

## House of Lords Communications Committee

### The Internet: to regulate or not to regulate? inquiry

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. A full list of UK Music members can be found in annex.

#### Overview.

3. UK Music's 2017 Measuring Music report UK music industry contributed £4.4 billion to the economy in 2016 - year on year growth of 6%. The UK music industry generated export revenues of £2.5 billion in 2016 - year on year growth of 13% and the UK music industry employed over 142,000 people in 2016.
4. Music is a digital business. In the UK there was a 9.5% increase in music consumption across all formats in 2017. Streaming now accounts for over half of UK music consumption. The success of services such as Apple Music, Spotify and Deezer has meant that last year 68.1 billion audio streams were served in the UK alone. 50% of the industry's global revenues now come from digital. The UK is second to the US in terms of the number of licensed music services.
5. The challenge all national governments face is how to encourage innovation and the creation of value without trampling all over legitimate individual and commercial rights and interests or subverting fundamental societal norms. Many of our key arguments are echoed in other debates concerning the internet - whether it be privacy, data protection or harm from unfiltered content. It is also worth noting that the claim that lies beneath the notion of intellectual property is similar to the one that underpins the notion of privacy, having been created by an individual's relationship with the world and concerning how the author retains control over it. Privacy and intellectual property cannot be treated in isolation of one another.
6. In pursuit of innovation and economic growth protections for innovators in the digital space, the net result has not been a sensible equilibrium in which the tech sector has

risen in a symbiotic way or been subject to sufficient checks and balances. Conversely it has led to the creation of some of the biggest companies in the world, often able to defy attempts at governmental control and steps to level the playing field. There is an urgent need to re-establish the balance between power and responsibility online.

## **Background.**

7. Digital technologies and the online market have changed the way in which music is used and consumed dramatically over the last two decades, providing significant challenges and opportunities for the music industry. This first manifested itself in the late 1990s with the development of peer-to-peer file sharing platforms; services such as Napster and latterly Pirate Bay. The prevalence of pirated music throughout the 2000s impacted on the music industry considerably. 2001 saw the launch of the iTunes store and the first iPod and with it digital downloads, offering legitimate access to digital music. Despite this, online piracy continued to grow throughout the first decade of 21<sup>st</sup> century. As a result the value of the music industry fell year on year. Not only did the industry face falling incomes but was forced to spend millions enforcing our rights.
8. There are gains as a result of the industry's efforts and investment. For example, networks are being policed that have not had obligations or incentives to act. There has been a gradual decrease in music piracy in the last few years, with the average number of monthly infringing tracks consumed across the four main types of piracy platforms in the UK (bittorrent, stream rippers, cyberlockers & mp3 download) having fallen to 36 million in 2017 from 54 million in 2016, a reduction of 33%. We have also seen an increase in legal consumption during this period. This is not to say that the costs and losses due to piracy to music businesses have not been significant. Platforms have still been able to grow rapidly without regulation and low obligations placed on them.
9. Although traffic has decreased over the past 12 months across the main types of pirate sites, consumers wishing to access music illegally can still do so. Stream ripping sites/apps (which are still operational) allow the consumer access to any music across YouTube and social media, including Instagram, which has recently become popular for discovering new music. Bittorrent & cyberlockers still facilitate large volume piracy – such as back catalogues or recent albums. All popular artists' repertoire is available on these sites. UK Music member the BPI estimates 426 million tracks were consumed from infringing sources in 2017 and that music piracy in the UK costs the music industry over £120 million a year.
10. The code of practice on search engines<sup>1</sup>, agreed last year and facilitated by the Government, shows that there is more that intermediaries can do when challenged. Greater obligations to act are needed for co-operation to be meaningful. Administrative site blocking and notice and stay down would both reduce music industry costs and make it harder for illegal operations to build and thrive.
11. The music industry in 2018 is a market dominated by digital streaming services rather than downloads and yet the problems of piracy persist albeit in new forms. In addition, the growth of streaming brought with it services which hosted works uploaded by users, most notably YouTube but increasingly social media platforms such as Facebook. These services were able to build global billion dollar businesses based upon advertising while claiming that were not required to seek the authorisation of the rightholders whose works they were making available. The dismantling of the link between the use of music and

