Streaming in the Dark: Competitive Dysfunction Within the Music Streaming Ecosystem

Meredith Filak Rose*

DOI: https://doi.org/10.15779/Z38M32NB75

* Senior Policy Counsel, Public Knowledge. J.D. University of Chicago School of Law; A.B. University of Chicago. The paper has benefited enormously from comments by Profs. Charles Duan and Blake Reid, and the friendship and mentorship of the late Sherwin Siy. I also owe an enormous debt to my two children and my husband Garett Rose, who now knows more about music streaming than he ever cared to.

INTRODUCTION

In February 2022, a protest erupted outside the former location of Spotify's Los Angeles offices. Songwriters blasted music and marched the sidewalk, holding signs that read "Dear Spotify, pay the music creators who built you!", "No budget, no bops," and "Spotify is valued at $67bn – pay artists 1 penny per stream."[1] Among the group were Grammy award-winning songwriters who spoke of not being able to afford rent.[2]

Nearly a decade after Taylor Swift (temporarily) pulled her music from the streaming service in protest over low artist pay-outs,[3] the situation shows no signs of improving. Artists and songwriters continue to receive miniscule payments from streaming. Their labels blame streaming services;[4] streaming services point the finger at record label contracts.[5] Industry analysts suggest a range of causes for this issue: the antiquated nature of the copyright system,[6] a rise in ambient "mood" playlisting,[7] the presence of automated bots,[8] too much

---

[1] August Brown, *'If We Don't Get Paid, Songs Don't Get Made': Songwriters Take to the Streets Against Spotify*, L.A. TIMES (Mar. 1, 2022), https://www.latimes.com/entertainment-arts/music/story/2022-03-01/spotify-protest-songwriters-royalty-rates.

[2] *Id.*

[3] Jack Linshi, *Here's Why Taylor Swift Pulled Her Music from Spotify*, TIME (Nov. 3, 2014), https://time.com/3554468/why-taylor-swift-spotify.

[4] *See* Andrew Flanagan, *'This Is an Important Subject' Says RIAA in Response to Berklee Report*, BILLBOARD (July 15, 2015), https://www.billboard.com/music/music-news/this-is-an-important-subject-says-riaa-in-response-to-berklee-report-6633607 ("Too many artists, songwriters, labels and publishers today are being paid below market rates – or not at all – by many streaming services and radio platforms.").

[5] *See* Shira Ovide, *Streaming Saved Music. Artists Hate It.*, N.Y. TIMES (Mar. 22, 2021), https://www.nytimes.com/2021/03/22/technology/streaming-music-economics.html; Ben Sisario, *Musicians Say Streaming Doesn't Pay. Can the Industry Change?*, N.Y. TIMES (May 7, 2021), https://web.archive.org/web/20230209201400/https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html; *cf.* Stuart Dredge, *Billy Bragg: Labels Not Spotify Deserve Streaming Music Payouts Scrutiny*, GUARDIAN (Nov. 7, 2013), https://www.theguardian.com/technology/2013/nov/07/billy-bragg-spotify-artist-payouts.

[6] *See* Paula Mejía, *The Success of Streaming Has Been Great for Some, but Is There a Better Way?*, NPR (July 22, 2019), https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way.

[7] *Id.*

[8] Ari Herstand, *AI Isn't the Music Industry's Biggest Problem: Here's How to Stop Streaming*

AI-generated music,[9] too much human-made music.[10] 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, released a draft report that was highly critical of major industry players[11]—only for its Competition Markets Authority to walk back much of the report's recommendations and shutter the inquiry.[12] Members of Congress introduce resolutions that die on the House floor.[13] Musicians are left receiving checks for fractions of pennies, and no one—not regulators, not industry insiders, and often not musicians themselves— knows the best way to turn the tide.

Despite all this, the music industry is thriving overall, reaching financial heights not seen in almost three decades. In 2021, recorded music revenues reached an all-time high of $15 billion.[14] When adjusted for inflation, this still falls short of the industry's peak in the late 1990s. It does, however, match the revenues of the late '80s and early '90s, a time when the industry had recovered from an early-'80s recession, and was undergoing waves of profitable mergers and acquisitions—but, importantly, was not thought to be in crisis.[15]

The late 1990s boom was unsustainable. It was driven by new formats and rapid industry reorganization and consolidation. CDs were cheaper to produce than records or cassettes, but the new format gave the industry a cover to raise prices.[16] Customers purchased second and third copies of recordings they already owned, simply to keep up with new trends.[17] Additionally, the industry continued its move away from singles—once by far the predominant format—and funneled

---

Fraud Right Now, VARIETY (July 11, 2023), https://variety.com/2023/music/opinion/how-to-stop-streaming-fraud-1235666090.

[9] Amanda Hoover, *Spotify Has an AI Music Problem—but Bots Love It*, WIRED (May 11, 2023), https://www.wired.com/story/spotify-ai-music-robot-listeners.

[10] Rachel Hurley, *Spotify and Streaming Are Not the Problem. Too Much Music Is.*, ROCK THE PIGEON (Jan. 31, 2022), https://web.archive.org/web/20230209203115/https://rockthepigeon.com/2022/01/31/spotify-and-streaming-are-not-the-problem-too-much-music-is.

[11] DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE, ECONOMICS OF MUSIC STREAMING, 2021-2, HC 50-2 (UK) [hereinafter PARLIAMENTARY REPORT].

[12] Competition & Mkts. Auth., Notice of Proposal Not to Make a Market Investigation Reference Under Section 131 of the Enterprise Act 2002(July 26, 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.

[13] *See, e.g.*, H.R. Con. Res. 102, 117th Cong. (2022)..

[14] U.S. Sales Database, RECORDING INDUS. ASS'N AM., https://web.archive.org/web/20230216190520/https://www.riaa.com/u-s-sales-database (last visited Feb. 16, 2023).

[15] *See* KEITH NEGUS, CULTURE AND CONFLICT IN THE POPULAR MUSIC INDUSTRY 4–5 (2011).

[16] *See* Reebee Garofalo, *From Music Publishing to MP3: Music and Industry in the Twentieth Century*, 17 AM. MUSIC 318, 344 (1999).

[17] *Id.*

consumers toward buying more expensive full albums.[18] Ironically, this "boom" seeded consumer demand for *à la carte* purchasing, streaming—and yes, piracy. These glory days are not coming back, because they were always destined to be temporary.

But even if the industry can no longer "party like it's 1999,"[19] it should be partying like it's 1990. The music industry has settled into an equilibrium with the new digital landscape: it 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?

Something appears to be rotten in streaming, but nobody seems to agree on what it is. Despite broad consensus that artists should be enjoying greater financial benefits from the efficiencies supposedly introduced by digital streaming and content delivery, no one agrees on the best source of those benefits. Should users pay more? How much user funding is necessary to sustain a healthy, ethical, and competitive marketplace? Are the streaming services hoarding the wealth, as they are often accused of doing?[20] Are labels and publishers pocketing the money?[21] Is the problem too much governmental regulation,[22] or not enough?[23]

The flow of money from consumers to artists is not a straightforward pipeline; it is a fire sprinkler. The mainstream music industry is vast, complex, and marked by arbitrage. Deals are largely obscured by non-disclosure agreements (NDAs), which create uncertainty and mistrust in equal measure. Scholars and lawmakers alike have very few windows into the deals that labels, publishers, artists, and platforms strike with one another.

However, publicly available data and occasional high-profile leaks reveal that the industry's opacity and complexity leaves musicians scrabbling for pennies. This reality is hard to square with a multibillion-dollar industry with

---

[18] Notably, this shift may in and of itself have raised antitrust issues. Jeffrey Philip Wachs, Note, *The Long-Playing Blues: Did the Recording Industry's Shift from Singles to Albums Violate Antitrust Law?*, 2 U.C. IRVINE L. REV. 1047, 1058 (2012).

