PUBLIC KNOWLEDGE

STREAMING IN THE DARK:

Where music listeners' money goes—and doesn't.

2023 | MARCH

MEREDITH ROSE

Streaming in the Dark

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ACKNOWLEDGEMENTS

This paper would not have been possible without the help of many fellow toilers in the copyright mines. I owe an enormous debt to Kevin Erickson at the Future of Music Coalition, Kevin Casini of Ecco Artist Services, Daniel Takash at the Niskanen Center, Gary Slaiman of Slaiman Consulting LLC, and token "not a copyright lawyer" lawyers Kiernan Reed and Garett Rose. Their generous contributions of time and expertise (and occasional non-expertise) helped make this paper possible. I also owe a special and unique debt to the Internet Archive for developing and maintaining the archival tools that power this paper's citations and will, I hope, preserve its usefulness into the future.

I would also like to thank the entire team at Public Knowledge for their support. Special thanks to John Bergmayer, Shiva Stella, Sara Collins, and Chris Lewis for hauling this project, at times kicking and screaming, over the finish line.

Finally, I owe much to the long line of Public Knowledge music experts on whose shoulders I now teeter: Dylan Gilbert, Raza Panjwani, Ryan Clough, Jodie Griffin, and the late, much-missed Sherwin Siy. This one's for you, friend.

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EXECUTIVE SUMMARY

This paper proceeds from what might be the only universal point of agreement in all of music policy: The streaming market place is fundamentally broken.

Consumers are pouring more than $12 billion dollars a year into music streaming services. From there it enters a dark, labyrinthine economy shaped by centuries-old laws and unchecked market power. When that money emerges out the other side and reaches artists, it has been reduced to fractions of pennies.

Our ability to scrutinize that black box has been methodically and strategically hampered by the use of non-disclosure agreements (NDAs). On its face, we don't know much about what happens to that money. But what we do know is disconcerting, and what we can reverse engineer is outright alarming. The streaming and music industries are both breeding grounds for anticompetitive behavior. Astronomical licensing costs have squeezed the streaming market and created a world where music streaming is treated as a loss leader for the world's wealthiest tech companies. Licensing deals are riddled with payola and other kickbacks, which maximize wealth for major labels while minimizing how much they have to pay out to artists.

Meanwhile, power middlemen control choke points within the music industry. Major labels and superstar talent claim the overwhelming majority of the financial pie, leaving small and independent artists and labels to pick up the scraps. And they do this under strict secrecy, keeping effective change (and accountability) at arm's length.

Information asymmetries are the key to the status quo deadlock that leaves streaming in the hands of the world's most powerful companies—and artists subsisting on pennies. Without information, artists and indie labels can't cut deals that accurately reflect the value of their work. New services can't come to market. Activists can't effectively push for change. Policymakers can't begin to reform a system they don't understand. This status quo threatens innovation, choice and quality—for users and musicians alike.

If we can agree that the system is broken, then we can also agree that there must be a way forward. At a minimum, the Federal Trade Commission must pierce the NDA curtain to study this marketplace and determine just how bad things are—and where. From there, the question becomes one of not *whether* major reforms should follow, but which ones. Lawmakers have a vast array of tools at their disposal, from antitrust law, to fair-dealing mandates, to app store regulation, to whistleblower protections. No one of these is going to work on its own; cleaning up this mess is going to take a little of everything.

INTRODUCTION: A FEW NOTES ABOUT THE INDUSTRY

Artists decry the per-play rates offered by streamers. Labels pin the blame on streaming services. Artists and streaming services both point the finger back at record label contracts.[1] Industry analysts suggest a range of causes: the antiquated nature of the copyright system,[2] rise in ambient "mood" playlisting,[3] the market simply having to accommodate too much music.[4] Lawmakers, for their part, have had no greater success at getting to the bottom of it. The U.K. Parliament, after a nearly two-year inquiry, launched a draft report which was hugely critical of major industry players—only for its Competition Markets Authority to walk back much of the report's rhetoric and decline to pursue further inquiry.[5] Members of Congress introduce resolutions which die on the House floor.[6]

Something, it seems, is rotten in streaming; it's just that nobody seems to agree on what it is. It's widely thought that artists should get more money from streaming than they do now. But where will it come from? Should users pay more? How much user money do platforms need to keep to stay operational, and to ensure that competition can benefit both musicians and music fans?

The consumer-to-artist money pipeline is not a funnel; it's a fire sprinkler. The complexity of the market, and the shroud of secrecy in which it operates, breed mistrust on all sides. Musicians are receiving checks for fractions of pennies, and conscientious music consumers don't know how best to help.

You wouldn't know it from the state of discourse, but the music industry is more financially successful than it has been in *years*. Recorded music revenues in 2021 reached an all-time high of $15 billion.[7] When adjusted for inflation, this still falls short of the industry's late '90s heyday; it does, however, match the revenues of the late '80s and early '90s, a time when the industry was not thought to be in crisis.

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[1] Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, NY Times (7 May 2021), https://web.archive.org/web/20230209201400/https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html.
[2] Paula Mejía, *The Success Of Streaming Has Been Great For Some, But Is There A Better Way?*, NPR (22 Jul 2019), https://web.archive.org/web/20230209204420/https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way.
[3] Id.
[4] Rachel Hurley, *Spotify and streaming are not the problem. Too much music is.*, Rock the Pigeon (31 Jan 2022), https://web.archive.org/web/20230209203115/https://rockthepigeon.com/2022/01/31/spotify-and-streaming-are-not-the-problem-too-much-music-is/.
[5] Notice of proposal not to make a market investigation reference under section 131 of the Enterprise Act 2002, U.K. Competition Markets Authority (26 Jul 2022), https://web.archive.org/web/20230216190838/. https://assets.publishing.service.gov.uk/media/62de9e1f8fa8f5649797adc4/Notice_of_proposed_decision_not_to_make_a_market_investigation_reference.pdf.
[6] H.R. Con. Res. 102, available at https://web.archive.org/web/20230209202830/https://www.congress.gov/bill/117th-congress/house-concurrent-resolution/102/actions.
[7] U.S. Sales Database, Recording Ind. Assoc. Of Am., https://web.archive.org/web/20230216190520/https://www.riaa.com/u-s-sales-database/ [last accessed 16 Feb 2023].

Moreover, the “boom years” of the late 1990s were a short-term bubble caused by format shifts and industry reorganization. CDs were cheaper to produce than records or cassettes, but the new format gave the industry cover to raise prices. Customers purchased second and third copies of recordings they already owned, simply to keep up with the new format. Meanwhile, the industry continued its move away from singles—once by far the predominant format—and funneled consumers toward buying more expensive full albums. These glory days are not coming back, because they were always temporary. Ironically, this “boom” seeded consumer demand for a la carte purchasing, streaming—and yes, piracy.

But even if the industry can no longer “party like it’s 1999,” it should be partying like it’s 1990. The music industry has settled into an equilibrium with the new digital landscape, is no longer reeling from the shock of technological change, and has found a sustainable business model. So why doesn’t it feel that way?

The industry is vast, complex, and populated by layers upon layers of middlemen. This paper cannot identify every last one of them because the industry operates in secret. We have very few windows into the deals that labels, publishers, artists, and platforms strike with one another.

But we know enough from publicly available data (and high-profile leaks) to conclude that the industry’s opacity and complexity leaves musicians scrabbling for pennies—a reality that is hard to square with blockbuster industry revenues. The way that money flows through this ecosystem, and how it trickles up before reaching musicians, needs to be a major focus of reform.

Music Copyright 101

Copyright law creates a large number of rightsholders and an almost equally dizzying number of payment avenues.

First, "a copyright" is not a unitary thing. Copyright operates as a bundle of six defined sub-rights which can be further subdivided and then assigned individually or in combination.[8] In music, three[9] rights are tantamount: reproduction, distribution, and public performance.[10]

The law grants a copyright to the original human author(s) of a work—in this case, songwriters and recording artists.[11] However, in practice, most songwriters and recording artists license their works to other entities (typically record labels and publishers) as part of their contracts. These assignments are called **licenses.**

Streaming a song involves two copyrighted works: the recorded track (the "sound recording") and the underlying composition (the "musical work"). Sound recording copyrights are generally held by record labels; composition rights are held by publishers, who collect and publish the work of songwriters. In order to make a track available, a streaming service must obtain the relevant rights for both the sound recording *and* the composition. This means that services are constantly negotiating with both labels *and* publishers in order to ensure they can offer songs.

However, no one player holds all the exclusive rights covered by "a copyright." Rather, they hold some combination of sub-rights—the three most important being reproduction, distribution, and public performance. For sound recordings, those are typically all held by the record label. For musical works, they are oftentimes split between a publisher and a performing rights organization (PRO).

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[8] 17 USC § 106. Although the Copyright Act provides for six distinct sub-rights, the available rights in a given work depend on that work's format. For example, while § 106 provides for both a right of public *performance* and a right of public *display*, it is legally and semantically impossible to "publicly perform" a painting, or "publicly display" a sound recording.

[9] A fourth right—the "sync right," which allows for the synchronization of music to image—is also an increasingly important income stream for artists. While the failures of the unregulated synch license market are numerous, they are also beyond the scope of this paper. For a brief primer on that market and its failures, *see* Chris Cooke, *YouTube launches new music micro-licensing service for its video creators*, Complete Music Update (21 Sep 2022), https://web.archive.org/web/20230213204248/https://completemusicupdate.com/article/youtube-launches-new-music-micro-licensing-service-for-its-video-creators/.

[10] Because this paper focuses exclusively on digital streaming, I have taken the liberty of collapsing two distinct rights—the public performance right of a musical work, and the more limited *digital* public performance right enjoyed by sound recordings—into one. Fellow copyright wonks will, I hope, forgive my decision.

[11] The exception to this general rule of awarding a copyright to humans is found in the section of the Copyright Act dealing with "works made for hire" and applies to employees working in the course of their employment (e.g. a reporter producing an article for their paper) or a work specifically commissioned under an express written agreement. 17 USC § 101.

Starting with the Creators

The act of getting creative works to market is a long, arduous, and complicated task with little guarantee of success. The shift to streaming has simplified some aspects while significantly complicating others. To understand the universe of licensees, rightsholders, and middlemen involved, it may be easier to start in the shoes of songwriters and recording artists.

Songwriters

Steven Songwriter composes a song. Using the terminology of copyright law, he has created a **musical work,** and he now holds the copyright in that work. Getting this song recorded, or otherwise put out on the market, is a difficult endeavor. Here, the songwriter has some options.

> **Music publishers** are companies that publish, market, and manage IP rights for compositions.

Steven has three options to publish his work.[12] He may decide to work with a traditional music publisher; he may work with a publishing administrator; or he may self-publish. **Traditional publishers** provide a broader spectrum of services and will market Steven's composition to recording artists and record labels. In exchange, Steven assigns his **rights of reproduction and distribution** (also known as **mechanical rights**) to the publisher. Steven may also choose to work with a **publishing administrator**; these provide fewer services, but Steven gets to keep his copyrights. And while self-publishing is becoming increasingly easy and common, it is, in 2023, still dwarfed by traditional publishers and publishing distributors.