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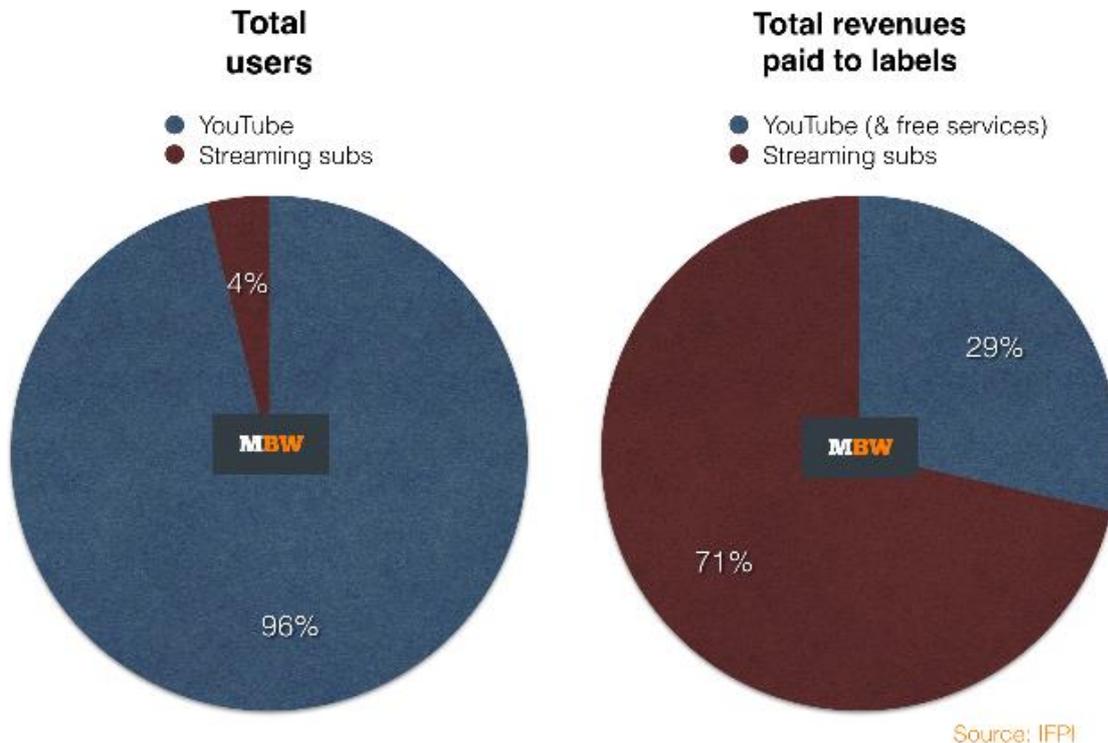
<sup>1</sup> <https://www.gov.uk/government/news/search-engines-and-creative-industries-sign-anti-piracy-agreement>

the need to obtain authorisation from creators, performers and producers has built a transfer of value from the music industry to online platforms.