[19] PRINCE, 1999 (Warner Bros. 1982).

[20] *See, e.g.*, Jay-Z, *Stream of Consciousness*, TIDAL, https://tidal.com/browse/video/45389738 (last visited Aug. 9, 2023) ("Jimmy Iovine on for the safety net / Google dangled round a crazy check / I feel like YouTube is the biggest culprit / They pay you a tenth of what you supposed to get"); James Cook, *Jay Z Released a New Version of a Diss Track Hitting Out at Spotify, Apple and Google*, BUS. INSIDER (May 22, 2015), https://www.businessinsider.com/jay-z-releases-apple-spotify-google-diss-track-on-tidal-2015-5.

[21] Dredge, *supra* note 5.

[22] Nat'l Music Pubs.' Ass'n, "Selective Withdrawal" of New Media Rights from ASCAP and BMI 2 (Aug. 9, 2019), https://media.justice.gov/vod/atr/ascapbmi2019/pc-550.pdf; Editorial Board, *Deregulate the Music Industry*, BLOOMBERG (Dec. 16, 2015), https://www.bloomberg.com/view/articles/2015-12-16/deregulate-the-music-industry#xj4y7vzkg; Scott Hanus, Note, *Deregulating the Music Industry: A Push to Give Power Back to the Songwriters*, 16 DEPAUL BUS. & COM. L.J. (2018).

[23] *See* Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 WASH. U. L. REV. (forthcoming 2024) (manuscript at 12–15, https://ssrn.com/abstract=4496870.

historically high revenues. The path that money takes through (and out of) this ecosystem, and how to ensure that it reaches the artists responsible for the creative works underlying its success, must be a major focus of any legislative reform in the sector.

This Article identifies three dynamics that contribute to the ongoing crisis within streaming. First, in the absence of robust regulation, copyright-based industries tend to consolidate and exhibit monopolistic behavior. This dynamic was on full display during the early years of modern songwriting and publishing, and, in the absence of regulatory controls, has reoccurred in the modern record industry. Second, industry-wide reliance on NDAs creates asymmetries that are strategically advantageous for the most powerful players, as they hinder effective bargaining both by artists (who are generally diffuse independent actors) as well as licensees. Finally, these factors combine to misalign the incentives of the two parties at the largest negotiating table: the streaming services and the major record labels.

I. Understanding Market Power in the Music Industry

This Section examines various sources of market power within the music industry. Some, such as copyright, provide some degree of power across multiple copyright-based industries, but—for reasons of consumer preference explored in more detail *infra*—afford a much stronger degree of power in the popular music streaming market. Others, such as NDAs, allow for the creation and maintenance of information asymmetries that benefit the largest players. Still, others are the result of industry reordering during the shift to digital distribution. Taken together, the ecosystem's norms, laws, and business practices combine to provide the most powerful actors with tools to maintain overwhelming dominance at the expense of smaller rivals.

A. Copyright: Its Structure and Role in Market Power

The music industry rests upon the foundation laid by copyright law. Without the ability to exclusively control their products, record labels and publishers would struggle to exist, let alone reach the remarkable heights of the current market. To more fully understand how dominant firms shape the ecosystem, we must examine two major areas. First, we must understand how the legal structures of copyright law influence the structure of the industry built atop it. Second, we must examine the role that copyright plays in firms' market power.

1. The Structure of Copyright

While music continuously changes and evolves, the law underpinning it does not. The legal regime of musical copyright is byzantine and historically more receptive to adding complexity than removing it. It would be difficult to discuss the industry without first addressing its underlying laws; thus, a (necessarily abridged) overview is necessary.

First, a "copyright" is not a unitary thing. A copyright holder has permission to prohibit (or in real property terms, exclude) others from utilizing the protected work in certain ways. The Copyright Act enumerates six rights of exclusion, some of which are medium-specific.[24] In practice, these rights are typically broken out and licensed individually or in combination. In music, three[25] rights are paramount: reproduction, distribution, and public performance.[26] In most cases, these rights are assigned to various arbitrage entities who, in exchange for payment, collect royalties on behalf of the copyright holder, as well as manage any potential sublicensing.

Second, what we conceptualize as a "song" is, under copyright law, two distinct works. The underlying composition (known as the "musical work"), represented by sheet music and lyrics and composed by a songwriter, is one copyrightable work; the audio recording of its performance by a recording artist (the "sound recording") is another.[27] These two things are legally distinct and follow separate, though often intersecting, trajectories through the maze of licensing and royalties.

Finally, while the law vests copyright directly in the original human author(s) of a work—in this case, songwriters and recording artists[28]—the reality is that most of these creators assign their rights to other entities via contract. Record labels and publishers typically require creators to sign over their rights as part of their recording or publishing contracts. These assignments are called licenses. In the case of sound recordings, the reproduction, distribution, and

[24] 17 U.S.C. § 106. For example, while § 106 provides for both a right of public *performance* and a right of public *display*, it is both legally and semantically impossible to "publicly perform" a painting, or "publicly display" a sound recording.

[25] A fourth, non-statutory right derived from the public performance 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 sync license market are numerous, they are also beyond the scope of this paper. For a brief primer on that market and its complications, see Chris Cooke, *YouTube Launches New Music Micro-licensing Service for Its Video Creators*, COMPLETE MUSIC UPDATE (Sept. 21, 2022), https://completemusicupdate.com/article/youtube-launches-new-music-micro-licensing-service-for-its-video-creators; Nancy Kartos, *Cycling Through Litigation: The Ultimate Cost of Not Entering into Appropriate Sync Licensing Agreements*, CARDOZO ARTS & ENT. L.J. BLOG 278 (Mar. 22, 2021), https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1277&context=aelj-blog.

[26] 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 shorthand.

[27] 17 U.S.C. § 102(a)(2), (7) (identifying both "musical works, including any accompanying words" and "sound recordings" as separately copyrightable subject matter).

[28] The exception to this general rule 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. *Id.* § 101. Musicians, importantly, are not considered "employees" of their record labels, nor songwriters of their publishers.

public performance rights are typically managed by the record label or its organs; for musical works, the management and enforcement of those rights is often split between a publisher and a performing rights organization (PRO), discussed *infra*.

All of this combines to make streaming a logistically complicated proposition. For a single track, the streaming service must negotiate and pay for two different "works" (the composition and the recording), clearing three distinct rights (reproduction, distribution, and public performance) per work, by negotiating with three or more managing entities (record labels, PROs, and publishers). Crucially, this dynamic—plus the ongoing need to collect and distribute royalties—means that streaming services and major rightsholders are bound to one another for the long haul, whether they like it or not.

The process is no easier for creators; the act of getting creative works to market has historically been a long, arduous, and complicated task, with little guarantee of success. While the shift to streaming has simplified some aspects, most musicians' interactions with streaming remain mediated by a well-established industry infrastructure. To best understand the universe of licensees, rightsholders, and middlemen involved—and how they interact with one another—it may be easiest to stand in the shoes of a (hypothetical) songwriter and recording artist.

a. Songwriters

Steven Songwriter composes a song. Using the terminology of copyright law, he has created a *musical work*, and he now holds a copyright in that work. Finding someone to record his song, or otherwise release it out into the market, is no small endeavor. Luckily, Steven has options. Generally speaking, 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 broad 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. Alternatively, Steven may choose to work with a publishing administrator, which provides fewer services but lets Steven retain control of his copyrights. The third option, self-publishing, lets Steven retain full control of his copyrights *and* gives him more direct control in negotiating deals for his work. While self-publishing is becoming increasingly easy and common, it is, as of 2023, still dwarfed by traditional publishers and publishing administrators.