But Steven also wants his song to be performed, both live and online. He may choose to sign up with a **performing rights organization (PRO)** such as ASCAP or BMI, and grant them the right to bundle his **public performance right** with those of other composers. (Less commonly, he may also assign this right to his **publisher**—which itself may sign up with a PRO to manage the public performance rights in its catalog.)

> **Digital Service Providers** (or **DSPs**) refers to interactive, on-demand music streaming services.

The publisher and performing rights organizations negotiate with streaming services, or **digital service providers (DSP)**, for royalty rates, which they are then responsible for passing along to Steven.

[12] Outside of DSPs, songwriters also work to license their works to record labels so that they can be used for sound recordings. The dynamic of this market, while outside the scope of this paper, is similarly vast and dysfunctional.

Recording Artists

A recording artist, Rachel Recorder, performs Steven's song on her new album. Rachel has created a copyrighted **sound recording**. But, much like Steven, she faces an uphill battle in getting this recording to market. She may choose to self-release; but, if she is like most artists, she enters into a contract with a **record label**, which is owned by a larger **record company.** The label and company contribute to the production and recording of her song, and in exchange, she assigns them the **reproduction, distribution,** and **public performance** rights in her recording.

Record companies are companies that own and manage one or more labels. **Labels** act as imprints, often specializing in specific genres.

This record label in turn contracts with a **distribution company,** which may be in-house, independent, or run by a larger record company. This **distribution company** bundles Rachel's rights together with those of many other recording artists. It uses that catalog to negotiate with streaming services to establish licensing fees, per-stream rates, and other terms.

Now, whenever a **streaming service** (also known as a Digital Service Provider, or **DSP**)[13] plays Rachel's recording of Steven's song, they must pay according to the terms of its agreement with the **distribution company**. Typically this involves paying the **distribution company**, which in turn pays the **record label**, which then pays **Rachel** a rate set by the terms of her contract. (Alternatively, some portion of the payment may be made through an outside third party, **Sound Exchange**, which will split the payment 45/50/5 between Rachel, her label, and a fund for session musicians.) Because the recording also constitutes a derivative work of Steven's composition, the label splits royalties with the publishers.

The **streaming service** must also pay for all the rights associated with Steven's composition. They pay **performing rights organizations** on the one hand, and **publishers** on the other. If, for whatever reason, they cannot locate Steven or his publisher, they instead can pay licensing fees to the **Mechanical Licensing Collective (MLC)**, which will then seek out the appropriate rights owner.

Streaming Introduces Complexity

Pre-streaming, records were considered "rights ready." This means that, by the time the record reached store shelves, the copyright deals were all done. The chain of copyright negotiations stopped at the record label's doors. The store didn't need a license to stock or sell the record.[14] Its

[13] **DSP** in this context does not include AM/FM radio, terrestrial radio, satellite services, and video-based apps such as TikTok. These services operate under separate licensing regimes to interactive streaming, and thus are beyond the scope of this paper.

[14] It *would* have had to obtain a license to, for example, install listening stations or perform the CD over the store's speaker system—-but that is a discussion beyond the scope of this paper.

customers didn't need a license to buy the record, or to play it in their home or for friends. Once the customer lawfully purchased a copy of the record, they now owned it just as much as they owned a pair of shoes; they could resell it, gift it, lend it, or destroy it just as they could any other piece of chattel property. Formats such as CDs, which used a physical object to house a digital copy of a recording, followed these same rules.[15]

Streaming, however, upends this dynamic. Where record stores simply put records on their shelves, streaming services *perform* these songs, subjecting them to multiple extra layers of rights clearances. Just as before, the label must clear the composition rights before actually recording a track; however, the streaming service must *also* clear rights—not only with the label, but also separately with the publisher (for reproducing and distributing the composition) and performing rights organizations (for publicly performing the same). Streaming services must maintain ongoing, continuous licensing relationships not only with primary rightsholders, but also with various intermediaries such as distributors, collective rights management societies, collections societies, and others. To cap it all off, the subscription streaming model means that consumers can no longer lend, resell, or regift their music. They can merely listen to it—at least, until the DSP drops it from the catalog.[16]

Systemic Industry Problems

The music industry's problems are not just in its relationship with streaming. Some are as old as the industry itself. Others stem from the pains of modernizing a system whose core is "a hodge-podge of technical platforms and data sets created variously since the 1980's."[17] Yet others are more general problems which will sound familiar to industries that deal primarily with "intangible" assets.[18] However, a few are particularly relevant to the dynamics of digital streaming.

Concentration and Monopoly

> ***"Once organized on a broad commercial scale for profit, even the aesthetic pursuit of dreams, music, and other evidences of the free spirit may engender commercial repressions inconsistent with our basic antitrust philosophy of free trade and fair competition."***[19]

Three major record companies—Universal Music Group, Sony Music Entertainment, and Warner Music Group—are collectively referred to as the "**Big Three**." Together they control

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[15] 17 USC § 109. *See also* Aaron Perzanowski and Jason Schultz, *The End of Ownership* ch. 10 (2017).
[16] For a thorough dive into the problems raised by subscription dynamics and digital licensing, *see* Aaron Perzanowski and Jason Schultz, *id*.
[17] Vickie Nauman, *Reimagining The Music Business*, ReThink Music (26 Jan 2016), http://www.rethink-music.com/news/reimagining-the-music-business.
[18] For a broad discussion of the systemic problems faced (and created) by firms in the "intangible economy," *see* Jonathan Haskel and Stian Westlake, *Capitalism Without Capital* (2017).
[19] Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & Contemp. Probs. 294 (1954).

85% of the U.S. music catalog[20] and account for 74.1% of all digital music revenue globally.[21] They are the products of decades of consolidation, with larger companies gobbling up smaller companies, and (occasionally) their own peers.[22]

The Big Three's in-house **publishers**—Sony, Universal Music Publishing Group, and Warner-Chappel Music—account for approximately 60% of U.S. music publishing revenue.[23] Collectively they control or administer the rights to an estimated 10 million songs.[24] The U.K. Parliamentary Report expressed concern about this vertical integration, not only because it amplified the Big Three's market power, but because it lead to systemic devaluation of the composition right:

> It is well-evidenced that redressing the disparities in relative value between the song and the recording has occurred infrequently in the last few decades. Whilst the major music groups dominate music publishing, there is little incentive for their music publishing interests to redress the devaluation of the song relative to the recording.[25]

Digital service providers (or **DSPs**, colloquially known as "streaming services") are less concentrated. However, the market's relative diversity comes with significant caveats. Spotify, based in Sweden, accounted for about 38% of global streaming revenues and 30.5% (approximately 187.8 million) of global subscribers in Q2 2022. The three largest American DSPs—Apple Music, Amazon Music, and YouTube Music—collectively serve 222 million subscribers (approximately 36% of the global listener market) and account for 46% of revenue in that same period.[26] Adding in Pandora, a subsidiary of Sirius XM, nudges the total global

[20] Dan Rys, *Record Label Market Share Q4 2022: Republic's 'Midnights' Run Outpaces a Surging Sony*, Billboard (11 Jan 2023), https://www.billboard.com/pro/record-label-market-share-q4-2022-republic-Surges-sony-big-year/.
[21] OMDIA Research, *SME and WMG the biggest market share winners in 2021*, Music and Copyright (5 Apr 2022), https://musicandcopyright.wordpress.com/2022/04/05/sme-and-wmg-the-biggest-market-share-winners-in-2021/.
[22] *See, e.g.*, Ron Knox, *Big Music Needs to be Broken Up to Save the Industry*, Wired (16 Mar 2021), https://www.wired.com/story/opinion-big-music-needs-to-be-broken-up-to-save-the-industry/; Mary Kaye Schilling, *The Music Industry in 1998: The Titanic Right Before It Hit the Iceberg*, Vulture (21 Nov 2013), https://www.wired.com/story/opinion-big-music-needs-to-be-broken-up-to-save-the-industry/.
[23] OMDIA Research, *supra* note 21.
[24] Tim Ingham, *The three major music publishers now own or control over 10 million songs between them (kind of)*, Music Business Worldwide (20 Oct 2022), https://www.musicbusinessworldwide.com/the-three-major-music-publishers-now-own-or-control-over-10-million-songs-between-them-kind-of/.
[25] Digital, Culture, Media and Sports Committee, Economics of Music Streaming, 2021-2, HC 50-2 71 (U.K.) [hereinafter *Parliamentary Report*].
[26] Mark Mulligan, "Music Subscription Market Shares | Chinese Dragon," MIDiA Research (7 Dec 2022). https://web.archive.org/web/20230202181911/https://www.midiaresearch.com/blog/music-subscriber-market-shares-2022.

revenue share of American firms up to 48%.[27] Smaller-scale services such as BandCamp, Soundcloud, and Tidal are notable for experimenting with artist compensation and upload models, but do not represent a significant share of the global market.

Notably, the four largest American DSPs—Apple, Amazon, YouTube Music, and Pandora—are *all* backed by major conglomerates. These DSPs have pockets deep enough to cross-subsidize their music business and offset its losses. But that backing also creates its own risks—not only for competitors' viability, but for user privacy and data collection.[28]

As the Parliamentary Report notes, "integrated music streaming services appear to be best placed to grow through [...] self-preferencing and bundling strategies."[29] While a full dissection of the competitive risks of "integration dominance" are beyond the scope of this paper, the U.K. Parliamentary Report highlights six risks in particular that are worth noting. Specifically, integrated DSPs have the ability and incentive to leverage:

1. Direct control of devices (smart phones, tablets, smart speakers), operating systems, App Store and search engines;[30]
2. Resulting preferential placement, advantageous default positions, and marketing privileges for cross selling;[31]
3. Access to vast troves of consumer data;[32]
4. The ability to impose costs on users of rival music streaming services;[33]
5. The ability to offer consumers bundles of their services;[34]
6. Economies of scale that make them more appealing to rightsholders, re-entrenching dominance.[35]

[27] France's Deezer (1.9%), Chinese services Tencent (13.4%) and NetEase (6.1%), and Russia's Yandex (2.2%) also represent a substantial portion of the global market. Mark Mulligan, *Music Subscription Market Shares*, MIDiA Research (7 Dec 2022), https://web.archive.org/web/20230202181911/https://www.midiaresearch.com/blog/music-subscriber-market-shares-2022.
[28] One of the risks associated with a model where cross-subsidization is the rule, is the fact that services without such subsidization lack the financial backstop of their larger competitors. In the context of video streaming, we see that Netflix has a competitive disadvantage relative to services like Amazon Prime, Disney+, or YouTube. *See, e.g.*, Ramon Lobato and Amanda Lotz, *Beyond Streaming Wars: Rethinking Competition in Video Services*, 8 Media Indus. 89 (2021), available at https://journals.publishing.umich.edu/mij/article/id/1338/.
[29] For a broad discussion of the risks associated with integrated music streaming services, *see* Competition and Markets Authority, Music and Streaming: Final Report, 2022, ¶¶4.56, 4.107 (U.K.) [hereinafter *CMA Report*], https://web.archive.org/web/20230219204032/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120610/Music_and_streaming_final_report.pdf.
[30] *Id.* at ¶ 4.57.
[31] *Id*.
[32] *Id*.
[33] *Id*. *See also* the struggle between Spotify and Apple over in-app subscriptions, discussed *infra.*
[34] *Id.* at ¶ 4.65.
[35] *Id.* at ¶ 4.64.

