Copyright contracts and the economics of music streaming

Response by CREATe (www.create.ac.uk) to the Parliamentary Inquiry by the Digital, Culture, Media and Sport Committee into 'The economics of music streaming'*

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CREATe

CREATe is the UK Copyright and Creative Economy Centre, based at the University of Glasgow. In 2012 CREATe was established as an RCUK Centre jointly by the Arts and Humanities Research Council (AHRC), Engineering and Physical Sciences Research Council (EPSRC) and the Economic and Social Research Council (ESRC). From 2018-2023, CREATe is leading work on Intellectual Property, Business Models, Access to Finance and Content Regulation as part of the AHRC Creative Industries Policy & Evidence Centre (PEC). From 2020-2023, CREATe also leads the creative industries stream of a major EU H2020 research consortium: reCreating Europe – Copyright law, cultural diversity and the Digital Single Market.

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Summary

This submission offers evidence in response to the following question posed in the call:

- How can policy favour more equitable business models?

The evidence is drawn from the following

- reviewing historical precedent for limiting the assignability of copyright;
- assessing from contemporary exemplars the empirical effects of copyright reverting from corporate investors to primary creators;
- empirical research evaluating contemporary music industry contracting practices and role of copyright law in remuneration of primary creators.

We find that

- there is little evidence that music streaming currently supports a profitable business model. Therefore, primary creators are in some ways bearing the start-up costs of increasingly popular but loss-making music streaming platforms;
- 'life of copyright' legacy contracts mean artists generally have little or no control over what platforms their music appears on;
- the royalties artists receive from streaming are based on rates established in the pre-digital era;
- evidence from the audio-visual sector suggests that intervention on the assignability and licensing of intellectual property rights is a potentially powerful tool.

We recommend that

- calls to redefine streaming of sound recordings as 'communication to the public', are unlikely to be practicable or result in remunerative equity for creators and investors;
- ex-post remedies such as the 'use it or lose it' and 'best-seller clause' provisions should be augmented by ex-ante limitations to contractual assignability of copyright.

Introduction

This submission draws on empirical research conducted by CREATe researchers examining the music copyright industries and relevant research on IP in the wider creative industries as part of the AHRC Creative Industries Policy & Evidence Centre (PEC) at the University of Glasgow.[1] The evidence presented here focuses on one question posed in the call.

– How can policy favour more equitable business models?

Like many areas of the digital environment, music streaming presents considerable challenges as well as opportunities for incumbents and new-entrants alike. But we have also shown, using UK survey data tracking online media consumption behaviour from 2013 to 2018, that consumption changes are less dramatic than often reported. There are important socio-economic constants. Age and social class shape what is accessed and consumed. Changes in technological conditions need to be understood against this background (Leung, Kretschmer, Meletti 2020).

The changing landscape presents particular challenges for the copyright regime. While reform to copyright law alone cannot resolve structural imbalances in the music industries, we contend that achievable interventions can contribute to a more equitable balance of interests among creators, investors and consumers.

Defining a 'music streaming platform'

Technological and business-model innovation in cultural sectors present considerable definitional challenges, not least to policymakers. This is exemplified in the reference to platforms, 'such as Spotify, Apple Music, Amazon Music and Google Play' in the call for evidence.[2] While the functionality of the user interfaces of these services is similar, and all operate a mixed subscription and ad-funded model, the underlying business models vary considerably. The core business of Spotify is the provision of music streaming. For Amazon it is online retail and cloud computing; Apple's core business is tech hardware and Google's targeted advertising. In each case music streaming is complementary, but secondary to core revenue-generating activities.