But Steven doesn't simply want his song to be licensed; he wants it to be performed, both live and on a record. He may choose to sign up with a PRO such as ASCAP or BMI (both discussed *infra*). In doing so, he grants the PRO the right to bundle his *public performance right* with those of other composers. (Less commonly, he may also assign the public performance right directly to his publisher, which in turn may enlist a PRO to manage the public performance rights across the publisher's catalog.)

Steven's publisher and PRO negotiate with streaming services, also known as digital service providers (DSPs), [29] for royalty rates. The DSP—and then the PRO, in its turn—are then responsible for passing along to Steven his share of the revenue generated by streams of his work.

If, for whatever reason, the DSP cannot locate Steven or his publisher, it instead can pay licensing fees to the Mechanical Licensing Collective (MLC), which will then seek out the appropriate rights owner.

b. Recording Artists

A recording artist, Rachel Recorder, performs Steven's song on her new album. Rachel has created a copyrighted *sound recording*. Much like Steven, she faces an uphill battle in getting this recording to market. She may, like many 'do-it-yourself' artists, choose to self-release and enlist a distributor to place her track on streaming services. 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 financially to the production and recording of her song; in exchange, Rachel assigns them the reproduction, distribution, and public performance rights in her recording.

This record label in turn contracts with a distribution company. This distributor may be in-house, independent, or run by a larger record company. The distributor bundles Rachel's rights together with those of many other recording artists. It then uses that catalog to negotiate with streaming services to establish licensing fees, per-stream rates, and other terms.[30]

Now, whenever a DSP plays Rachel's recording of Steven's song, it must pay according to the terms of its agreement with the distribution company. Typically, this passes through three stages. First, the DSP pays the distributor. The distributor then (generally) takes its share off the top and pays the remainder to the record label. Finally, the record label pays Rachel a rate set by the terms of her contract; pays Steven's publisher, according to the terms of the licensing deal that enabled Rachel's recording; and pockets the rest. While this is the most common arrangement, it is not universal. Some DSP/distributor contracts may stipulate that the DSP route some portion of its licensing fee through an outside organization called SoundExchange. SoundExchange is a hybrid public/private model, which, per its statutory mandate,[31] splits royalties 45/50/5 between Rachel, her label, and a fund for session musicians.

[29] "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 legally and functionally distinct licensing regimes, and thus are beyond the scope of this Article.

[30] *See* PARLIAMENTARY REPORT, *supra* note 11, at 16.

[31] 17 U.S.C. § 114(g)(2).

2. Copyright and Market Power

Much ink has been spilled over whether copyright can properly be called a monopoly.[32] On paper, the argument in favor seems straightforward: copyright allows firms to prevent the creation of perfect substitute goods. This view has the benefit of being widely repeated both in literature[33] and at the Supreme Court.[34] However, it also has its fair share of detractors.[35] While copyright grants the ability to preclude the creation of identical products, critics say that it falls short of creating true monopoly *power*:

> [Copyright] protection creates monopoly power only if substitutes are unavailable and entry barriers prevent the emergence of any such substitutes in the foreseeable future. Neither of these restrictive conditions is likely to be met with respect to copyright. Although some works exist for which there are few alternatives, substitutes are readily available for most works.[36]

In other words, most copyrighted works are not so inherently valuable in their originality that the market cannot provide "good enough" substitutes.

This view has some intuitive appeal. However, as a heuristic for examining

---

[32] For a comprehensive examination of copyright's role in market power, see Noti-Victor & Tang, *supra* note 23.

[33] *See, e.g.*, S. J. Liebowitz, *Copyright Law, Photocopying, and Price Discrimination*, 8 RES. L. & ECON. 181, 184 (1986); Ian E. Novos & Michael Waldman, *The Effects of Increased Copyright Protection: An Analytic Approach*, 92 J. POL. ECON. 236, 236–38 (1984); James Boyle, *Foreword: The Opposite of Property?*, 66 LAW & CONTEMP. PROBS. 1, 8 (2003); Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1386–89 & n.76 (1998); Julie E. Cohen, *Copyright and the Perfect Curve*, 53 VAND. L. REV. 1799, 1801 (2000); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1700 (1988).

[34] *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198 (2022) ("fair use . . . can help to keep a copyright monopoly within its lawful bounds"); Georgia v. Public.Resource.Org, Inc., 590 U.S. 255, 259 (2020) ("The Copyright Act grants potent, decades-long monopoly protection for 'original works of authorship.'"); Allen v. Cooper, 589 U.S. 248, 256 (2020) (referring to copyrights and patents as "monopoly rights"); Golan v. Holder, 565 U.S. 302, 346 (2012) (discussing "copyright's grants of limited monopoly privileges"); Dastar Corp. v. Twentieth Century Fox Film Corp., 539 U.S. 23, 33–34 (2003) ("[O]nce the . . . copyright monopoly has expired, the public may use the . . . work at will and without attribution."); Eldred v. Ashcroft, 537 U.S. 186, 217 (2003) ("The monopoly granted by a copyright 'is not a monopoly of knowledge . . . .'"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (discussing "the copyright monopoly granted by Congress"); Am. Tobacco Co. v. Werckmeister, 207 U.S. 284, 293 (1907) ("The purpose of the copyright law is . . . to secure a monopoly . . . ."); Holmes v. Hurst, 174 U.S. 82, 85 (1899) ("[T]he right of an author to a monopoly of his publications is measured and determined by the copyright act . . . ."); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 56 (1884) ("The monopoly which is granted to [authors] is called a copyright . . . .").

[35] *See, e.g.*, Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 427 (2002); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 217 (2004); Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 118 (1990) ("Rights to exclude are not monopolies just because the property involved is an intangible rather than something you can walk across or hold in your hand.").

[36] Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 217–18 (2004).

the streaming market, it is overly simplistic. It suffers from two main defects. First, it assumes that copyright's ability to exclude extends only to perfect copies or substitutes. In reality, copyright's boundaries are fuzzy by design. Its ability to exclude extends well beyond perfect substitutes, encompassing non-identical works which nevertheless could be considered "close enough" to measurably affect the original's market share.[37] On a practical level, this creates a deterrent to the creation of near-perfect substitutes. The enormous financial risk of copyright litigation—both its high administrative costs and eye-watering statutory damages—are often sufficient to chill creation of works that stray too close to an existing high-value product.[38] The more valuable a given work, the greater the incentive for rightsholders to aggressively police close substitutes—and thus the lower the likelihood of truly competitive alternatives making it to market.

Second, the specific market matters. Rights to exclude are more powerful in some markets than in others, thanks to different preferences among consumers, intermediaries, and producers. Some are highly fungible: "sound-alike" tracks are a staple of cinematic scoring and advertising.[39] Romance novel enthusiasts

---

[37] Notably, this idea—that the "character and purpose" factor of fair use hangs heavily upon whether the two works share an overlapping market use—forms the doctrinal core of the Supreme Court's recent decision in *Andy Warhol Foundation for the Visual Arts v. Goldsmith*:

> In a broad sense, a use that has a distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create. A use that shares the purpose of a copyrighted work, by contrast, is more likely to provide "the public with a substantial substitute for matter protected by the [copyright owner's] interests in the original wor[k] or derivatives of [it]," which undermines the goal of copyright.

598 U.S. 143 S. Ct. 1258, 531–32 (2023) (internal citations omitted); *see also* Michael G. Anderson et al., *Market Substitution and Copyrights: Predicting Fair Use Case Law*, 10 U. MIAMI ENT. & SPORTS L. REV. 33, 34 (1993) ("The case law exhibits a strong tendency to take one overriding principle into account - the principle of market substitution.").