Taken together, these pose a substantial threat to innovation, choice, and quality for users and musicians alike.

The Black Box Problem

Several factors working in tandem limit our view into the streaming ecosystem. First and most obvious is the ubiquity of **non-disclosure agreements**, or **NDAs**.[36] NDAs are the standard at almost every level of the licensing chain, from deals between streamers and labels, all the way down to individual artists' record deals. Artists and their managers are not even allowed to review the terms of their own labels' streaming deals.[37] Sadly, this is a long-standing problem in the industry; multiple economists have noted that such clauses make it "virtually impossible to obtain systematic data in this field."[38]

This "NDA curtain" leaves us with very few sources of hard data. If we want to understand what's going on, we must rely on a combination of public industry averages, illustrative examples, and data reverse-engineered from publicly available sources.[39] We have been careful, when discussing the experiences of artists, to cite sources which speak directly to that experience.[40] While testimonials are no substitute for thorough data, they can illustrate dynamics that may be otherwise hidden from public view.

The Superstar Model

Music, like many other copyright industries, generally follows what economist Anita Elberse calls the "superstar acquisition model."[41] This is a "many eggs, few baskets" strategy in which firms peg their financial health to the success of their biggest stars and prioritize them (often disproportionately) over smaller, less lucrative acts.

This is a stark contrast to the early, mostly utopian visions of music streaming, most of which focused on how it could lower barriers to entry and uplift independent voices. While many independent artists have indeed benefited, the opposite has also happened: Labels have used the lowered costs of distribution and reproduction to double and triple down on their most lucrative

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[36] Yoon Sing Kok, *Unveiling the Black Box: Allocate the Missing Revenues in Music Streaming*, University of Agder (2017). Available at https://web.archive.org/web/20230202182154/https://uia.brage.unit.no/uia-xmlui/bitstream/handle/11250/2457472/Kok,%20Yoon%20Sing.pdf?sequence=1.
[37] Chris Cooke, Music Managers Forum, *Dissecting The Digital Dollar* 104 (3d ed. 2020).
[38] Sherwin Rosen, *The Economics of Superstars*, 71 Am. Econ. Rev. 845 (1981), https://www.jstor.org/stable/1803469.
[39] For an illustrative example of such "reverse engineering" see the methodology and data sources from Luis Aguiar and Joel Waldfogel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?* (October 2015). NBER Working Paper No. w21653, pp. 12-16. Available at SSRN: https://ssrn.com/abstract=2679691.
[40] Of particular use is the work of the Music Managers' Forum, a cross-border collective of managers and industry veterans which puts out a biennial report on the practical economics of streaming, current trends within the industry, and the challenges faced by artists and their representatives.
[41] *See, e.g.,* Anita Elberse, *Blockbusters: Hit-making, Risk-taking, and the Big Business of Entertainment* (2013).

artists.[42] Digital streaming has not, as hoped, upended the superstar model: The top 1% of artists account for more than 90% of all streams, while the top 10% of artists account for 99.4%.[43] This has profound impacts on the economics of artist compensation, which we will discuss below.

This preference for superstars is not entirely self-serving. Consumers, even when given abundant options, return to "superstar" products at a high rate.[44] While there are indisputable benefits to preserving and making available the "long tail" of music (i.e., older or more obscure tracks that would otherwise be unavailable or lost), the long tail does not drive profits, and the artists responsible for the long tail are often overlooked or forgotten altogether.[45]

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[42] Mark Sweeney, *'Odds are against you': the problem with the music streaming boom*, The Guardian (2 Oct 2021), https://web.archive.org/web/20230209203309/https://www.theguardian.com/music/2021/oct/02/odds-are-against-you-the-problem-with-the-music-streaming-boom.

[43] Emily Blake, *Data Shows 90 Percent of Streams Go to the Top 1 Percent of Artists*, Rolling Stone (9 Sep 2020), https://web.archive.org/web/20230209193737/https://www.rollingstone.com/pro/news/top-1-percent-streaming-1055005/. Notably, these numbers actually represent an *improvement* over radio play, where "the top 1 percent received practically all—read: 99.996 percent—of radio spins on the music released" during an analogous period.

[44] *See* Rosen, *supra* note 38 at 845 (describing the phenomenon as being characterized by "concentration of output among a few individuals, marked skewness in the associated distributions of income and very large rewards at the top.").

[45] Rosen at 845.

WHERE IS ALL THE MONEY GOING?

Consumers are tossing billions of dollars over the garden wall of streaming services. Record companies are reporting record profits. It is not, by any equitable measure, making its way to artists. So where is it going?

STAGE ONE: Customers to Streaming Services ($12 Billion)

This is one of the few pieces of the puzzle for which there is a concrete, public number. Consumers spend approximately $12 billion a year on consumer music streaming.[46] MusicWatch's consumer study estimates that consumers spend an average of $98 per person per year on recorded music across formats;[47] however, limitations in the data suggest that the overall number may be substantially higher.[48] While that is below the 1999 peak of $23.7 billion (inflation adjusted), it is also up from the 2014 trough of $7.7 billion.[49]

Subscription Pricing

Most streaming services offer multiple tiers of paid subscription, from barebones ad-free options to multi-user family plans or plans offering HD sound quality. Standard individual plans range from $4.99-$10.99/month, with deluxe plans in the $15.99-$19.99/month range. Although we have some data on the effect of price changes on consumer preferences in the context of physical music, public data on how pricing affects consumer streaming behavior is limited.

Many streaming services also offer an ad-supported or "freemium" option. These bring in substantially less revenue, primarily through advertising and/or collection of consumer data, and pay lower per-stream rates to rightsholders.[50] The economics (and ethics) of freemium service has become a flash point for artists, rightsholders, and services alike.[51] Despite this, freemium

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[46] Hypebot, *MusicWatch: Music Engagement And Spending Hit Record Highs Driven By Streaming, Vinyl, Social Video*, Celebrity Access (25 Mar 2022), https://web.archive.org/web/20230202183117/https://celebrityaccess.com/2022/03/25/musicwatch-music-engagement-and-spending-hit-record-highs-driven-by-streaming-vinyl-social-video/.
[47] *Id*.
[48] MusicWatch's data accounts for streaming, subscriptions, and CD purchases, but does not include Amazon Music or Pandora/SiriusXM—two of the largest recorded music services in the country. *Id*.
[49] U.S. Recorded Music Revenues by Format, Recording Ind. Ass'n Am., https://web.archive.org/web/20230217193439/https://www.riaa.com/u-s-sales-database/ [last accessed 17 Feb 2023].
[50] Amy X. Wang, *Spotify is doubling down on an unprofitable strategy*, Quartz (1 Mar 2018), https://web.archive.org/web/20230202183219/https://qz.com/work/1218831/spotify-is-doubling-down-on-an-unprofitable-strategy-as-it-prepares-to-go-public.
[51] Tim Ingham, *'The music industry would be insane to dump freemium'*, Music Business Worldwide (12 Mar 2015), https://web.archive.org/web/20230209155934/https://www.musicbusinessworldwide.com/the-music-industry-would-be-insane-to-dump-freemium/.

models are viewed as valuable both for their role in piracy diversion,[52] and as sources of valuable user data.[53]

App Stores and Payment Processors

For services with mobile apps, app stores can also take a slice. Generally, app stores take between 15-30% of all in-app purchases and subscriptions.[54] This amount has long been a sticking point within the app industry, often flaring up into acrimonious public finger-pointing and calls for regulatory intervention.[55] While the full complexity of app store markets is beyond the scope of this paper, two things are particularly relevant to the music market.

First, until early 2022, the Apple App Store forbade apps from including outside links to web-based sign-ups. This meant that app developers who wanted to offer subscriptions had to either do so in the app, subjecting the subscription fee to Apple's 30% cut, or hope their customers independently found their way to the service's web-based sign-up. This policy was quietly adjusted in early 2022 to allow certain app developers, such as Spotify and Netflix, to *request* (but not guarantee) the right to point subscribers to web-based sign-up forms.[56]

Second, this prompted some services to set separate prices for in-app subscriptions and website sign-ups. For a time, a Spotify premium subscription purchased on the web cost $9.99, while the same subscription purchased through the iOS app was priced at $12.99 to compensate for

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[52] *Id. See also* Christine Halmenschlager and Patrick Waelbroeck, *Fighting Free with Free: Freemium vs. Piracy* (29 Nov 2014), https://ssrn.com/abstract=2475641.

[53] *See, e.g.*, Jack Morse, *How to stop Spotify from sharing your data, and why you should*, Mashable (5 Apr 2022), https://web.archive.org/web/20230209160323/https://mashable.com/article/spotify-user-privacy-settings ("[T]he wildly popular music streaming service in fact collects, stores, and shares reams of seemingly mundane user data, adding up to an intrusion that's much more than just the sum of its parts. While Spotify customers are busy rocking out, the company has its metaphorical hands full profiting off the data that rocking generates."); Amanda Hoover, *The Big Problem With Spotify Wrapped*, Wired (1 Dec 2022), https://web.archive.org/web/20230209160736/https://www.wired.com/story/spotify-wrapped-user-data/ ("What makes Spotify so good at creating these lists and predicting the music that users want to hear is a robust artificial intelligence system and its immense data trove."); Quina Baterina, The Dark Side of Spotify Data Collection, MakeUseOf (16 Oct 2021), https://web.archive.org/web/20230209160940/https://www.makeuseof.com/spotify-data-collection/.

[54] Ian Carlos Campbell and Julia Alexander, *A Guide to Platform Fees*, The Verge (24 Aug 2021), https://web.archive.org/web/20230202183335/https://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google.

[55] *See, e.g.*, Chris Welch, *Spotify urges iPhone customers to stop paying through Apple's App Store*, The Verge (8 Jul 2015). https://web.archive.org/web/20230202183429/https://www.theverge.com/2015/7/8/8913105/spotify-apple-app-store-email; Joan E Solsman, *Spotify: Apple's App Store abuses its power to 'stifle' rivals*, CNET (14 Mar 2019), https://web.archive.org/web/20230202183622/https://www.cnet.com/tech/services-and-software/spotify-apple-app-store-abuses-power-to-stifle-competition/; Joan E. Solsman, *Apple fires back: Spotify pays fees on less than 1% of its members*, CNET (24 Jun 2019), https://web.archive.org/web/20230202183711/https://www.cnet.com/tech/mobile/apple-fires-back-spotify-pays-fees-on-less-than-1-percent-of-members/; Oliver Darcy, *Spotify is going to war with Apple after the App Store rejected its big new feature*, CNN.com (1 Nov 2022), https://web.archive.org/web/20230202183726/https://www.cnn.com/2022/11/01/media/spotify-apple-app-store-reliable-sources/index.html.

