

IFPI Comments on the European Commission Draft Guidelines on the Application of Article 102 TFUE

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I. IFPI

IFPI is the voice of the recording industry worldwide, representing over 8,000 record company members across the globe, many of which based in the European Union. IFPI also has an office in Brussels and national groups in 18 EU Member States

We appreciate the opportunity to comment on the draft Guidelines on the Application of Article 102 TFUE that were circulated by the European Commission in August 2024.

II. EXECUTIVE SUMMARY

Today over two thirds of total industry revenue is generated by different types of streaming services, which offer consumers access to hundreds of millions of licensed songs. This is the result of the highly competitive nature of the recording industry and the fact that there is little or no friction in the way record companies license their rights. The recording industry has a strong track record of licensing rights to new services, and for innovative business models, at scale.

Sustained growth of the music industry in the EU depends on the existence of fair and competitive digital content markets. However, online markets have a tendency to produce a small number of very dominant services. The Commission's focus on the online markets is therefore welcome, considering the market power of certain dominant online technology companies.

We are concerned that AI companies / services such as OpenAI, or Suno and Udio in the specific area of music generation, that are backed by some of the largest technology companies and venture capital investors, are already gaining dominance in their respective fields. At the same time they are subject to several legal actions for unauthorised uses of copyright content, which makes the trend even more concerning".

In addition to keeping this market power in check, it is important that the development of music related AI results in a healthy market driven ecosystem. Any unwarranted regulatory intervention would merely add friction to or distort the markets, thereby undermining the

key pillars of the existing vibrant market for licensing: the competitive nature of the recording industry and its almost frictionless licensing mechanisms.

In line with what is confirmed in the guidelines, we note that the ownership of IP as such does not amount to holding a dominant position and the normal exercise of IP rights, including enforcement thereof, does not amount to abuse of IP.

III. IFPI SUBMISSION

1. The Recording Industry Is Highly Competitive

The EU recorded music sector generated €5.2 billion in 2023¹. The industry has undergone a radical transformation adapting to the digital online environment, and currently about two thirds of total income in the EU markets comes from streaming.²

As a result of the technological developments and structural changes, the music industry is more competitive than ever; barriers to entry to market are lower, having all but disappeared, and more music is being produced and/or distributed by a larger number of entities.

As much is confirmed by the 2022 UK Competition and Markets Authority “Music and Streaming Market” study (hereinafter referred to as the CMA report). When describing the recording industry, the CMA did *“not [find] significant competition concerns overall, in particular those that are likely to be leading to substantial excess profits.”*³ The CMA further found that, *“consumers have benefited from streaming through access to full catalogues of music and innovative services for free or at a fixed monthly price, which has reduced in real terms [...]”*⁴

The choice currently available to consumers on streaming platforms is greater than anything experienced before. Over ten million artists of the most diverse geographical backgrounds have uploaded their music to Spotify.

These findings are evidence that the existing licensing mechanisms have enabled the emergence and growth of new innovative services in Europe and elsewhere, including the likes of Spotify and Deezer.

AI is no exception in that respect. A number of record companies are already collaborating with AI developers for the use their recordings in the training of AI models. Based on the evidence at hand, there is no need or justification to intervene in the way sound recording right holders license their rights for existing or emerging services.

¹ Source: [Music in the EU](#).

² Note that this figure is a rough average with some markets showing higher shares of streaming revenue (e.g., Spain) and others lower ones (e.g. France). The share of total income from digital sources is, however, higher as this figure does not take into account downloads and other forms of digital consumption.

³ See [CMA report](#) para 7.5.

⁴ See [CMA report](#) para 7.1.

2. Services Already Dominating Online Are Moving To Generative AI, The Commission Should Stay Vigilant

The Commission is however right to be concerned about the current dominance of a handful of online platforms and to be vigilant of any potential abuses of their market power. Many of these services build and maintain their popularity on the back of content created and produced by European creative industries, including the music industry, and any abuses could end up harming the EU creative sectors. Such potential abuses include leveraging their size to impose unfair commercial terms or granting preferential treatment to content owned or controlled by the platforms.

Moreover, some of the same dominant technology companies are leveraging their substantial financial resources to invest in companies operating in the generative AI sector. Some AI providers, such as OpenAI, are already enjoying a position tantamount to dominance.

The Commission lists as one of the factors taken into account by EU courts in their assessment of dominance, *“whether the dominant undertaking violates rules in other areas of law (for instance, data protection law) and thereby affects a relevant parameter of Innovation competition, such as price, choice, quality or innovation,”* referring to the 2023 Meta Platforms and Others judgment (C-252/21).

It is therefore highly concerning that, as witnessed by the myriad of legal actions, a number of the leading extremely well-funded generative AI providers -- including OpenAI, Anthropic, and Suno whose models are available to European users -- have allegedly trained their models on copyright protected content without authorisation from the right holders, in breach of the EU copyright rules and the obligations under the AI Act.

Such wilful misuse of copyright content in violation of EU copyright law, would amount to an attempt to gain an unfair competitive advantage and would cause a serious distortion of the legitimate licensing markets for copyright content. We would urge the Commission to investigate further whether these services are acting in violation of the EU competition law.

3. Ownership Of IP As Such Does Not Amount To Holding A Dominant Position, And The Normal Exercise Of Rights Should Not Be Considered Abuse

The draft Guidelines correctly note that *“[t]he mere possession of IP rights cannot as such be considered to confer a dominant position.”* It therefore follows that the normal exercise and enforcement of rights by an IP right holder should not be considered abuse of market power.

In that vein, it is again worth pointing out the competitive nature of the recording industry, as well as record companies’ strong track record in licensing new services and innovative business models, including AI services. As regards to AI in particular, we note that the pending legal actions, referred to above, are the result of AI providers’ refusal to negotiate licenses, not right holders’ refusal to enter into good faith licensing discussions. Access to copyright content on market terms is not a problem, let alone one that may require competition intervention. The problem is that some companies refuse to engage in good faith licence negotiations with right holders, claiming instead that their wholesale use of copyright content

to build their commercial services would be allowed as “fair use”, a dubious claim under the US law and anyway an alien concept in the EU.

Thank you for the opportunity to make this submission. We stand ready to provide further information on any of the above points.

For further information, please contact:

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