[38] One need look no further than the infamous *Blurred Lines* case to acknowledge that copyright suits reach well beyond strict copying, and encompass works that, in the court's opinion, stray too close to another original work. In that case, the court upheld a jury verdict finding that a "constellation" of unprotectable individual elements amounted to a "feel" that could itself be copyrighted. *Williams v. Gaye*, 885 F.3d 1150 (9th Cir. 2018). For a broader review of the academic literature on strategic use of copyright against competitors, see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009); Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 UCLA L. REV. 400, 439 (2019) (noting that damage enhancements are requested in over 80 percent of suits, despite being awarded in only 2 percent); Mark Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185 (2007) (critiquing the strategic development of licensing markets as precluding fair use); Paul Goldstein, *Derivative Rights and Derivative Works in Copyright*, 30 J. COPYRIGHT SOC'Y U.S.A. 209, 209 (1982) ("Copyright, which once protected only against the production of substantially similar copies . . . today protects against uses and media that often lie far afield from the original.").

[39] This is largely attributable to a quirk in traditional video editing workflow: the use of existing tracks as placeholders—known as "temp music"—while cutting a scene. *See, e.g.*, Every Frame a Painting, *The Marvel Symphonic Universe*, YOUTUBE (Sept. 12, 2016),

are voracious readers[40] who actively organize their preferences around specific plot similarities between works.[41] In these scenarios, "close enough" substitutes can effectively compete with—and displace—copyrighted works in a more traditional model of competition.[42]

But not all markets accommodate this kind of substitution. The most economically valuable segment in music streaming—mainstream popular music—is driven overwhelmingly by consumer demand for a small subset of works whose rights to exclude are fiercely guarded (and often ruthlessly enforced). To the end consumers whose preferences (and dollars) drive streaming platforms, popular music is 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.[43] In other words, there are no perfect substitutes in the world of popular music. Non-substitutable works represent a small percentage of the overall catalog but the biggest economic drivers of the market.[44] To meet consumer demand, a broad-catalogue DSP must supply its customers with the most popular music.[45]

---

https://www.youtube.com/watch?v=7vfqkvwW2fs; Every Frame a Painting, *Hollywood Scores & Soundtracks: What Do They Sound Like? Do They Sound Like Things?? Let's Find Out!*, YOUTUBE (Sept. 12, 2016), https://www.youtube.com/watch?v=IEfQ_9DIItI; Andrew Liptak, *How Hollywood's Temp Scores Are Hurting Your Favorite Action Movies*, VERGE (Sept. 12, 2016), https://www.theverge.com/2016/9/12/12893622/hollywood-temp-scores-every-frame-a-painting-film; Simon Power, *Temp Tracks: A Movie's Secret Score,* SHOCKWAVE SOUND (Oct. 10, 2018), https://www.shockwave-sound.com/blog/temp-tracks-a-movies-secret-score.

40 *See Literary Liaisons: Who's Reading Romance Books?*, NIELSEN (Aug. 2015), https://www.nielsen.com/insights/2015/literary-liaisons-whos-reading-romance-books ("6% of buyers purchase romance books more than once a week, and 15% do so at least once a week. . . . 25% of buyers read romance more than once a week, and nearly half do so at least once a week; only 20% read romance less than once a month."); Christine Larson, *Open Networks, Open Books: Gender, Precarity and Solidarity in Digital Publishing*, INFO. COMMC'N & SOC'Y 1892, 1896 (2019) (noting that "romance readers read more than four times as many books annually as the average American").

41 Elena Burnett et al., *From Meet-cutes to Happy Endings, Romance Readers Feel the Love as Sales Heat Up*, NPR (Feb. 13, 2023) https://www.npr.org/2023/02/13/1154798284/romance-books-club-novel-group-reading; Ann Kjellberg, *How Amazon Turned Everyone Into a Romance Writer (and Created an Antitrust Headache)*, OBSERVER (Sept. 12, 2022), https://observer.com/2022/09/how-amazon-turned-everyone-into-a-romance-writer-and-created-an-antitrust-headache; ALYSSA PALMER, DECONSTRUCTING TROPES IN POPULAR ROMANCE FICTION 3 (2021), https://alyssalinnpalmer.com/wp-content/uploads/2023/05/Deconstructing-Tropes-in-Popular-Romance-Fiction-Alyssa-PalmerID3513585-MAIS601Final.pdf.

42 *See* Michael Abramowicz, *A New Uneasy Case for Copyright*, 79 GEO. WASH. L. REV. 1644, 1646 (2011).

43 *See* Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845, 846 (1981).

44 *See* Emily Blake, *Data Shows 90 Percent of Streams Go to the Top 1 Percent of Artists*, ROLLING STONE (Sept. 9, 2020), https://www.rollingstone.com/pro/news/top-1-percent-streaming-1055005.

45 In communications policy, this is referred to as a "bottleneck" problem. For a thorough discussion of copyright as a communications bottleneck, see Timothy Wu, *Copyright's Communication Problem,* 103 MICH. L. REV. 278, 326 (2004). *See also* Michael A. Einhorn, *Long Tail or Bottleneck: What's Next for Spotify?*, COMPETITION POL'Y INT'L ANTITRUST CHRON., Feb. 2021, at 9–11 (discussing the role that high music licensing costs have played in Spotify's

Music, like many other copyright industries, generally follows what economist Anita Elberse calls the "superstar acquisition model"—a many eggs, few baskets strategy in which firms peg their financial health to the success of their biggest stars and prioritize them disproportionately over smaller, less lucrative acts.[46] This is a stark contrast to the early, largely utopian visions of music streaming, many of which focused on its potential to lower entry barriers 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 artists.[47] Digital streaming has not, as hoped, upended the superstar model; the top 1 percent of artists account for more than 90 percent of all streams, while the top 10 percent of artists account for 99.4 percent.[48]

This hyper-focus on superstars is not entirely irrational; as noted, *supra*, consumers' preferences in popular music are very specific, and the threat of copyright enforcement chills the creation of close-enough substitutes. Moreover, even in an environment with abundant options, consumers return to "superstar" products at a significantly high rate.[49] While there are indisputable benefits to preserving and making available the "long tail" (i.e., old or obscure tracks that, absent preservation, would be lost altogether), it does not drive profits, and its artists are often overlooked or forgotten.[50] This reality has profound impacts on the economics of artist compensation, discussed *infra*.

This dynamic of specific consumer preference and low substitutability gives labels price-setter power, or the ability to unilaterally determine the price of their products (in this case, licenses).[51] And while DSPs are largely beholden to major labels, this obligation is not reciprocal; major labels may choose to license to any number of competing DSPs, many of which enjoy the backing (and financial resources) of enormous tech conglomerates. A rational major label will thus set the price for its licenses at the maximum rate they believe the licensee can bear. This allows labels to absorb any available surplus from the licensee. The lack of

---

diversification to podcasts).

46 *See, e.g.*, ANITA ELBERSE, BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT (2013).

47 Mark Sweeney, *'Odds are Against You': The Problem with the Music Streaming Boom*, GUARDIAN (Oct. 2, 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.

48 Blake, *supra* note 44. Notably, these numbers represent an improvement over terrestrial radio play, where "the top 1 percent received practically all — read: 99.996 percent — of the radio spins on of the music released" during an analogous period. *Id.*

49 *See* Rosen, *supra* note 43, at 845 (characterizing the phenomenon as a "concentration of output among a few individuals, marked skewness in the associated distributions of income and very large rewards at the top.").

50 *Id.*

51 *Price-setter*, OXFORD DICTIONARY OF ECONOMICS (3d ed. 2009).

profitable DSPs in the market[52] appears to validate this dynamic.