[56] Todd Spangler, *Apple will let content apps like Netflix, Spotify link to their websites to sign up users*, Variety (30 Mar 2022), https://web.archive.org/web/20230202183918/https://variety.com/2022/digital/news/apple-app-store-netflix-spotify-web-accounts-1235219399/.

Apple's fees. (Spotify has since discontinued the option to purchase subscriptions through the iOS app altogether.)[57]

For subscriptions managed outside of an app store, payment processors such as Visa, Mastercard, and PayPal also take a slice off of subscription fees. However, these numbers appear to be comparatively small, between 1-4%, with high-volume services at the lower range. If we assume around 1.5%, that would shave off (roughly) $180 million from the total pot. That means that approximately $11.82 billion makes it into the hands of DSPs.

STAGE TWO: Services to Rightsholders (Approx. $8.28 Billion)

Thanks to the pervasive NDA culture around music streaming deals, public data on the cost, volume, and contours of DSP licensing agreements is nearly nonexistent. What we have instead are aggregate estimates. The Parliamentary Inquiry revealed that, of the $12 billion of consumer money spent on music streaming, approximately **$8.28 billion (approximately 69%)** transfers through to rightsholders. However, as we will discuss below, it is unclear whether this number accounts for the veritable buffet of non-cash compensation that form a large part of major deals.

What DSPs Keep

How much do services keep for themselves? There are no comprehensive public numbers, but we can again rely on the averages put forward by the Parliamentary Report and confirmed by estimates published by the Digital Music Alliance (DiMA).[58] DSPs pocket about **31% of consumer dollars**, or about **$3.72 billion**. Notably, a broad sampling of industry stakeholders agreed that "it was basically reasonable for the services to aim to keep approximately 30% of their revenue."[59]

Despite this impressive number, streaming services are notoriously unprofitable.[60] Spotify has famously *never* managed an annual profit,[61] despite one quarterly success in 2018, and an encore

[57] *Apple Payments for Spotify*, Spotify. https://web.archive.org/web/20230202184034/https://support.spotify.com/us/article/apple-payments/ [last accessed 2 Feb 2023].
[58] *U.S. On-Demand Subscription Streaming Revenue: Who gets paid and how much?,* Digital Media Ass'n., https://web.archive.org/web/20230223185624/https://dima.org/news-and-resources/who-gets-paid-and-how-much/ [last accessed 23 Feb 2023].
[59] Cooke at 81.
[60] *Parliamentary Report* at 67. *See also* Benjamin Pimentel, Tomio Geron, and Janko Roettgers, *Jack Dorsey is so money: What Tidal and banking do for Square*, Protocol (4 Mar 2021), https://www.protocol.com/square-tidal-jack-dorsey-banking ("The business of music streaming is not sustainable in and of itself," [author Cherie] Hu said, pointing to the fact that Tidal lost $52 million on subscription revenues of just $166 million in 2019").
[61] Adam Clark, *Spotify Earnings Reveal Larger-Than-Expected Loss. Why the Stock Is Gaining*, Barrons (31 Jan 2023), https://www.barrons.com/articles/spotify-stock-price-earnings-51675163902.

performance in Q3 2019.[62] Deezer, founded in 2007, earned praise for its ambition in setting a *2025* target date for profitability.[63] The financials for Tidal, which was purchased by fintech firm Block in 2021, are obfuscated under the firm's public reporting.[64] The finances of services such as Apple Music, Amazon, and YouTube Music are generally not broken out from their parent companies in public reporting.

Profit is, of course, not the only measure of market success. It is, however, a salient (and apparently elusive) one. How, despite massive consumer spending, have *none* of these enormous firms managed to turn a consistent profit? The answer is complicated, and its full nuance is beyond the scope of this paper. Two factors, however, are immediately relevant.

The simplest answer lies in basic economics. Popular music is what economists refer to as "non-fungible"; a consumer who wants to listen to the new Lizzo album is not interested in a "close enough" substitute, even if they enjoy the substitute on its own merits.[65] In other words, there are no perfect substitutes in the world of popular music. Major labels act as "price setters." Because there are no perfect substitutes, they can unilaterally set the price for their products (in this case, licenses).[66] Record companies can choose from a buffet of DSPs, some of which are underwritten by the largest companies the world has ever seen. This gives them the incentive and ability to charge what the market will bear and absorb the buyers' (in this case, DSPs') surplus. Market observation—namely, the lack of profitable DSPs—appears to bear out this hypothesis.

Second, the move to digital distribution has allowed labels to eliminate many of the costs incurred by physical distribution, while *also* offloading their financial risk to DSPs. As the Parliamentary Report notes,

> Traditional costs that fall to the record labels with physical distribution, such as manufacturing, storing and transporting the product or for breakage or returns, do not apply for streaming. Instead, the internet has simultaneously allowed for frictionless transfer of assets from the label to the service. Concurrently, the costs incurred by digital distribution have been transferred to and are borne by the streaming service.[67]

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[62] Tim Ingham, *Spotify is Profitable. How Did That Happen?*, Rolling Stone (12 Nov 2019), https://web.archive.org/web/20230209212235/https://www.rollingstone.com/music/music-features/spotify-profitable-how-happen-910456/.
[63] Mathieu Rosemain, *France's Deezer pledges to turn a profit by 2025*, Reuters (22 Sep 2022), https://web.archive.org/web/20230209212540/https://www.reuters.com/technology/frances-deezer-pledges-turn-profit-by-2025-2022-09-21/.
[64] Stuart Dredge, *Block financials hint at $56m of quarterly Tidal revenues*, Musically (4 Nov 2022), https://web.archive.org/web/20230209212443/https://musically.com/2022/11/04/block-financials-hint-at-56m-of-quarterly-tidal-revenues/.
[65] Rosen, *supra* note 38.
[66] *Price-setter*, Oxford Dictionary of Economics (3d ed. 2009).
[67] *Parliamentary Report* at 67.

The combination of price-making power, risk transfer, and information asymmetry creates a perfect environment for anticompetitive behavior.

Rightsholder Middlemen: The Players

In the United States, there are multiple potential routes by which DSPs pay rightsholders. Most of these, however, involve multiple layers of entertainment industry middlemen who each take a cut off the top. By the time the money reaches artists and songwriters, it has often been reduced to mere pennies on the dollar.

The most common point of payment for DSPs is **distributors**. These middleman services bundle catalogs and negotiate rates, and are responsible for passing royalties along to the next layer of rightsholders—labels, publishers, and occasionally Collective Rights Management Societies (CRMs)—who then pay the artist according to the terms of their contract. The vast majority of distribution is handled by entities under the umbrella of the Big Three.

DSPs also pay **Collective Rights Management** organizations (CRMs). CRMs, like distributors, bundle a specific kind of license on behalf of their members. They generally provide more transparency into how royalties are calculated and distributed. However, they only represent a small piece of the licensing pie, and in some cases are skipped over altogether in favor of confidential direct deals.

Distributors and Aggregators

Getting a track on a streaming platform is a logistically complicated task. Sound files must meet certain technical requirements, as must the associated metadata. While a handful of smaller services (such as Bandcamp and Soundcloud) allow direct uploads from artists, most do not have the capacity to individually deal with rightsholders.[68] DSPs, for their part, generally prefer licensing large catalogs over individual tracks. As such, they deal primarily with distributors.

Distributors and aggregators are businesses which, among other things,[69] "act[] as the middleman between rightsholders and music streaming services."[70] Bundled catalogs are more attractive to

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[68] Spotify discontinued its direct-upload program in 2019. *We're Closing the Upload Beta Program. Here's What Artists Need to Know*, Spotify (1 Jul 2019), https://web.archive.org/web/20230202190851/https://artists.spotify.com/en/blog/we%27re-closing-the-upload-beta-program. Apple requires independent artists to partner with an "Apple-preferred" distributor. "Get your music on Apple Music," *Apple Music for Artists*, https://web.archive.org/web/20230202191129/https://artists.apple.com/support/1108-get-your-next-release-on-apple-music [last accessed 2 Feb 2023].

[69] The diversity of business models in this space is vast, and beyond the scope of this paper. However, it is worth briefly distinguishing between the two main types of service. As a general rule of thumb, distributors provide a broader array of services (which may include physical production and distribution), while aggregators focus primarily on digital releases. Both may provide a wide range of services—including license negotiation, marketing & strategy, catalog & metadata delivery, and facilitating payouts—or only one.

[70] *Parliamentary Report* at 16.

DSPs and give rightsholders more negotiating leverage than they would enjoy separately. Distributors take advantage of this by bundling catalogs, and negotiating rates on behalf of their rightsholder clients.[71] They are also responsible for receiving DSP payments and distributing them to the next level of intermediary rightsholders—record labels, CRMs, and music publishers.

Competition Overview: Distributors

There are an enormous number of distributors and aggregators operating in the streaming space, all offering different services, models, and commitments to artists. Despite this, the Big Three still overwhelmingly dominate. The distribution arms of Sony, Warner, and Universal represent their own companies' holdings, but also, through owned and affiliated companies, offer third-party distribution for independent labels. In 2017, distributors controlled by the Big Three collected **more than 87% of all U.S. digital royalties**.[72] This overwhelming market share, and the accompanying culture of opacity, raises serious concerns about the ability of the Big Three to manipulate both the DSP and artist ends of the market.

Despite this concentration, distributors have adopted a wide array of business and payment models. Services may charge "a flat per-song/album fee, an annual recurring subscription toll, or a percentage-based commission of up to 15%. Or any combination of the three."[73] In 2018, Spotify agreed to pay the Big Three (plus major indie distributor Merlin) 52% of the revenue generated by their artists.[74] In that same time period, Spotify's short-lived direct upload program—which allowed artists to bypass distributors entirely and deal directly with Spotify—paid artists 50% of the program's prorated net revenue. When accounting for the share taken by the distributors and intermediate rightsholders, this all but guaranteed a higher pass-through rate for participating artists.[75]

Collective Rights Management Societies

Many (though not all) songwriters also rely on CRMs to manage the various licenses required for streaming. The oldest and most well-known are **Performing Rights Organizations (PROs)**, which bundle and license public performance rights. Specialty PROs—such as MusicReports (which licenses primarily for television and film)—also exist.

[71] *The Mechanics of Music Distribution: How it Works, Types of Music Distribution Companies + 35 Top Distributors*, SoundCharts (29 Jun 2022), https://web.archive.org/web/20230218163202/https://soundcharts.com/blog/music-distribution.
[72] *Id.*
[73] *Id.*
[74] Tim Ingham, *Spotify's Direct Distribution Deals: What Do Artists Get Paid?*, Music Business Worldwide (23 Sep 2018), https://web.archive.org/web/20230217200157/https://www.musicbusinessworldwide.com/spotifys-direct-distribution-deals-what-do-the-artists-get/.
[75] *Id*.