### **The problem.**

12. This gap between the value realised in the online market and that which is returned to the music industry, is due to a legal framework which is not fit for purpose or relevant to the digital landscape. The current framework permits some platforms hosting and making available musical works uploaded by their users to avoid obtaining a licence, or in some cases pay significantly less than the market rate for the music they use.
13. Limitations from liability for Internet service providers (so called “safe harbours”) provide for across the EU in the e-Commerce Directive 2000) and the United States by Digital Millennium Copyright Act 1998. The limitations in the e-Commerce Directive restrict the liability of information society intermediaries if their activities qualify as mere conduit, caching, or hosting. Notably, these limitations were devised in the late 1990s to help the development of the then nascent digital communications market. In 2018, the digital communications market is well labelled established. Digital communication providers, established considerable time after the coming into force of the e-Commerce Directive and the Digital Millennium Copyright Act, are the main source of access to music and other creative content benefiting from enormous increases in broadband availability and speed.
14. The world has changed. In the late 1990s information society intermediaries were predominantly enabling the sending of digital material such as emailing. The biggest intermediary was AOL providing a dial-up service, a web portal, an email and messaging service as well as an internet browser called Netscape. In 2018 information society intermediaries are the main sources of creative content online; all of these US tech giants were created considerable time after the legislation limiting the liability of information society intermediaries (Facebook: 2004; YouTube (2005 and sold to Google in 2006). These services were clearly not the intended beneficiaries of the limitations of liability in the e-Commerce Directive and the Digital Millennium Copyright Act. Nevertheless, such services often rely on limitations of liability to reduce the licensing fee for the use of music in negotiations with rightholders or even avoid obtaining a licence altogether.
15. This deprives composers, performers, music publishers and record companies from the remuneration they should be due in a functioning market for their creative endeavours.. It also disrupts the legitimate market for online digital music services given that some platforms pay less if anything for music relying on limitations of liability whilst other services de facto offer the same product (i.e. access to music online) and pay the fair amount. The resulting value gap between digital music platforms and online music providers impacts both creators/ performers and legitimate online music providers.
16. The 2014 figures below exemplify that 4% of the users of online music services are responsible for 71% of revenues paid to labels (this has not changed in 2018).

## YouTube - Worldwide user base vs. revenues in 2014



### Approach.

#### 1. Clarification of liability of information society intermediaries

17. Liability of information society intermediaries is in urgent need of clarification, at national, regional and international level (given the global nature of the Internet) in particular as regards online platforms providing access to user uploaded music.
18. UK cases provide such clarity recognising that both the platform and the users of the platform communicate to the public (E.g. *Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others* [2012] EWHC 268 (Ch), 20 February 2012 Paras 71 and 81 respectively). There is recognition that online platforms providing access to user uploaded music (or other creative works) are communicating to the public by making material available on the platforms; they are also reproducing material on their servers. In as far as they communicate to the public they cannot benefit from any limitation of liability because they are not hosting.
19. Users uploading music to such platforms are also communicating to the public and making reproductions given the technical process involved in their individual computers. Only as regards such activities of users digital platforms might be able to benefit from limitations of liability provided they fulfil the respective qualifications.
20. The currently discussed European Directive Copyright in the Digital Single Market provides a good opportunity to clarify the liability of information society intermediaries *de lege lata* (in particular Article 13 thereof). Should an effective solution not be adopted at European Union level the withdrawal from the European Union presents a good opportunity for the United Kingdom to develop a clear framework for a fair value chain involving composers, performers and rightholders as well as platforms and digital music

providers. The Digital Charter might provide the appropriate vehicle for such activities at national level, be it by legislation or by providing guidance.

## *II. Stay down*

21. Specifically, this should also include an obligation to keep musical works and sound recordings off the platform once notified about their illegitimacy. Currently, rightholders identify illegitimate material made available on digital platforms and notify them about this material. Ideally, digital platforms take this material down following such notices. However, despite effectual content recognition technologies readily available (the competitive market for such technologies includes for instance Content ID; Audible Magic ; Gracenote, Shazam etc) the takedown of material is often limited to the actual internet link and not to the actual work thus enabling an immediate re-upload. It is key that digital platforms apply such technologies in order to ensure that the material remains removed from their services. UK Music member the BPI has removed over 605 million links to infringing content across Google and Bing since it began its delisting strategy in 2011.

## *III. Trade agreements following the withdrawal from the European Union*

22. Given our concerns regarding the appropriateness and effectiveness of limitations of liability under both European Union and United States laws UK government needs to assess critically any reference to such systems in future trade agreements with the European Union, the United States, or any other country. If for instance the United States insists on applying their system of limitations of liability for services as they have done in the trade agreement with South Korea this would undermine the UK music industry, a net exporter of music globally, considerably.