B. Non-Copyright Sources of Market Power and Dysfunction

Most of the music industry's struggles predate streaming. Some are as old as the industry itself; others stem from the pains of modernizing a system whose operational core consists of "a hodge-podge of technical platforms and data sets created variously since the 1980s."[53] Yet others are more general problems which will sound familiar to anyone acquainted with industries that deal primarily in "intangible" assets.[54] However, a few are particularly relevant to the dynamics of digital streaming.

1. Non-Disclosure Agreements and Information Asymmetry

One of the largest sources of power in the music streaming ecosystem is also the one that hampers meaningful reform: ubiquitous NDAs.[55] Across industries, such provisions "not only affect those who are a party to the restriction but also shape the flow of information—including regarding salaries and ethical conduct—in organizations and markets more broadly."[56] NDAs are standard at almost every level of the music industry, from deals between streaming services and labels, to individual artists' record deals.

This secrecy is a standing point of contention for many players in the ecosystem. Artists and managers are not allowed to review the terms of their own labels' streaming deals.[57] This is particularly ironic for managers, whose effectiveness depends upon their ability to advocate for their client artists in business negotiations.[58] Crucial components of major deals between DSPs and distributors—such as rates, non-cash payments, and the beneficiaries of each—are obscured from both the public and the artists for whom record companies claim to advocate. The predictable result is that "artists are not able to find out

---

[52] Nicolas Bucher, *Music Streaming: 'Waiting for Platforms to Become Profitable Means Accepting a Dysfunctional System'*, LE MONDE (Mar. 21, 2023), https://www.lemonde.fr/en/opinion/article/2023/03/21/music-streaming-waiting-for-platforms-to-become-profitable-means-validating-a-dysfunctional-system_6020097_23.html.

[53] Vickie Nauman, *Reimagining the Music Business*, RETHINK MUSIC (Jan. 26, 2016), https://web.archive.org/web/20230311190442/http://www.rethink-music.com/news/reimagining-the-music-business.

[54] For a broad discussion of the systemic problems faced (and created) by firms in the "intangible economy," see JONATHAN HASKEL & STIAN WESTLAKE, CAPITALISM WITHOUT CAPITAL (2017).

[55] Yoon Sing Kok, *Unveiling the Black Box: Allocate the Missing Revenues in Music Streaming* 47 (2017) (M.A. thesis, University of Agder), https://uia.brage.unit.no/uia-xmlui/bitstream/handle/11250/2457472/Kok%2C%20Yoon%20Sing.pdf?sequence=1&isAllowed=y.

[56] Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 880 (2021).

[57] CHRIS COOKE, DISSECTING THE DIGITAL DOLLAR 104 (3d ed. 2020).

[58] *See id.*

what they are actually making from music streaming."[59] One 2015 survey found that more than half of music managers did not know the share arrangement between DSPs and their label, and two-thirds did not know the agreed minimum payments for their own artists.[60] It is perhaps unsurprising that licensing secrecy is one of the most common complaints cited by activists and artists,[61] and that organizations have cited deal secrecy as a major impediment to comprehensive reform.[62]

These agreements impose very real costs on both the ecosystem at large and on artist welfare.[63] They provide a strategic advantage for major firms; information silos hinder efficient price-setting[64] and prevent artists from effectively demanding better rates by obscuring information they need to negotiate better deals or to "shop around" for distributors that best represent their interests. As discussed *infra,* lack of actionable information creates a bottleneck that pushes independent labels and artists toward distribution systems run by their competitors—and the market power those competitors wield means that they, and not the independents, get to set the terms of the market. It also prevents artists from effectively auditing their royalty payouts against the expected returns dictated by labels' DSP deals; assessing whether their labels or publishers are adequately representing their interests; deciding whether their labels or publishers are behaving fairly towards other artists; and assessing the actual commercial value of their work.[65]

NDAs also provide broader tactical advantages to dominant firms. Tactically, NDAs insulate players accused of bad behavior from political or economic repercussions. When artists complain about low streaming payouts, both DSPs and labels can cast the blame on one another, with no risk of being second-guessed. Lawmakers, meanwhile, must base their policy judgments entirely on self-reporting from DSPs, majors, and trade groups.

---

[59] Kok, *supra* note 55, at 7.

[60] CHRIS COOKE, DISSECTING THE DIGITAL DOLLAR, PART ONE: HOW STREAMING SERVICES ARE LICENSED AND THE CHALLENGES ARTISTS NOW FACE 49 (2015) [hereinafter COOKE 2015], https://web.archive.org/web/20230226222013/https://themmf.net/site/wp-content/uploads/2015/09/digitaldollar_fullreport.pdf.

[61] COOKE, *supra* note 57, at 104.

[62] ReThink Music, *Fair Music: Transparency and Payment Flows in the Music Industry*, BERKLEE INST. CREATIVE ENTREPRENEURSHIP 15–17 (2015).

[63] The ability of pay transparency to increase wages and improve worker well-being is well documented and underpins much of the scholarship on the issue. *See* Zoe B. Cullen, *Is Pay Transparency Good?*, (Nat'l Bureau of Econ. Rsch., Working Paper No. w31060, 2023), http://www.nber.org/papers/w31060; Deborah Thompson Eisenberg, *Money, Sex, and Sunshine: A Market-Based Approach to Pay Discrimination*, 43 ARIZ. ST. L.J. 951, 1001 (2011); Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 588 (2020).

[64] For a broader discussion of the effect of imperfect information on price, see Joseph E. Stiglitz, *Equilibrium in Product Markets with Imperfect Information*, 69 AM. ECON. REV. 339 (1979).

[65] *See* PARLIAMENTARY REPORT, *supra* note 11, at 73–74.

Commentators have noted that this proverbial "NDA curtain" makes it "virtually impossible to obtain systematic data in this field."[66] Thus, approximating the landscape requires us to rely on industry releases, illustrative examples, and data reverse-engineered from publicly available sources.[67]

2. *Market Concentration*

Three major record companies—Universal Music Group, Sony Music Entertainment, and Warner Music Group—are collectively referred to as the "Big Three" (or "majors"). Together, they control 85 percent of the U.S. music catalog by volume,[68] and account for 74.1 percent of all digital music revenue globally.[69] These companies are the products of decades of consolidation, with larger companies gobbling up smaller ones and (occasionally) their own peers.[70]

Publishing is marginally less concentrated. The Big Three's in-house publishers—Universal Music Publishing Group, Sony Music Publishing, and Warner-Chappel Music—account for approximately 60 percent of U.S. music publishing revenue.[71] Collectively, they control or administer the rights to an estimated 10 million songs.[72] The U.K. Parliamentary Report expressed concern about this vertical integration between record labels and publishers, citing both its ability to amplify the market power of the Big Three record labels, and the potential to systemically devaluate composition rights at the expense of recording rights:

> 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,

---

[66] Rosen, *supra* note 43, at 845.

[67] For an illustrative example of such "reverse engineering," see Luis Aguiar & Joel Waldfogel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?* 12–16 (Nat'l Bureau Econ. Rsch., Working Paper No. w21653, 2015), https://ssrn.com/abstract=2679691. Of particular use is the work of the Music Managers' Forum, a cross-border collective of managers and industry veterans that 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.

[68] Dan Rys, *Record Label Market Share Q4 2022: Republic's 'Midnights' Run Outpaces a Surging Sony*, BILLBOARD (Jan. 11, 2023), https://www.billboard.com/pro/record-label-market-share-q4-2022-republic-Surges-sony-big-year.

[69] OMDIA Research, *SME and WMG the Biggest Market Share Winners in 2021*, MUSIC & COPYRIGHT (Apr. 5, 2022), https://musicandcopyright.wordpress.com/2022/04/05/sme-and-wmg-the-biggest-market-share-winners-in-2021.