Songwriters may also be represented by **Mechanical Rights Organizations (MROs)**. As the name implies, MROs license reproduction and distribution rights (also known as "mechanical" rights) on behalf of member songwriters. The primary MRO is the **Mechanical Licensing Collective**, established in 2018 by the Music Modernization Act and granted the ability to issue blanket mechanical licenses for all compositions—even when the rightsholder is currently unknown.[76]

SoundExchange was designed to play a similar (but more limited) role in administering the digital public performance right for sound recordings. It was established in the early 2000s and is required by law to divide royalties according to a set formula: 45% of royalties go to featured artists, 5% to a fund for non-featured artists, and the remaining 50% to the rightsholder (typically the record label). To date, it has distributed over $5 billion in royalties.[77] However, as noted, SoundExchange's reach is limited; it administers only two statutory licenses, which themselves only apply to *non-interactive* streaming or webcasting.[78]

Competition Overview: Performing Rights Organizations

There are five dominant PROs that administer some or all of the public performance rights for songwriters in the US: **ASCAP**, **BMI**, **SESAC**, and **GMR**.[79] Each of these have songwriter members and publisher members. While a songwriter can only sign with one PRO, a publisher can split its catalog among multiple PROs.

ASCAP and BMI, the oldest and largest by catalog size, were founded in the early 20th century. Both offer sweeping "blanket" licenses of bundled composition public performance rights. These blanket licenses are immensely valuable to DSPs, terrestrial radio stations, venues, and others, because they eliminate the cost and effort of identifying, locating, and negotiating independently with thousands upon thousands of composers and publishers.[80] However, this market power resulted in predictably bad behavior. ASCAP refused to offer individual or per-use licenses, while simultaneously barring its members from directly negotiating with licensees. The end result was that all purchasers—large or small, and regardless of need—were forced into

[76] 17 USC § 115(d).
[77] Variety Staff, *SoundExchange Passes $5 Billion Mark in Streaming Royalty Distributions*, Variety (15 Mar 2018), https://web.archive.org/web/20230218165419/https://variety.com/2018/biz/news/soundexchange-passes-5-billion-mark-in-streaming-royalty-distributions-1202728206/.
[78] 17 USC §§ 112, 114.
[79] A fifth PRO, AMRA, operates in a more specialized niche: it licenses public performance and mechanical rights to international DSPs, but only on behalf of Canadian and American publishers. (It also distributes songwriter royalties from those deals.) Because of its limited specialty, it is difficult to gauge its overall impact on the broader ecosystem.
[80] "The disk-jockey's itchy fingers and the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author, or—heaven forfend the legal ramifications!—the manifold unascertainable and unlocatable heirs, assigns, or other legal representatives of the composer and author." 19 L. & Contemp. Probs. 294, 297.

sweeping blanket licenses priced at ASCAP's sole discretion.[81] These market abuses (among others)[82] led the Department of Justice to initiate antitrust action against ASCAP. Both organizations entered into roughly parallel consent decrees in 1941, and remain under them today.[83]

Until recently, both operated as nonprofits; BMI declared its intent to switch to a for-profit model in late 2022.[84] Both, by the terms of their consent decrees, must accept any published songwriter who wants to join.[85] Combined, ASCAP and BMI control over 90% of composition public performance rights in the United States. Their market control is so profound that the Department of Justice has repeatedly declined to rescind or substantially modify their consent decrees, even when helmed by otherwise deregulatory administrations.[86]

SESAC and GMR are both invitation-only, and do not disclose their finances or payment structures. SESAC was founded in 1930 and originally focused on promoting European songwriters; its narrow focus and limited market power allowed it to escape the kind of antitrust scrutiny placed upon its larger cousins in the '30s and '40s. It has since morphed into a

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[81] Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 Fordham Intell. Prop. Media & Ent. L.J. 733 (1998).

[82] Black and rural songwriters could, famously, not find representation via ASCAP. While this attitude (common as it was at the time) did not motivate the antitrust action, certain consent decree provisions—such as the requirement that ASCAP take all comers who had met the minimum publication requirements—marked a substantial, if often only theoretical, improvement for minority and 'hillbilly' songwriters. *See* Diane Pecknold, *The Selling Sound: The Rise of the Country Music Industry* 54-55 (2007) (explaining that 'hillbilly' artists, the precursors to modern country, "were aggressively excluded from the unions, licensing societies, and social formations that constituted the music business"); Catherine Squires, *African Americans and the Media* 147 (2009) ("Blues and jazz performed by blacks was termed 'race music.' The music on these records was usually not included in the ASCAP catalogue [sic], because ASCAP rarely allowed Black members"). For a broad discussion of the anticompetitive risks of PROs, see Jonathan Band and Brandon Butler, *Some Cautionary Tales about Collective Licensing*, 21 Mich. State Int'l L. R. 687 (2013).

[83] The Department of Justice primarily pursued its case against ASCAP. BMI's consent decree sprang in part from "alleged legal infirmities somewhat akin to those of ASCAP." 19 L. & Contemp. Probs. 306 (1954). The more salient reason for its adoption, however, was strategic: the PROs had been engaged in a long and bitter feud, and BMI's acquiescence to a consent decree forced ASCAP's hand to accept one as well. *See, e.g.,* Sol Taishoff, *War Against ASCAP Believed Nearly Won*, Broadcasting Magazine (27 Jan 1941), *available at* https://web.archive.org/web/20230220033834/https://worldradiohistory.com/Archive-BC/BC-1941/1941-01-27-BC.pdf. Full archives of Broadcasting Magazine (the self-proclaimed "newsmagazine of the fifth estate,") are available at https://web.archive.org/web/20230220033718/https://worldradiohistory.com/Broadcasting-Magazine.htm.

[84] Jem Aswad, *BMI Is Changing to a For-Profit Business Model*, Variety (12 Oct 2022), https://web.archive.org/web/20230217194317/https://variety.com/2022/music/news/bmi-for-profit-business-model-1235400965/.

[85] *United States v. Am. Soc'y of Composers, Authors & Publishers*, Civ. Action No. 41-1395 (WCC), 18 (S.D.N.Y. Jun. 11, 2001) (Second Amended Final Judgment) [hereinafter *ASCAP Consent Decree*]; *United States v. Broadcast Music, Inc.*, No. 64-Civ-3787, at 2 (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment) [hereinafter *BMI Consent Decree*].

[86] Makan Delrahim, Assistant Attorney General, Antitrust Division, U.S. Dept. of Justice, Remarks as Prepared for the Vanderbilt University Law School: *"And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees* (15 Jan 2021), available at https://web.archive.org/web/20230217220619/https://www.justice.gov/opa/speech/file/1355241/download.

broad-catalog, invitation-only PRO representing major talent such as Adele, Bob Dylan, and Neil Diamond.

GMR exclusively services “superstar” songwriters such as Bruce Springsteen, Bruno Mars, Lizzo, and the estates of John Lennon and George Gershwin.[87] They control a small but high-demand segment of the market, and there are indications that competition for blockbuster talent is becoming ever more fierce.[88]

Antitrust Concerns

PROs represent an enormous source of efficiency, but carry a matching risk of monopolistic behavior. ASCAP and BMI in particular have been the subject of endless commentary.[89] There are a few crucial points about the business model itself that are worth highlighting, in brief.

First, the Supreme Court itself has noted that ASCAP’s and BMI’s primary product—their sweeping blanket licenses—would, in the absence of standing consent decrees and rate courts, likely violate antitrust law.[90] The benefits of these licenses do not exist in *spite* of the consent decrees, but largely flow *from* them. Take catalog transparency: PROs have every economic incentive to obfuscate their holdings as a simple matter of negotiation. The temptation is so strong that even *self-imposed* transparency mandates fall by the wayside; in 2011, ASCAP failed to follow its own internal transparency rules because a member publisher advocated for it as a negotiating advantage.[91] Comments during the Department of Justice’s 2014 consent decree review highlighted this incentive failure again and again.[92]

[87] Catalog, Global Music Rights, https://globalmusicrights.com/Catalog [last accessed 17 Feb 2023].
[88] Ed Christman, *As Competition Heats Up, Performance Rights Organizations Respond To Market Changes*, Billboard (1 Jul 2019), https://web.archive.org/web/20230203161001/https://www.billboard.com/music/music-news/competition-heats-up-performance-rights-organizations-respond-market-changes-8518214/.
[89] *See, e.g.*, Hillman *supra* n 81; Sigmund Timberg, *ASCAP, BMI and the Television Broadcasters - A Postscript*, 13 Int'l Bus. Law. 415 (1985); William W. Nye, *Some Economic Issues in Licensing of Music Performance Rights: Controversies in Recent ASCAP-BMI Litigation*, 13 J. Media Econ. 15 (2000); Maurice Stucke and Allen P. Grunes, *Potential Legal Issues in Terminating the ASCAP and BMI Decrees* (U. Tenn. Knoxville Law Faculty Pub. 133, 2018); Jay M. Fujitani, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for Antitrust Regulation*, 72 Calif. L. Rev. 103 (1984).
[90] *Broadcast Music, Inc. (BMI) v. Columbia Broadcasting System (CBS), Inc.*, 441 U.S. 1, 13 (1979) (“[I]t cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices. In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain. …That fact alone might not remove a naked price-fixing scheme from the ambit of the *per se* rule.”)
[91] *In re Pandora Media, Inc.,* 6 F. Supp. 3d 317, 345 (S.D.N.Y. 2014), *aff'd sub nom. Pandora Media, Inc. v. Am. Soc. of Composers, Authors & Publishers*, 785 F.3d 73 (2d Cir. 2015).
[92] *See, e.g.*, Comments of Future of Music Coal. at 12 (“Under the Consent Decrees, ASCAP and BMI have struggled with transparency in internal and external matters.”); Comments of Comput. & Commc’n Indus. Ass’n at 4-7 (“PROs should not simultaneously be empowered to control a large and economically significant swath of cultural works, and at the same time be permitted to obscure the boundaries of that dominion.”); Comments of NCTA at 5 (“The lack of transparency in the current system is a significant impediment to concluding transactions; creating greater transparency in these respects would have significant efficiency benefits ... The existing ASCAP and

Second, the consent decrees prohibit ASCAP and BMI from demanding that songwriters license exclusively through the PROs.[93] This establishes the blanket license as a floor; songwriters will always have their works included in the blanket license, but retain the option to directly negotiate for better terms. Exclusivity and opposition to direct licensing was a known problem before the consent decrees, and it remains one outside of them. SESAC and GMR have both been accused in court of blocking direct license attempts. SESAC was found by a judge to have obscured the contents of its repertory specifically to push over-inclusive licenses and prevent licensees from identifying the parties with whom they needed to negotiate.[94] GMR was accused of a similar practice, but the case settled before the court could rule on the merits.[95]

Finally, while PROs compete to attract songwriter and publisher members—by offering better rates, transparency, and representation[96]—they do not need to compete for *licensees*. Legally and practically, DSPs are captive buyers for all four PROs. This is largely due to the legal practice of fractional licensing and the business practice of performers securing songwriting credits.