The absence of YouTube from the call is also telling. YouTube, owned by Google, is by most measures the largest music streaming platform in terms of user engagement even though it is a video-sharing platform rather than a dedicated music streaming platform (Richards 2019). Platforms such as the social network Facebook, the video conferencing site Zoom and online gaming platform Twitch further blur the lines around what constitutes a music streaming platform. It is unclear whether these activities are under consideration by the inquiry. In the 2019 Directive on Copyright in the Digital Single Market (2019/790/EU), the European Union defined a new category of 'online content-sharing service provider' (OCSSP, defined in Article 2) 'of which the 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'. OCSSPs will acquire new obligations under Article 17. This is a site of fierce contention where the UK has policy options if and how to diverge from the EU regulatory regime (CREATe 2020).

[1] The work stream led by CREATe focuses on Intellectual Property, Business Models, Access to Finance and Content Regulation. Early findings relating to Platform Regulation can be found here: https://www.create.ac.uk/platform-regulation-resource-page/

[2] Google Play Music shut down in the UK in October 2020 with Google transferring accounts to its YouTube Music platform (Faulkner 2020).

Since the inception of music streaming this definitional ambiguity has remained unresolved (Barr 2013). Devising a regulatory framework that can accommodate the sometimes fundamentally different underlying business models of online platforms, which nevertheless offer comparable functionality, remains problematic.

In acknowledging these challenges, this submission of evidence seeks to contain its focus to the following aspects of the use of musical works and sound recordings by music streaming platforms. On the consumption-side: definition of the act of music streaming in copyright law; On the supply-side: assignability of copyright by primary creators.

Reconsidering communication to the public/making available

In essence music streaming platforms allow users to access recorded music containing two music copyright works: musical works (often a combination of musical composition and lyrics in a song), and sound recordings. Exploitation of these different types of copyright 'subject matter' forms the basis of the music publishing industry and the recording industry respectively.

Streaming as a means of disseminating and accessing recorded music was not unforeseen by the music industries or legislators (MMC 1994). The WIPO Treaty and UK law have made provision for music streaming since 1996 but legal definitions of streaming remain contested.

Although the streaming of the musical work and the sound recording of a single song occur simultaneously, each falls under a distinct legal characterisation.

The copyright in the composition or song is treated both as the communication to the public of a copyright work and mechanical reproduction thereof. These licences are negotiated and administered in the UK by PRS for Music and MCPS on behalf of authors and publishers.

Streaming of sound recordings is defined as, 'the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them', drawing on a definition in international law (WIPO Copyright Treaty and WIPO Performances and Phonogram Treaty, 1994 – so called Internet Treaties). These rights are not administered collectively, instead royalties are distributed to artists according to whatever contractual arrangement they have made with their record company, recoupable against advance payments made to artists and other costs. Unsigned artists typically upload their music to streaming platforms via an aggregator service that takes a percentage of revenue or a flat fee.

There has been considerable lobbying effort in support of redefining streaming of sound recordings as 'communication to the public', thus aligning them with other uses such as radio broadcasts and public performance that provide featured and non-featured performers the inalienable right to 'equitable remuneration'. Crucially, this right to equitable remuneration is inalienable and as such cannot be signed over to third parties. Nor can it be set against unrecouped costs incurred by record companies in the way that sales are.

While this inconsistency may seem inequitable it is reflective of the underlying core business of the music publishing and recording industries. Music publishing is an industry largely engaged in licensing music copyright to third party commercial users. Indeed, as an industry music publishing successfully altered its core model from sale of products (sheet music) to a licensing-based industry in the early 20th Century (Towse 2015).

While licensing is an important revenue source for the recording industry, until very recently, it was an industry principally engaged in the sale of products to consumers. Applying the principle of 'equitable remuneration' to music streaming is an approach advocated by the Musicians' Union and a number of academics (Trubridge 2015, Osborne 2017). These

arguments challenge the principle of recording industries entitlement to recoup production and marketing costs from sales. Given the extent to which streaming has cannibalised physical and digital sales it is unsurprising that the recording industry is resistant to such proposals.