[70] *See, e.g.*, Ron Knox, *Big Music Needs to be Broken Up to Save the Industry*, WIRED (Mar. 16, 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 (Nov. 21, 2013), https://www.vulture.com/2013/11/music-industry-1998-beginning-of-the-end.html.

[71] OMDIA Research, *supra* note 69.

[72] Tim Ingham, *The Three Major Music Publishers Now Own or Control over 10 Million Songs Between Them (Kind Of)*, MUSIC BUS. WORLDWIDE (Oct. 20, 2022), https://www.musicbusinessworldwide.com/the-three-major-music-publishers-now-own-or-control-over-10-million-songs-between-them-kind-of.

there is little incentive for their music publishing interests to redress the devaluation of the song relative to the recording.[73]

DSPs are less concentrated. However, the market's relative diversity comes with significant caveats. Spotify, a Swedish company, accounted for about 38 percent of global streaming revenues and 30.5 percent of global subscribers (approximately 187.8 million subscriptions) in the second quarter of 2022. The three largest American DSPs—Apple Music, Amazon Music, and YouTube Music—collectively serve approximately 36 percent of the global listener market (222 million subscribers) and account for 46 percent of revenue in that same period.[74] Adding in Pandora—a subsidiary of satellite radio company Sirius XM since its 2019 acquisition—nudges the total global revenue share of American firms to 48 percent.[75] Smaller-scale services such as BandCamp, SoundCloud, and Tidal, while notable for their experimentation with artist compensation models, nevertheless do not represent a significant share of the global market.[76]

Notably, the four largest American DSPs (Apple, Amazon, YouTube Music, and Pandora) are all backed by major conglomerates. These DSPs survive in part by their ability to treat streaming as a loss-leader[77]—a dynamic which creates its own risks for user privacy and data collection.[78] As the Competition and Markets Authority report notes, "[I]ntegrated music streaming services appear to be best placed to grow through . . . self-preferencing and bundling strategies."[79] While a full dissection of the competitive risks of "integration dominance" are beyond the scope of this Article, the Parliamentary Report highlights six risks in particular. Specifically, integrated DSPs have the ability and incentive to leverage their direct control of devices (smart phones, tablets, smart speakers), operating systems, app stores, and search engines;[80] engage in preferential placement, advantageous default positions, and marketing privileges for cross

---

[73] PARLIAMENTARY REPORT, *supra* note 11, at 71.

[74] Mark Mulligan, *Music Subscription Market Shares | Chinese Dragon*, MIDIA RESEARCH (Dec. 7, 2022), https://www.midiaresearch.com/blog/music-subscriber-market-shares-2022.

[75] France's Deezer (1.9 percent), Chinese services Tencent (13.4 percent) and NetEase (6.1 percent), and Russia's Yandex (2.2 percent) also represent a substantial portion of the global market. *Id*.

[76] *See id*.

[77] Noti-Victor & Tang, *supra* note 23, at 14–16.

[78] 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 & Amanda Lotz, *Beyond Streaming Wars: Rethinking Competition in Video Services*, 8 MEDIA INDUS. 89 (2021).

[79] COMPETITION & MKTS. AUTH., MUSIC AND STREAMING: FINAL REPORT ¶ 4.65 (2022) [hereinafter CMA REPORT], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1120610/Music_and_streaming_final_report.pdf. For a broad discussion of the risks associated with integrated music streaming services, see *id*. ¶¶ 4.56, 4.107.

[80] *Id.* ¶ 4.57.

selling;[81] leverage their access to vast troves of consumer data;[82] impose costs on users of rival music streaming services;[83] bundle their services to consumers;[84] and enjoy economies of scale that make them more appealing to rightsholders, thus entrenching their dominance.[85] Taken together, these pose a substantial threat to innovation, choice, and quality for users and musicians alike.

3. *The Transition to Digital and the Death of "Rights Ready" Products*

Perhaps the most significant effect of the great shift to digital has been to elongate the licensing chain. Pre-streaming, records were considered "rights ready." This meant that, by the time the record reached store shelves, all necessary licensing contracts had been signed and sealed. Aside from the record label (which was typically responsible for paying the recording artist and splitting some of its incoming revenue with the composition's publisher), all necessary money had changed hands and obligations had been fulfilled. In other words, the licensing chain stopped at the record label's doors. The company that trucked the records to stores did not need a license from the label or publisher.

The record store did not need to seek permission from rightsholders to put the album on its shelves. Customers did not need to sign a contract when they purchased the record, or when they played it in their home or for friends.

Moreover, once the customer lawfully purchased a copy of the record, they owned it in the same way 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 personal property. Formats that used a physical object to house a digital copy of a recording, such as CDs, followed these same rules.[86]

This reality was made possible by the principle of exhaustion, also known as the first sale doctrine. Originally a judicial doctrine with roots dating back to the nineteenth century, first sale is now a statutory limitation on copyright which holds that "the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord."[87] The reasons for this are perhaps most obvious when considering the alternative:

---

[81] *Id*.

[82] *Id*.

[83] *Id*.; *see also* the struggle between Spotify and Apple over in-app subscriptions, discussed *infra*.

[84] *Id.* ¶ 4.65.

[85] *Id.* ¶ 4.64.

[86] *See* UMG Recordings, Inc. v. Augusto, 628 F.3d 1175, 1183 (9th Cir. 2011) (holding that record labels' affixation to CDs of labels purporting to limit their use and resale had no effect on the enjoyment of title to the physical object).

[87] 17 USC § 109; *see also* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY ch. 10 (2017).

> The Copyright Act prohibits unauthorized distribution—the selling, renting, leasing, or giving away—of protected works. Without some exception or limitation, we would have no right to donate our used books or sell our used video games or even give a newly purchased CD to a friend on their birthday. The first sale doctrine steps in to prevent that absurd result. It allows copy owners to sell, give away, lend, or rent their copies even when the copyright holder objects.[88]

Much of our modern media economy depends on this principle. Used bookstores, used record stores, and libraries all depend to varying degrees on the first sale doctrine for their existence.[89]

Streaming, however, upends this dynamic. While record stores simply stocked records on their shelves, streaming services *perform* them—an act which requires additional rights clearances.[90] Just as before, the label must secure the composition rights before recording a track; now, however, the DSP must *separately* clear the full suite of rights with the label, publisher (for reproducing and distributing the composition) and PROs (for publicly performing the same). DSPs thus maintain continuous licensing relationships not only with primary rightsholders, but also with various intermediaries such as distributors, collective rights management societies, collections societies, and others. And for consumers, the subscription streaming model means that consumers can no longer lend, resell, or regift their music. They can merely listen to it—until the DSP drops it from the catalog.[91]

II. MAPPING THE MONEY BLACK HOLE

Consumers are tossing billions of dollars into the black hole of streaming services. Record companies are reporting record profits. That money is not, by most estimations,[92] making its way equitably to artists. So where is it going?

Broadly speaking, the path that funds traverse between consumers and artists can be divided into three stages of transfer: 1) payments from consumers to

---

[88] PERZANOWSKI & SCHULTZ, *supra* note 87, at 25.

[89] *Id.*; *see also* Lorie M. Graham & Stephen M. McJohn, *Intellectual Property's First Sale Doctrine and the Policy Against Restrains on Alienation*, 7 TEX. A&M L. REV. 497, 498 (2020).