"Fractional licensing" is a scheme under which any joint rightsholder (such as one songwriter out of a group of four) can only license their "fraction" of the work. To stream a song with multiple credited songwriters, a DSP must separately clear each writer's share—even when each writer is represented by a different PRO. This would, perhaps, be manageable in a world where most songs were penned by one or two composers. We do not live in that world; in 2016, most "popular mainstream songs ha[d] (on average) at least four writers and six publishers each,"[97]

BMI song databases are fundamentally inadequate for users seeking to identify, for example, the songs licensable on a publisher-by-publisher or writer-by-writer basis."); Comments of Nat'l Ass'n Broad. at 4 ("Lack of meaningful access to [licensing] information has increased transaction costs and hindered licensing activities—both direct and collective."); Comments of Netflix at 17 ("the lack of transparency to users can lead to material information imbalances or asymmetries between licensors and licensees—which render a marketplace setting demonstrably noncompetitive"); Comments of Radio Music Licensing Comm. at 32; Comments of Nat'l Religious Broad. Music Licensing Comm. at 10 (noting that "[t]he PROs themselves disclaim the accuracy of their database.").

[93] *ASCAP Consent Decree* at 6.

[94] *Radio Music License Comm. v. SESAC*, No. 12-cv-5087, Report and Recommendation, at 29 (E.D. Pa., Dec. 20, 2013).

[95] "[E]ven where a station is willing to try to operate without using GMR's 'must have' repertory, GMR does not make available a feasible and reliable method that radio stations can use to determine, with any level of confidence, what works they would need to avoid playing in order to operate without risk of copyright infringement." Complaint, *Radio Music License Comm. v. Glob. Music Rts.*, No. 16-6076 (E.D. Pa., Mar. 29, 2019). The case settled in 2022.

[96] Both ASCAP and BMI post detailed information about royalty calculations and payment schedules on their websites. *ASCAP Payment System: How ASCAP Calculates Royalties*, ASCAP, https://web.archive.org/web/20230217200405/https://www.ascap.com/help/royalties-and-payment/payment/royalties [last accessed 17 Feb 2023]; *How We Pay Royalties: General Royalty Information*, Broadcast Music Inc., https://web.archive.org/web/20230217200535/https://www.bmi.com/creators/royalty/general_information [last accessed 17 Feb 2023].

[97] Daniel Sanchez, *The Average Hit Song Has 4+ Writers and 6 Different Publishers*, Digital Music News (Aug. 2, 2017), https://www.digitalmusicnews.com/2017/08/02/songwriters-hit-song/.

and thirteen of that year's top 100 hits had eight or more songwriter credits attached.[98] This results in a perfectly captive marketplace, where DSPs must obtain blanket licenses from all PROs. PROs thus have no incentive to compete against each other to attract licensees.[99]

Contours of a Licensing Deal

So what exactly goes into a deal between DSPs and middlemen? The short answer is that we don't exactly know. The slightly longer answer is that we have some ideas—and none of them look good.

Secrecy and NDAs

Notably, most of what we know about licensing agreements is via secondhand sources and leaks. Most licensing contracts are bound by nondisclosure agreements (NDAs). This means that details—-such as rates, non-cash payments, and the beneficiaries of each—-are obscured from both the public and, often, the artists for whom record companies claim to advocate.

This secrecy harms everybody. Artists, for their part, are furious at being kept from knowing how their work is being monetized, and at what rates; licensing secrecy has been repeatedly cited as one of the most common complaints in streaming.[100] Even artists' managers are locked out of the process.[101]

This means that, in practice, "artists are not able to find out what they are actually making from music streaming."[102] One 2015 survey found that more than half of music managers did not know the share arrangement between DSPs and their label; two-thirds did not know the agreed minimum payments for their own artists.[103] Meanwhile, distributors have the incentive to provide the best deals for their biggest clients, even at the expense of smaller accounts. For distributors owned and controlled by the Big Three, this means they have both the incentive and the ability to self-preference their own works over those of others. The result is that mega-stars wield outsized influence at the negotiation table, while smaller artists take the scraps:

> As one artist noted, because these parties do not negotiate directly with platforms but instead release via a distributor or piggy-back on the majors'

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[98] There are multiple reasons for this rising trend. Many are industry-specific; none show any signs of abating. Mark Sutherland, *Songwriting: Why it takes more than two to make a hit nowadays*, Music Week (May 16, 2017), https://www.musicweek.com/publishing/read/songwriting-why-it-takes-more-than-two-to-make-a-hit-nowadays/068478.
[99] Nor, of course, do consumers structure their preferences around PRO affiliation.
[100] Cooke at 104.
[101] Cooke at 104.
[102] Kok at 7.
[103] Chris Cooke, Music Managers Forum, *Dissecting The Digital Dollar, Part One: How streaming services are licensed and the challenges artists now face* 49 (2015), https://web.archive.org/web/20230226222013/https://themmf.net/site/wp-content/uploads/2015/09/digitaldollar_fullreport.pdf [hereinafter Cooke 2015].

deals, “we just get to sign up, wait for the first payments to come through, and then decide whether it was worth it or not.”[104]

On a macro level, this entrenches the imbalance of power between indie and self-released artists on one hand, and more powerful labels on the other. It also prevents artists from thoroughly auditing royalty payouts; assessing whether their labels or publishers are adequately representing their interests; deciding whether their labels or publishers are behaving fairly toward other artists; and assessing the actual commercial value of their work. Outside of the industry, this curtain of secrecy prevents artists, lawmakers, and advocates alike from making sound, data-informed assessments about the functionality and health of the music marketplace.

Payola

Licensing deals between DSPs and major rightsholders typically include kickbacks and other non-cash payments. Labels have leveraged their catalog to secure equity stakes,[105] algorithmic amplification for preferred artists,[106] user demographic and consumption data,[107] and advertising discounts.[108] The aggregate result is that major rightsholders negotiate for, and secure, numerous invisible forms of compensation that influence both the streaming service and the labels’ payment to their own artists.

Researchers have discovered that songs from major labels “feature on popular Spotify playlists at a disproportionately higher rate than independent songs,”[109] and are “over-represented in the recommendation process, with Universal’s and Warner’s over-representation even being further amplified over iterations” of a recommendation engine.[110] This is likely due to the degree of leverage majors possess over the service, both financially and via kickbacks. Together, this

[104] *Parliamentary Report* at 69.
[105] Cooke at 99; Tim Ingham, *If Universal Music Sells Its Spotify Stock Right Now, Artists Get $500 Million*, Rolling Stone (11 Feb 2021), https://web.archive.org/web/20230206202326/https://www.rollingstone.com/pro/features/universal-music-spotify-ownership-artists-1126893/.
[106] Glenn Peoples, *How ‘Playola’ Is Infiltrating Streaming Services: Pay for Play Is ‘Definitely Happening’*, Billboard (19 Aug 2015), https://web.archive.org/web/20230226224334/https://www.billboard.com/pro/playola-promotion-streaming-services/; Paul Resnikoff, *Major Label CEO Confirms That ‘Playlist Payola’ Is a Real Thing…*, Digital Music News (20 May 2016), https://web.archive.org/web/20230226224106/https://www.digitalmusicnews.com/2016/05/20/playlist-payola-real-killing-artist-careers/.
[107] Jack Morse, *How to stop Spotify from sharing your data, and why you should*, Mashable (5 Apr 2022), https://web.archive.org/web/20230209160323/https://mashable.com/article/spotify-user-privacy-settings.
[108] A leaked 2017 contract between Spotify and Sony included “an allocation of advertising on the service’s freemium service which [Sony] could use or sell on.” Cooke at 102. *See also* Micah Singleton, *This was Sony Music's contract with Spotify*, The Verge (19 May 2015), https://web.archive.org/web/20230206201939/https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract.
[109] *Parliamentary Report* at 69.
[110] Peter Knees et al., *Bias and Feedback Loops in Music Recommendation: Studies on Record Label Impact* (MORS Workshop, 16th ACM Conference on Recommender Systems, 2022), https://web.archive.org/web/20230219202636/https://ceur-ws.org/Vol-3268/paper6.pdf.

creates a relationship where the DSP, in the words of the Parliamentary Report, "resembl[es] more a vertically integrated part of major record labels" than an independent entity.[111]

These mechanisms are, by any definition, **payola**. Pay-to-play schemes have been a staple of the modern music industry almost since its inception.[112] Although the avenues and players have shifted over the years, the core idea—"the undisclosed payment, or acceptance of payment, in cash or in kind, for promotion of a song, album, or artist"—remains unchanged.[113] Rightsholders offer licenses at discounted rates, in exchange for increased play and promotional visibility. This creates a landscape of unfair competition, where the firm in the position to offer the biggest payment (or discount) can disadvantage their competitors. DSPs, for their part, have actively solicited this; Spotify's Discovery mode, launched in November 2020 and described as a "marketing tool," promises artists increased visibility in exchange for accepting lower per-stream rates.[114] It has been thoroughly lambasted by artist advocates as its own form of payola,[115] and even prompted a Congressional letter expressing concern.[116]

More cynically, payola may be used to minimize the labels' financial obligations toward artists. Unlike royalty calculations, most recording contracts are silent on whether an artist is entitled to shares of things such as advertising revenue—let alone non pecuniary compensation such as playlist placement or user data. This asymmetry has led to fears that labels are prioritizing equity and other payola mechanisms in order to reduce their financial obligation to artists, while maximizing their own profits. Moreover, the NDA curtain means that at major labels, "specifics and sometimes even the basics about these commitments had generally not been communicated internally, let alone to artists and their representatives."[117] It is impossible to know for certain how extensively these kickbacks are being used, and whether or not they are being used to avoid paying artists. But "while this may simply be paranoia on the part of artists and managers," writes Cooke, "the secrecy that surrounds so many digital deals adds to this distrust."[118]

Advances, Breakage, and the Black Box

Even amid a buffet of kickbacks, major rightsholders will often require DSPs to pay out 7- or 8-figure advances as part of a licensing package. Leaked documents showed that Spotify paid

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[111] *Parliamentary Report* at 69.
[112] Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. Irvine L. Rev. 805, 806 (2022). Available at: https://scholarship.law.uci.edu/ucilr/vol12/iss3/6..
[113] *Id*.
[114] *Discovery Mode: Meet your next fans*, Spotify, https://web.archive.org/web/20230220225302/https://artists.spotify.com/en/discovery-mode [last accessed 20 Feb 2023].
[115] The Artist Rights Alliance, *Op-Ed: Spotify's New 'Discovery Mode' Is Just Payola*, Rolling Stone (18 May 2021), https://www.rollingstone.com/pro/music-biz-commentary/spotify-payola-artist-rights-alliance-1170544/.
[116] Ashley Cullins, *Spotify's "Discovery Mode" Being Probed by House Judiciary Committee*, The Hollywood Reporter (3 Jun 2021), https://web.archive.org/web/20230220224113/https://www.hollywoodreporter.com/business/digital/spotify-discovery-mode-congress-1234962754/.
[117] Cooke at 103.
[118] *Id.*

Sony Music $9 million in advances in their deal's first year, $16 million in the second, and $17.5 million in the third.[119] Analysis shows that Spotify paid out a full 82% percent of its total 2015 revenues in advance payments alone.[120]

This upfront payment is treated as an advance on future royalties, and provides guaranteed income for the label. In theory, a DSP can recoup the advance if the revenue (or other payment metric) generated by that label's catalog meets the advance amount within a set time period. However, if the catalog *fails* to do so, the un-recouped excess still belongs to the label. To borrow an illustration put forward by Chris Cooke of the Music Managers Forum, "[I]f the service pays a $1 million advance for the next year, but then the record company's catalogue [sic] generates only $750,000 under its revenue share or minimum guarantee arrangement, the rights owner gets to keep the extra $250,000."[121]

The ultimate fate of this surplus $250,000 (colloquially known as "breakage"[122]) is a source of industry contention.[123] While all three majors and many independent labels have publicly committed to sharing breakage fees with artists,[124] "it remains unclear exactly what these commitments … mean in real terms, i.e., how surpluses are allocated to artists and when such allocations began."[125]

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[119] *See, e.g.*, Ben Sisario, *Sony Terms With Spotify Uncovered in Contract*, NY Times (24 May 2015), https://web.archive.org/web/20230206201822/https://www.nytimes.com/2015/05/25/business/media/sony-terms-with-spotify-uncovered-in-contract.html; Micah Singleton, *This was Sony Music's contract with Spotify*, The Verge (19 May 2015), https://web.archive.org/web/20230206201939/https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract; Steve Knopper, *Leaked Sony-Spotify Contract Reveals Inner Workings of Streaming Music*, Rolling Stone (21 May 2015), https://web.archive.org/web/20230206202107/https://www.rollingstone.com/music/music-news/leaked-sony-spotify-contract-reveals-inner-workings-of-streaming-music-56450/.

