprive creators and rightholders of the opportunity to properly participate in the value created by their content for the services in question but also compete unfairly with legal licensed services, driving down value across the market.
15. It is necessary that such services are (1) clarified, as part of a specific copyright initiative (and not as a broader amendment to the E-Commerce Directive), that they are outside the scope of the hosting defence, and (2) liable for the works they use.

Question 2

How and to what extent do online platforms shape and control the online environment and the experience of those using them?

16. We agree with the assessment of online platforms in para 3.3.1 of the Digital Single Market Strategy² which states that online platforms "can control access to online markets and can exercise significant influence over how various players in the market are remunerated."
17. Similarly, the strategy's identification of concerns that some platforms lack transparency and conduct other detrimental tactics and practices are often echoed at internal UK Music discussions.
18. In order to counter potential problems caused to rightsholders by some online platforms, it is becoming increasingly important for there to be effective means to enforce copyright infringements across EU borders.
19. Specific civil measures exist in the UK, such as blocking orders against internet access providers available in the UK under Section 97A CDPA (implementing Art 8(3) Information Society Directive).
20. The principles of Section 97A CDPA have now been firmly established in various court cases since 2010 (most notably in the initial cases of *Twentieth Century*

² http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf

Fox Film Corp and others v British Telecommunications plc and others [2011] EWHC 1981 (Ch) and *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch)).

21. We recommend monitoring the implementation of Art 8(3) Information Society Directive throughout the European Union to ensure compliance with this provision.
22. It should be clarified that the injunctive relief provided in Article 8(3) Information Society Directive can apply cross border to promote a legitimate Digital Single Market.

Question 4

What problems, if any, do online platforms cause for you or others, and how can these be addressed? If you wish to describe a particular experience, please do so here.

23. The liability of internet intermediaries validly benefitting from Article 14 e-Commerce Directive needs to extend to works which have been notified and taken down but subsequently re-uploaded. The effectiveness of Notice and Takedown systems is reduced given their alleged limitation to the specific link. It is clear that even when rightholders engage in issuing notice and takedown on an industrial scale, material taken down invariably re-appears. It needs to be clarified that the notification of a work triggers actual knowledge regarding the work itself and not only the specific copy of the work uploaded. Technology is available to assist the process and is best applied at the level of the Internet Service Providers, yet its use can be disincentivised by some services as the technology provides evidence of actual knowledge.
24. An additional issue concerns the definition of “Communication to the public,” The “new public” has been introduced in recent decisions of the Court of Justice of the EU when interpreting Article 3 of the Information Society Directive – the communication to the public right.
25. The concept of “new public” brings with it the potential for considerable uncertainty and unfair economic loss for rightholders if a retransmission of a licensed communication to the public may potentially not require a licence, even if the retransmitting service is building its business on serving up this copyright content.
26. This is particularly troubling for the licensing and distribution of music. Music is mostly distributed without DRM and many initial transmissions are to a global audience. Assuming the initial transmission is licensed, it would not be unusual for the valuation placed on the relevant licence to have taken into account the consumption of the relevant content by the recipients of the transmission. The licensee carrying out the initial transmission cannot necessarily know, be

expected to report on or capture the value of future retransmissions by third-party services.

27. Requiring that licensee to take out a licence that provided for adequate compensation for all potential transmissions is likely to place a significant burden on the licensee. Leaving further transmissions out of the scope of the licence in circumstances where retransmissions cannot be licensed would clearly and directly cause huge prejudice to the interests of rightholders.
28. We seek a clarification that a communication to an audience is still a copyright act, even if it is a communication to the same audience.
29. In addition we note that internet transmissions also include the act of reproduction of a musical work and sound recording at the level of the service provider and the user.

Annex

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- FAC – The Featured Artists Coalition – the voice of the featured artists.
- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which works on behalf of over 90,000 record companies and performers to license recorded music played in public (at pubs,

nightclubs, restaurants, shops, offices and many other business types) and broadcast (TV and radio) in the UK.

- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 100,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

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