## **Further issues**

### *Secondary ticketing market*

23. Reselling at profit in the online secondary ticketing market is a matter of concern. This was highlighted in the recent UK Live Music Census<sup>2</sup>.
24. As a result of the Competition and Markets Authority inquiry three of the four principal secondary ticketing platforms are being forced to obey the law. This is welcome yet the fourth, Viagogo, still refuses to comply and is now under threat of legal action.<sup>3</sup>
25. Secondary ticketing websites benefit from appearing high in search rankings, often at the expense of primary sources. Google has unveiled new rules regarding ticket resale websites to make it clear they are secondary sites yet Viagogo still appears at the top of online search despite not fully complying with the law.
26. UK Music recommends that the changes made by Google be reviewed three months' after implementation to see if they have proved effective and have prevented the public from being misled.

## **Limitations of liability of information society intermediaries (e-Commerce Directive)**

<sup>2</sup> <http://uklivemusiccensus.org/>

<sup>3</sup> <https://www.gov.uk/government/news/secondary-ticketing-sites-pledge-overhaul>

**Mere conduit:** Article 12 e-Commerce Directive exempts from liability information society intermediaries who store transmitted information automatically and transiently. This means that in order to qualify for this limitation, the information society intermediaries must not (1) initiate the transmission, (2) select the receiver of information or the actual information contained in the transmission, or (3) modify it. The information transmitted must take place for the sole purpose of carrying out the transmission only, and not be stored for a period longer than reasonable necessary for the purposes of the transmission.

**Caching:** Article 13 e-Commerce Directive exempts from liability information society intermediaries which store transmitted information automatically and temporarily “for the sole purpose of making more efficient the information’s onward transmission to other recipients of the service upon their request.”

**Hosting:** Article 14 e-Commerce Directive exempts from liability information society intermediaries which store data which are specifically selected and uploaded by a user of the service, and intended to be stored (“hosted”) for an unlimited amount of time. Hosting providers can only benefit from the liability exemption when they are *“not aware of facts or circumstances from which the illegal activity or information is apparent”* (when it concerns civil claims for damages) or they *“do not have actual knowledge of illegal activity or information.”*

Additionally, the e-Commerce Directive provides that there is no obligation to monitor, Article 15. However in case law the concept of duty of care was developed. The duty of care which information society intermediaries owe to monitor and remove copyright infringing content has not been stated in the legislation. Moreover, Article 15 e-Commerce Directive provides that there is no general obligation on information society intermediaries to monitor. There is hence no general obligation actively to monitor information which is transmitted or stored, or actively seek facts or circumstances which indicate infringing activity. The Court of Justice of the European Union established some parameters of the duty of care owed by information society intermediaries to monitor content. In L’Oreal and others v eBay and others, the Court denoted that the Internet service provider needs to undertake further activities if he has been playing a more “active role” in the infringement in order to qualify for the limitation of liability under the e-Commerce Directive. In the SABAM cases (e.g. SABAM v Netlog), the Court stated that an information society intermediary cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical works, as well as paying for it. (c.f. Article 15 e-Commerce Directive). The cases were based on the specific facts at hand without providing a specific definition of duty of care.

### **Limitation of liabilities (Digital Millennium Copyright Act, S 512)**

The Digital Millennium Copyright Act limits the liability of online service providers in certain circumstances.

- Transitory communications; (c.f mere conduit);
- System caching;
- Storage of information on systems or networks at direction of users; (c.f. Hosting - knowledge);
- Information location tools (not currently included under mandatory European Union provisions, see Article 21 (2) e-Commerce Directive

### **Annex**

UK Music’s membership comprises of:-

- AIM – The Association of Independent Music – the trade body for the independent music community, representing over 850 small and medium sized independent record labels and associated music businesses.

- BASCA exists to celebrate, support and protect the professional interests of all writers of music.
- 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 represents and promotes the interests of featured recording artists in the music industry.
- MMF – Music Managers Forum - representing over 500 UK managers of artists, songwriters and producers across the music industry with global businesses.
- 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 114,000 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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