[120] Mark Mulligan, *Just How Well Is Streaming Really Doing?*, Music Industry Blog (31 Aug 2016), https://web.archive.org/web/20230206201550/https://musicindustryblog.wordpress.com/2016/08/31/just-how-well-is-streaming-really-doing/.

[121] Cooke at 101.

[122] Not to be confused with "breakage" fees that labels charge artists. Cooke at 102.

[123] Marvin Jules, *All Three Major Record Labels Say They Pay Their Artists "Breakage" Money From Digital Streaming*, Celebrity Net Worth (9 Jun 2015), https://www.celebritynetworth.com/articles/entertainment-articles/three-major-record-labels-say-pay-artists-breakage-money-digital-streaming/

[124] Glenn Peoples, *Warner Music Group CEO: 'We Will Share' With Artists Any Proceeds from Sale of Our Stake in a Streaming Service*, Billboard (4 Feb 2016), https://web.archive.org/web/20230206200737/https://www.billboard.com/music/music-news/warner-music-group-ceo-stephen-cooper-spotify-equity-breakage-6866856/; Billboard Staff, *Sony Music: We'll Also Share Potential Spotify Windfall With Artists*, Billboard (5 Feb 2016), https://web.archive.org/web/20230206201139/https://www.billboard.com/pro/sony-music-spotify-ipo-windfall-artists-breakage-policy/ ; Tim Ingham, *Universal: Yes, we share digital breakage money with our artists*, Music Business Worldwide (2 Jun 2015), https://web.archive.org/web/20230206201114/https://www.musicbusinessworldwide.com/universal-yes-share-breakage-payments-artists/.

[125] Cooke at 102.

STAGE THREE: Rightsholders to Musicians ($?? Billion)

The most critical component of the music streaming value chain—payment flows from rightsholders to artists—is also the one about which we know the least. Some points of transparency exist. There is, however, a vast difference in transparency between the composition and sound recording markets.

The composition side, although imperfect, holds some points of transparency. As noted above, ASCAP and BMI provide significant public information about their royalty schedules and calculations. The Mechanical Licensing Collective operates pursuant to statutory mandates including regular self-audits, annual reports, artist audit privileges, and other various transparency mechanisms to ensure accountability.[126] There are concerning areas of obfuscation—in particular, the negotiation practices of "megastar" PROs such as GMR and SESAC—but the state of the industry is, on a very surface level, observable to policy makers and participants alike.

And then there is the recording industry. We have no way to know how much money is ultimately making it to recording artists, even in the aggregate. Recording artists are generally paid by their record label, under the terms of their contract (subject, of course, to NDAs). What we do know, however, paints an unflattering portrait of how artists are treated by their labels—particularly at the Big Three—when it comes to streaming. A 2014 leak of Lady Gaga's contract with Universal caused an uproar when it revealed that her label, Interscope, had included a term that disqualified her from claiming *any* royalties generated by any contracts where Interscope licensed its whole catalog.[127]

> Under this arrangement, Interscope would absorb all the royalties from music streaming services that supposedly belonged to Lady Gaga. This bizarre incident was later confirmed by Troy Carter, Lady Gaga's ex-manager. He lamented, "Spotify is paying out a lot of money, it's just not finding its way into the hands of the artists."[128]

In short, because Interscope elected to license its entire catalog at once—the best possible outcome, from the standpoint of market efficiency—it avoided paying one of its biggest acts a single cent in streaming revenues.

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[126] *See, e.g.*, Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information, 85 Fed. Reg. 22568, 22570-71 (22 Apr 2020).

[127] Paul Resnikoff, *Universal Music Stole Streaming Royalties from Lady Gaga, Ex-Manager Says*, Digital Music News (25 Sep 2015), https://web.archive.org/web/20230220040228/https://www.digitalmusicnews.com/2015/09/25/universal-music-stole-streaming-royalties-from-lady-gaga-ex-manager-says/; Scott Timberg, *Spotify's secret big-label deals: When even Lady Gaga can't get a fair shake, transparency is music's only hope*, Salon (2 Jun 2015), https://web.archive.org/web/20230220040409/https://www.salon.com/2015/06/02/spotifys_secret_big_label_deals_when_even_lady_gaga_cant_get_a_fair_shake_transparency_is_musics_only_hope/.

[128] Kok at 7.

While leaks are infrequent, they merely "confirm what [artist advocates] are hearing anonymously or from off-the-record sources."[129] The failure of recording contracts—particularly among the Big Three—to fairly compensate artists has been raised time[130] and time[131] again,[132] over decades[133] and across genres.[134] It is impossible to know which currently-active contracts deny or diminish artists' streaming royalties. Outside of a small number of major stars, the answer appears to be "most of them."[135]

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[129] Timberg, *supra* note 127.
[130] Drew Schwartz, *Bad Deals Are Baked Into the Way the Music Industry Operates*, Vice (21 Oct 2020), https://web.archive.org/web/20230220042648/https://www.vice.com/en/article/y3gmjw/bad-deals-are-baked-into-the-way-the-music-industry-operates
[131] Mike Masnick, *RIAA Accounting: How To Sell 1 Million Albums And Still Owe $500,000*, TechDirt (7 Jul 2011), https://web.archive.org/web/20230220042920/https://www.techdirt.com/2011/07/07/riaa-accounting-how-to-sell-1-million-albums-still-owe-500000/.
[132] SLIPKNOT's COREY TAYLOR: Why Most Artists Get 'Screwed' By Music-Streaming Services, Blabbermouth.net (19 Aug 2019), https://web.archive.org/web/20230220042513/https://blabbermouth.net/news/slipknots-corey-taylor-why-most-artists-get-screwed-by-music-streaming-services ("The difference between streaming and radio is you make money off radio because of the publishing that's involved. With streaming, there really is no publishing that is promised. That money goes directly to—and technically it's mechanicals—goes directly to the label. So the label is making huge amounts of money. And they are not contractually bound to pay us for that, because of what they call 'new technology.' And unless you have been able to renegotiate your contracts in a way that makes it viable for you—which we haven't; which a lot of people haven't, because you can't keep up with the technology. Unless you are able to adapt with that—and legally, a lot of labels won't let you do that—you get screwed.")
[133] *See, e.g.*, Mark Savage, *From Prince to Megan Thee Stallion: When record contracts go wrong*, BBC (3 Mar 2020), https://web.archive.org/web/20230220043222/https://www.bbc.com/news/entertainment-arts-51704533.
[134] Jon Blistein and Delisa Shannon, *Bad Contracts Are a Music Industry Standard. Why Haven't They Evolved?*, Rolling Stone (17 Nov 2021), https://web.archive.org/web/20230220043732/https://www.rollingstone.com/music/music-news/music-industry-bad-contracts-summer-walker-1258695/.
[135] *Id*.

POLICY RECOMMENDATIONS

The mind-melting state of music royalties in the U.S. is not attributable to any one cause or actor; "[b]ut when you put all … of these things together, you get a weird franken-monster royalty schema that has resulted from a new music business model built on consumers paying to have access to music, rather than paying to own it."[136]

Consumers deserve to know, with certainty, that the money they are paying makes its way to artists—not middlemen. Artists deserve to know, with certainty, how much money is coming in, and who's skimming off the top. Independent labels and artists deserve a fair seat at the negotiating table, and everyone deserves a fair, competitive market with multiple avenues for music to reach the market.

How, then, do we get there from here?

Shine a Light on the Industry

The music industry is addicted to secrecy. Secrecy is powerful; it entrenches market power, allows blame shifting, and prevents artists from effectively demanding better treatment. Most importantly, secrecy allows those with the most information—labels and DSPs—to substitute public relations wars and finger-pointing for actual reform.

No meaningful change can come without lifting the NDA curtain. The Federal Trade Commission has a crucial role to play. That role begins with **the commission of a study under its Section 6(b) authority**.[137] This study should investigate industry practices related to streaming more broadly, but should focus specifically on:

1. Non-cash compensation in DSP/distributor agreements (payola);
2. Its impact on artist payments (aka "the black box");
3. Streaming advances and breakage;
4. Concentration among record companies, including whether their distributors have the incentive and ability to self-preference in contracts with DSPs, and whether previous mergers should be unwound;
5. The prevalence and impact of NDAs agreements in artist contracts;

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136 Jeff Price, *The Definitive Guide to Spotify Royalties*, Medium (17 Feb 2020), https://medium.com/@JPriceOfMusic/the-definitive-guide-to-spotify-royalties-dc5960862c00.

137 For a more thorough discussion of the FTC's authority to conduct investigative studies under 15 USC 46(b), see *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, Federal Trade Commission (rev. May 2021), https://web.archive.org/web/20230213182754/https://www.ftc.gov/about-ftc/mission/enforcement-authority.

6. The prevalence and impact of NDAs in distributor contracts (focusing in particular on their impacts on independent labels and artists);
7. The risks of bundling, self-preferencing, and anticompetitive behavior by integrated DSPs; and
8. The potential privacy risks posed by data collection among integrated DSPs.

The DOJ, thanks to its multi-decade oversight of the consent decrees governing ASCAP and BMI, is the competition authority for the composition market. **The DOJ should conduct a companion study** focusing on:

1. The market effects of the Big Three's ownership of the three largest music publishers, including whether it creates downward pricing pressure on composition rights in favor of sound recordings;
2. Potential anticompetitive behavior of unregulated PROs; and
3. The potential market effects of BMI's decision to move to a for-profit model.