[90] Further complicating DSPs' position is the shift to digital, where license agreements purport to override first sale. *See* Vernor v. Autodesk, 621 F.3d 1102 (9th Cir. 2010). For a more thorough discussion of this shift, see PERZANOWSKI & SCHULTZ, supra note 87; Noti-Victor & Tang, *supra* note 23, at 25–26; Nancy S. Kim, *The Software Licensing Dilemma,* BYU L. REV. 1103 (2008); Kristin Cobb, *The Implications of Licensing Agreements and the First Sale Doctrine on U.S. and EU Secondary Markets for Digital Goods*, 24 DUKE J. COMPAR. & INT'L L. 529 (2014); Clark D. Asay, *Kirtsaeng and the First-Sale Doctrine's Digital Problem*, 66 STAN. L. REV. ONLINE 17 (2013); Sarah Reis, Note, *Toward a "Digital Transfer Doctrine"? The First Sale Doctrine in the Digital Era*, 109 NW. U. L. REV. 173 (2015); Victor F. Calaba, *Quibbles 'n Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. TECH. L. REV. 1 (2002).

[91] For a thorough dive into the problems raised by subscription dynamics and digital licensing, see PERZANOWSKI & Schultz, *supra* note 87.

[92] *See*, *e.g.*, Sisario, *supra* note 5.

streaming services; 2) streaming services to rightsholder intermediaries; and 3) rightsholder intermediaries to musicians.

A. Customers Paying Streaming Services ($12 Billion)

This is one of the few pieces of the puzzle for which there is a concrete, public number: $12 billion per year.[93] Broken out on a per-consumer basis, that comes to approximately $98 per person per year on recorded music, across all formats;[94] however, limitations in the data suggest that the overall number may be substantially higher.[95] While total revenues are still below the 1999 peak of $23.7 billion (inflation adjusted), they are also up from the 2014 trough of $7.7 billion.[96] This total is subject to two major influences: 1) subscription pricing and 2) app store and payment processor fees.

1. Subscription Pricing

Most DSPs offer multiple tiers of paid subscription, from bare-bones, ad-free options to multi-user family plans, or plans offering HD sound quality. Standard individual plans range from $4.99-$10.99 per month, with deluxe plans in the $15.99-$19.99 per month range. Many streaming services also offer an ad-supported or "freemium" option, which are free to the end user, but are monetized through advertising and/or collection of consumer data. These generate substantially less revenue overall and pay lower per-stream rates to rightsholders.[97] The economics (and ethics) of freemium services has become a flash point for artists, rightsholders, and services alike.[98] Despite this, freemium

---

[93] *See* Hypebot, *MusicWatch: Music Engagement and Spending Hit Record Highs Driven by Streaming, Vinyl, Social Video*, CELEBRITY ACCESS (Mar. 25, 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.

[94] *Id.*

[95] 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*.

[96] *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 visited Feb. 17, 2023).

[97] Amy X. Wang, *Spotify Is Doubling Down on an Unprofitable Strategy*, QUARTZ (Mar. 1 2018), https://qz.com/work/1218831/spotify-is-doubling-down-on-an-unprofitable-strategy-as-it-prepares-to-go-public.

[98] Thomas M. Wagner & Thomas Hess, *What Drives Users to Pay for Freemium Services? Examining People's Willingness to Pay for Music Services*, Proceedings of the Nineteenth Americas Conference on Information Systems (Aug. 2013); Mariana Lopes Barata & Pedro Simões Coelho, *Music Streaming Services: Understanding the Drivers of Customer Purchase and Intention to Recommend*, 7 HELIYON 8 (2021); Holly Richmond, *The Most Ethical Way to Stream Music: Not at All*, CTR. DIGIT. ETHICS & POL'Y (Nov. 14, 2014), https://digitalethics.org/essays/most-ethical-way-stream-music-not-all; Rhian Jones, *'Spotify Are Selling Adverts, Not Music': How to Stream Ethically*, GUARDIAN (Jan. 16, 2021), https://www.theguardian.com/music/2021/jan/16/spotify-are-selling-adverts-not-music-how-to-stream-ethically; Tim Ingham, *'The Music Industry Would Be Insane to Dump Freemium'*, MUSIC BUS. WORLDWIDE (Mar. 12, 2015),

models are viewed as valuable both for their role in piracy diversion[99] and as sources of valuable user data.[100]

2. App Stores and Payment Processors

Streaming services with mobile apps are also subject to app store fees. Generally, app stores take between 15-30 percent of all in-app purchases and subscriptions.[101] This amount has long been a sticking point within the app industry, often flaring up into acrimonious finger-pointing and calls for regulatory intervention.[102] 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 outbound links to web sign-up forms. This meant that app developers who wanted to offer subscriptions had to either do so within the app—subjecting the

---

https://web.archive.org/web/20230209155934/https://www.musicbusinessworldwide.com/the-music-industry-would-be-insane-to-dump-freemium.

[99] Luis Aguiar & Joel Waldfogel, *Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?* 4 (Nat'l. Bureau Econ. Rsch., Working Paper No. 21653, 2015); *see also* Antoine Dubus et al., *Fighting Free with Free: Freemium vs. Piracy* (Mar. 2, 2023), https://doi.org/10.3929/ethz-b-000601226 ("[E]ven when free digital content is available online, the firm can completely deter online piracy by offering a free version with a low level of restriction along with the premium version.").

[100] *See, e.g.*, Jack Morse, *How to Stop Spotify from Sharing Your Data, and Why You Should*, MASHABLE (Apr. 5, 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 (Dec. 1, 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 Baterna, *The Dark Side of Spotify Data Collection*, MAKEUSEOF (Oct. 16, 2021), https://web.archive.org/web/20230209160940/https://www.makeuseof.com/spotify-data-collection/.

[101] Ian Carlos Campbell & Julia Alexander, *A Guide to Platform Fees*, VERGE (Aug. 24, 2021), https://www.theverge.com/21445923/platform-fees-apps-games-business-marketplace-apple-google.

[102] *See, e.g.*, Chris Welch, *Spotify Urges iPhone Customers to Stop Paying Through Apple's App Store*, VERGE (July 8, 2015), 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 (Mar. 14, 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 (June 24, 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 (Nov. 1, 2022), https://www.cnn.com/2022/11/01/media/spotify-apple-app-store-reliable-sources/index.html.

subscription fee to Apple's 30 percent cut—or hope their customers independently found their way to the service's website to subscribe. 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.[103]

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 Apple's fees. (Spotify has since discontinued the option to purchase subscriptions through the iOS app altogether.)[104]

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

B. Streaming Services Paying Rightsholders (Approx. $8.28 Billion)

According to the Parliamentary Inquiry, of the $12 billion consumers spend on music streaming, approximately $8.28 billion (roughly 69 percent) transfers through to rightsholders. This is, however, only a fraction of the picture. Licensing fees represent only one part of the overall compensation package for licensing deals between DSPs and the major record labels ("major licensing deals"). These major licensing deals can contain multiple forms of non-cash compensation, including playlist placement, discounted advertising rates, and equity stakes.[105] However, pervasive NDAs make it difficult to detail the scope, frequency, and overall value of these non-cash components.

This Section proceeds in three stages. First, it examines how much DSPs keep, and why they nevertheless remain unprofitable. It then maps the various intermediaries that stand between DSPs and rightsholders, as well as the competitive and historical pressures that shape the market behavior of various parties. Finally, it discusses the use of advances and non-cash compensation in licensing deals, as well as the competitive concerns that these models raise.

---

[103] Todd Spangler, *Apple Will Let Content Apps Like Netflix, Spotify Link to Their Websites to Sign Up Users*, VARIETY (Mar. 30, 2022), https://variety.com/2022/digital/news/apple-app-store-netflix-spotify-web-accounts-1235219399.

[104] *Apple Payments for Spotify*, SPOTIFY, https://support.spotify.com/us/article/apple-payments (last visited Feb. 2, 2023).