Moreover, there is precedent for rulings in respect of streaming rates for rightsholders being disregarded by streaming services in favour of a rate set in the market. In 2007 the Copyright Tribunal set rates for streaming services based on a per-stream vs revenue share principle (IPO 2007). While this established the principle on which payments are made, a lower per-stream rate and high revenue share was subsequently negotiated by PRS for Music (Shaw 2009).

Right of revocation and limiting assignability

It is the contention of this submission that a more reciprocally beneficial and practicable option for correcting these imbalances is achieved by limiting assignability of copyright. Perhaps the most problematic issue affecting creators operating in the music streaming environment are legacy contracts rooted in industry practices of the pre-digital age.

Recording contracts generally allow record companies but not artists to terminate the agreement at intervals throughout the term of the deal, usually linked to the release of bundles of content e.g. albums. While the artist may be 'dropped' the record company in many instances retains the sound recording rights for the full term of copyright, currently 70 years. This is largely a consequence of the asymmetrical bargaining power of record companies and new-entrant artists (Greenfield and Osborn 2007). These deals also illustrate the risk inherent in the activity being undertaken, "contracts reflect both the uncertainty of success and the inability of young performers to supply inputs other than their time and talents" (Caves 2000: 62). Evidence shows that these 'life of copyright' option deals remain commonplace in the UK music industries (Barr 2016).

The 'use it or lose it' provision in UK's 2013 copyright term extension for sound recordings (implementing Directive 2011/77/EU on the term of protection of copyright and certain related rights) was heralded as a mechanism allowing performers to gain control of rights in works no longer available to public after 50 years. As yet, there is no evidence of this provision being invoked (IPO 2018). Indeed, this clause is of little practical use in an age where the bar for satisfying the availability requirement is exceptionally low as aggregation of digital music files onto streaming platforms routinely occurs upon publication of works.

What constitutes a 'lack of exploitation' in the digital context needs to be re-examined (CREATe 2020). The implementation of a 'contract adjustment mechanism' or 'best-seller clause' akin to those already in place in some EU member states holds advantages for *some* creators. However, this provision does not apply to the assignment of rights to collective management organisations (CMO) and so would be of limited effect in the streaming realm. Unlike 'use it or lose it' or 'best seller clauses' a limited assignment period would apply to all creators of copyright works equally. Achieving this would require a reinterpretation of authorship of a sound recording (Osborne 2017). However, licensing of sound recording rights by artists to record company as opposed to full assignment is already a feature of some record deals, thus allowing copyright to revert to primary creators after a fixed-term licensing period (Barr 2016). In the context of music streaming, this would allow artists a far greater degree of control over what streaming services used their music and on what terms. It would also allow creators and investors to periodically renegotiate contracts and specific deal points based on an observable track-record (Kretschmer 2012; Giblin & Weatherall 2017; Yuvaraj & Giblin 2020).

Conclusions

Drawing on evidence from empirical research, this submission underlines the danger contingent in attempting to ascribe old norms to the new digital environment. As is the case in other cultural sectors, there is a considerable body of evidence that primary creators are best served by a policy framework that ensures provision of reversionary rights. Moreover, this also holds considerable advantages for third-party investors in respect of mitigating information asymmetry and consumers in ensuring works remaining in circulation. [3]

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[3] The notion that primary creators are better served to control rights than corporate assignees dates back to the earliest years of the copyright regime. The first copyright statute, the *Act of Anne* of 1710 established an initial copyright term of 14 years. After expiry, the 'sole Right of printing or disposing of Copies' returned to the author for a second term of 14 years. *The Bill for the Encouragement of Better Learning* 1737 proposed that authors could not assign copyright in their works to a third party for a term greater than 10-years after which the copyright should revert to the author (Deazley 2004; Bently and Kretschmer 2008). Although the 1737 bill was ultimately unsuccessful in achieving this aim, copyright reversal has returned recently as an attractive policy option (Kretschmer 2012, Barr 2016, Heald 2017, Giblin and Weatherall 2017, Furgal 2020).

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