Another, more targeted solution would be to require record companies to provide **an annual accounting of all non-cash compensation** received in DSP licensing deals. This would again fall under the purview of the FTC, which, as part of its Section 6(b) authority, can demand "annual or special . . . reports or answers in writing to specific questions" regarding a company's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals."[138] Public disclosure of this information would itself be a useful tool, as it would allow artists, consumers, and policymakers alike to police the proliferation of "black box" deals. However, there is also room for legislation on this front, such as a requirement that companies transfer a set percentage of the value generated by these "black box" deals along to their artists as cash compensation.

Standing Regulation for the Marketplace

The Department of Justice learned a crucial lesson in 1941, and has stood by it ever since: the music marketplace naturally tends toward consolidation, collusion, and anticompetitive behavior. This is not a critique of the industry's business choices; rather, it is the natural economic equilibrium of an industry where each player holds an exclusive monopoly in a non-fungible product. It has historically been dominated by powerful market players, and "like all good monopolists before and after them, that market power was abused."[139] In other words, collusive behavior is not an outlier. It is, as we have seen across the decades, the rational norm.

[138] 15 USC § 46(b).
[139] Hillman, supra note 79.

These risks are inherent and structural. Increased efficiency and antitrust risk will always be kissing cousins; we need not look any farther than the PRO landscape for evidence. Collective blanket licensing is, as the Supreme Court itself noted, illegal collusion redeemed *only* by the existence of regulatory controls.

On the composition side, the rise of unregulated, third-party "megastar" PROs has begun to complicate traditional market power analyses. While ASCAP and BMI are powerful for their catalog size and sheer unavoidability, SESAC and GMR exert near-total control over the highest demand market segments.

The solution is parity. Not, as ASCAP and BMI have argued, deregulatory parity, but instead unified standing oversight of all four major PROs. This may take the form of **matching consent decrees.** But while consent decrees have immense benefits as short- and mid-term guardrails, they are generally ill-suited to long-term oversight. They also do not prevent behavior that, while not strictly violating antitrust laws, is broadly anticompetitive.[140] Thus, a more viable alternative is to establish a **new, permanent licensing body** that is accountable to both artists and the public.

To quote legendary band leader Dick Robertson, "we did it before, and we can do it again—and we will do it again."[141] The Mechanical Licensing Collective is invaluable both as a "proof of concept" and as a living experiment for how to best design a permanent blanket licensing body. Much like the MLC, a Performing Rights Licensing Collective would be empowered to issue blanket licenses for all rightsholders, identified and unidentified. Direct deals between rightsholders and licensees would still be available; however, the ability to assign blanket licenses would be limited strictly to the PRLC.

Nor can the sound recording marketplace be allowed to continue as it is. The Big Three's overwhelming concentration of wealth and power give them the incentive and ability to unilaterally dictate terms—not only to DSPs, but to artists as well. They are vertically integrated behemoths with a footprint in every step of the value chain, unafraid to exercise their dominance in one area to self-preference in another. And they do this with the knowledge that, thanks to the NDA curtain, they can never be adequately held accountable.

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[140] For a litany of bad behavior committed even under the standing consent decrees, *see* Hillman, *supra* n 81. ("In a typical scenario, music monitors hired by the performing rights societies sit in a tavern or restaurant making notes of offending songs. The owner of the establishment is then confronted and a demand made for immediate payment of a blanket license fee, and the owner is reminded, in a less than subtle way, of the stiff per violation statutory damages in the Copyright Act. No advance notice is given, no questions are answered, and none of the remedies that might be available to the user, including those under the consent decree, are revealed. Pay or be sued is the short, and only answer. To some, it smacks of extortion.").

[141] Dick Robertson & His Orchestra, *We Did It Before (And We Can Do It Again)*, *on* We Did It Before (And We Can Do It Again) (Decca Records 1941).

Unfortunately, the history of antitrust scrutiny that structured the current composition market is entirely missing on the sound recording side. The end goal, however, should be similar: a collective licensing entity that is transparent, accountable, auditable, and—most importantly—not controlled directly by the largest rightsholders.

Deal Transparency

In theory, negotiation between rightsholders and DSPs *should* ensure proper compensation for artists. We know, however, that this isn't the case. This is largely due to information hoarding by major players, at the expense of everyone else.

Contract secrecy is a problem with deep roots and even longer tendrils. It privileges a few dominant players, while preventing external scrutiny and meaningful ground-up reform. Artists and managers don't have the information they need to negotiate better deals or "shop around" for distributors that best represent their interests. Independent labels and artists are bottlenecked into systems run by their competitors—and those competitors' market power means that they, not the independents, get to set the terms of the market. And lawmakers are kept in the dark, forced to rely on whatever scraps of data DSPs, majors, and trade groups think presents their clients in the best light.

The reality is that dominant players have the leverage to extract deals unavailable to smaller and independent rightsholders. In most situations, this would simply be part of a functioning market. But in music, it means that majors have the ability to lock out competitors by extracting any surplus left on the table. In short, there's no need to compete with a rival if you can simply take every penny off the table—or use playlist placements and recommendation algorithms to drown them out.[142]

The marketplace for sound recordings is both more concentrated, and also paradoxically more diverse, than the market for composition rights. Although there are a large number of independent voices, their market power has been artificially depressed. One potential solution to this problem is to mandate **fair dealing**. A fair dealing provision lies at the center of the ASCAP consent decree. It requires that ASCAP use "best efforts to avoid any discrimination among the various types of licenses offered to any group of similarly situated music users that would deprive those music users of a genuine choice among the various types of licenses offered, or the benefits of any of those types of licenses."[143] A similar requirement, be it imposed by law or regulation, would restrict DSPs' ability to offer sweetheart deals to major rightsholders at the expense of their smaller rightsholder competitors.

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[142] Notably, analogous behavior—specifically the ability of a platform to preference larger sellers through page placement—was raised as a significant concern by the House Subcommittee on Antitrust in its recent report. H. Subcomm. on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, 117th Cong., Investigation of Competition in Digital Markets (2022).
[143] *ASCAP Consent Decree* at 11.

At a bare minimum, a **transparency requirement** (possibly via the FTC's 6(b) authority, discussed above) would let smaller rightsholders know how their deals stack up against those offered to their larger competitors. It would lower barriers to entry for new DSPs, who would have a more complete picture of the kinds of deals they can expect to enter. And it will help those who feel shortchanged by the current system to identify where the problem lies and what to do about it.

User-Centric Compensation Models

When people buy music, they understand that they are directly supporting the artists they love. Or, at least, the record labels or publishers they have transferred their rights to. But streaming, as hopefully this paper has conveyed, is much more complex, and the money that a streaming subscriber pays the service does not necessarily go directly to the artists they listen to. But it does not have to be this way. **User centric payment models**, already in use at Deezer,[144] Tidal,[145] and SoundCloud[146] (where it is baked into SoundCloud's licensing agreement with Warner Music Group),[147] would ensure that consumer money goes to the artists whose music they consume—rather than to the rightsholder who extracted the best deal.[148]

It's unlikely that a user centric model would itself level the playing field. However, it has numerous benefits for both listeners and users. First, user-centric payment models would decrease payouts for the top 10 most-streamed artists, while generating a significant increase (between 0.6-2.2%) in royalties for the rest of the top 1,000 most-streamed artists.[149] Second, it would represent a fundamental improvement in fairness over the current market-centric payment system, which pools revenue from all users and prorates it according to an artist's share of all streams across the entire platform.[150]

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[144] *Pay Who You Play,* Deezer, https://www.deezer.com/en/ucps [last accessed 20 Feb 2023].

[145] Murray Stassen, *TIDAL to launch user-centric royalties system and direct-to-artist payments,* Music Business Worldwide (17 Nov 2021), https://web.archive.org/web/20230221011435/https://www.musicbusinessworldwide.com/tidal-to-launch-user-centric-royalties-system-and-direct-to-artist-payments-for-new-19-99-hifi-plus-tier/

[146] *Real Fans Are On SoundCloud*, SoundCloud, https://web.archive.org/web/20230221011800/https://legacy-community.soundcloud.com/fanpoweredroyalties [last accessed 20 Feb 2023].

[147] Ariel Shapiro, *Warner Music adopts SoundCloud's user-centric revenue model*, The Verge (21 Jul 2022), https://web.archive.org/web/20230221011554/https://www.theverge.com/2022/7/21/23272548/warner-music-soundcloud-user-centric-model-spotify.

[148] For an overview of the debate surrounding user centric payment, *see* Caleb J Murphy, *On Streaming Payouts: Is a User-Centric Payment System Better for Indie Musicians?*, Digital Music News (2 Aug 2022), https://web.archive.org/web/20230221011100/https://www.digitalmusicnews.com/2022/08/02/streaming-payouts-user-centric-payment-system-market-share-payment-system/

[149] Emmanuel Legrand, *User-centric model would not lead to significant changes in the distribution of music streaming royalties*, Legrand Network (2 Feb 2021), https://web.archive.org/web/20230221005957/https://legrandnetwork.blogspot.com/2021/02/user-centric-model-would-not-lead-to.html.

[150] For a summary of Deezer's user centric payment system and how it operates, *see Pay Who You Play,* Deezer, https://www.deezer.com/en/ucps [last accessed 20 Feb 2023].

App Store Regulation

The 15-30% fees imposed by Apple and Google on in-app transactions is an anticompetitive policy that harms musicians, music services, and music fans. It reduces the revenue that musicians and music services take in, forcing them to either raise their prices or accept lower margins. It also creates an unfair advantage for Apple Music and YouTube Music, which are exempt from these fees and can therefore undercut their rivals. This reduces consumer choice and diversity in the music market.

These fees are not justified by any legitimate costs. In fact, third-party developers are what make a software platform valuable in the first place. These fees are simply a way for these dominant platforms to exploit their market power and extract rents from dependent suppliers.

These app store fees should be abolished, and music stores like Bandcamp and streaming services like Spotify should be able to process their own payments free of these onerous fees, just as the sellers of physical goods can. A fairer app marketplace would foster a more vibrant music marketplace, giving musicians a chance to thrive without being exploited by monopolistic platforms.

Whistleblower Protections

Artists, managers, and other industry insiders are reluctant to speak out for fear of professional retribution. This is not a conspiracy theory; it was a foundational premise around which the U.K.'s Parliamentary streaming inquiry was structured. Any solution must include a standing venue for **confidential complaints by artists, staff, and other industry insiders**. Conveniently, the FTC's section 6(b) authority allows it to receive (and subpoena) testimony and other documentation under seal.

CONCLUSION

Music streaming is messy. It is broken. It is an anticompetitive and inequitable time bomb.

It is also the future, whether we like it or not.

Something, somewhere, has to give. The first step is to pull back the NDA curtain so that artists, services, and consumers alike can understand how billions of dollars can seemingly vanish into thin air. Once that has happened, lawmakers can bring to bear their broad and deep toolbox of remedies—regulation, litigation, and legislation—to ensure a more equitable future.

Competition law must necessarily be at the forefront of this effort. As surely as gravity pulls us down toward earth, an unregulated music licensing marketplace inevitably collapses into anticompetitive behavior. This is not a simple market of competing firms making substitutable widgets; it is a buffet of monopolies, monopsonies, and unchecked market power wielded without oversight or redress. Unless something is done to bring back competition and fair play, artists—and consumers—will be the ones footing the bill.