[105] *See, e.g.*, Ben Sisario, *Sony Terms with Spotify Uncovered in Contract*, N.Y. TIMES (May 24, 2015), https://web.archive.org/web/20230206201822/https://www.nytimes.com/2015/05/25/business/media/sony-terms-with-spotify-uncovered-in-contract.htm

1. What DSPs Keep ($3.72 Billion)

How much do streaming services keep for themselves? There are no comprehensive public numbers, but we can again rely on the Parliamentary Report's averages, which the DSP trade group, the Digital Music Alliance (DiMA), confirmed. DSPs pocket about 31 percent of consumer dollars, or roughly $3.72 billion.[106] That rate has remained more or less constant since the 2003 launch of Apple's iTunes download service, which kept 30 percent of the download price. [107] Notably, a broad sampling of industry stakeholders agreed that this number was "basically reasonable."[108]

DSPs nevertheless remain notoriously unprofitable.[109] Spotify has never managed an annual profit,[110] despite one quarterly success in 2018 and an encore performance in the third quarter of 2019.[111] Deezer, founded in 2007, earned praise for its ambition in setting a *2025* target date for profitability.[112] The financials for Tidal, which was purchased by fintech firm Block in 2021, are obfuscated under the firm's public reporting;[113] however, the firm "lost $52 million on subscription revenues of just $166 million in 2019."[114] 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 one. How have none of these firms—the engines of extraordinary consumer spending—managed to turn a consistent profit? The answer is

---

[106] *U.S. On-Demand Subscription Streaming Revenue: Who Gets Paid and How Much?,* DIGIT. MEDIA ASS'N., https://dima.org/news-and-resources/who-gets-paid-and-how-much (last visited Feb. 23, 2023).

[107] Nick Wingfield & Ethan Smith, *Music's New Gatekeeper*, WALL ST. J. (Mar. 9, 2007), https://www.wsj.com/articles/SB117340340327331757; Austin Carr, *Apple's 30% Fee, an Industry Standard, Is Showing Cracks*, BLOOMBERG (May 3, 2021), https://www.bloomberg.com/news/newsletters/2021-05-03/apple-s-30-fee-an-industry-standard-is-showing-cracks ("Apple established the 30% tech tax starting nearly two decades ago, with the iTunes Store. It took about 30 cents of a 99-cent song and used the same model when it introduced the App Store in 2008.").

[108] COOKE, *supra* note 57, at 81.

[109] PARLIAMENTARY REPORT, *supra* note 11, at 67.

[110] Adam Clark, *Spotify Earnings Reveal Larger-than-expected Loss. Why the Stock Is Gaining*, BARRONS (Jan. 31, 2023), https://www.barrons.com/articles/spotify-stock-price-earnings-51675163902.

[111] Tim Ingham, *Spotify is Profitable. How Did That Happen?*, ROLLING STONE (Nov. 12, 2019), https://www.rollingstone.com/music/music-features/spotify-profitable-how-happen-910456.

[112] Mathieu Rosemain, *France's Deezer Pledges to Turn a Profit by 2025*, REUTERS (Sept. 22, 2022), https://www.reutens.com/technology/frances-deezer-pledges-turn-profit-by-2025-2022-09-21.

[113] Stuart Dredge, *Block Financials Hint at $56m of Quarterly Tidal Revenues*, MUSIC ALLY (Nov. 4, 2022), https://musically.com/2022/11/04/block-financials-hint-at-56m-of-quarterly-tidal-revenues.

[114] Benjamin Pimentel et al., *Jack Dorsey Is So Money: What Tidal and Banking Do for Square*, PROTOCOL (Mar. 4, 2021), https://www.protocol.com/square-tidal-jack-dorsey-banking.

complicated, and its full nuance is beyond the scope of this Article. Two factors, however, are particularly relevant.

The first is an intractable issue of basic economics. As noted *supra,* major labels possess price-setter power, allowing them to extract any DSP surplus. Second, the move to digital distribution has also allowed labels to both minimize the costs of physical distribution and simultaneously offload 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.[115]

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

Labels' price-setter power also has secondary effects in driving licensees to diversify their business models. Spotify has embraced podcasting as a low-cost, high-revenue product that can potentially offset its music licensing costs.[116] However, this move has caused its own set of cascading controversies.[117] The grand experiment shows signs of faltering;[118] Spotify has since relinquished control of several high-profile podcast exclusives[119] and laid off nearly 2 percent of its entire staff.[120]

---

[115] PARLIAMENTARY REPORT, *supra* note 11, at 67.

[116] For a more detailed discussion, see Meredith Rose, *How Our Convoluted Copyright Regime Explains Why Spotify Chose Joe Rogan over Neil Young*, TECHDIRT (Feb. 18, 2020), https://www.techdirt.com/2022/02/18/how-our-convoluted-copyright-regime-explains-why-spotify-chose-joe-rogan-over-neil-young.

[117] From the outset, some commentators decried the move to put podcasts—a traditionally open-feed model—behind a garden wall. Will Bedingfield, *Spotify Is Breaking Podcasts*, WIRED UK (Oct. 13, 2021), https://www.wired.co.uk/article/spotify-exclusive-podcasts; Matt Stoller, *Will Spotify Ruin Podcasting?*, BIG (Feb. 8, 2020), https://www.thebignewsletter.com/p/will-spotify-ruin-podcasting. Its flagship exclusive podcast came under fire for spreading vaccine misinformation, leading to departure threats from a number of high-profile artists (and the actual departure of Neil Young). Ben Sisario, *Spotify Is Removing Neil Young Songs After He Complains of 'Misinformation'*, N.Y. TIMES (Jan. 26, 2022), https://www.nytimes.com/2022/01/26/arts/music/spotify-neil-young-joe-rogan.html.

[118] Amrita Khalid, *Spotify's Podcast Plan Is Going off the Rails*, VERGE (June 21, 2023), https://www.theverge.com/23768886/spotify-podcast-strategy-mistakes-joe-rogan-exclusives-trevor-noah; Lucas Shaw, *Spotify's Billion-Dollar Bet on Podcasting Has Yet to Pay Off*, BLOOMBERG BUSINESSWEEK (June 24, 2022), https://www.bloomberg.com/news/features/2022-06-24/spotify-s-joe-rogan-powered-podcast-bet-hasn-t-paid-off.

[119] Ashley Carmen & Lucas Shaw, *Spotify Shifts Podcast Strategy to Make Exclusives Available on Other Platforms*, BLOOMBERG (June 7, 2023), https://www.bloomberg.com/news/articles/2023-06-07/spotify-shifts-podcast-strategy-from-exclusives-to-a-wider-reach; Ariel Shapiro & Amrita Khalid, *Spotify Loosens Its Grip on Exclusive Podcasts*, VERGE (Apr. 18, 2023), https://www.theverge.com/2023/4/18/23688644/spotify-podcast-gimlet-rogan-audiobook-pew.

[120] Anne Steele & Will Feuer, *Spotify Layoffs Are Latest Sign of Struggles in Podcast Business*,

2. *What DSPs Pass Along ($8.28 Billion)*

DSPs typically do not pay record companies or music publishers directly; instead, they pay intermediaries. These intermediaries provide DSPs with bundled catalogues, often comprised of multiple rightsholders' works. Most intermediaries also act as negotiators on behalf of rightsholders, using the leverage of broad, bundled catalogues to extract better rates for their rightsholder clients. There are three primary kinds of intermediaries: distributors, aggregators, and collective rights management societies (CRMs). It is these entities through which DSPs funnel most of their revenue payments.

On paper, this provides a degree of separation between DSPs and major rightsholders. And some do work independently on behalf of artists and independent labels and publishers. Others, however, function as arms of the largest rightsholders and work to consolidate and privilege the market power of their parent companies.

a. Distributors and Aggregators

Placing a track on a streaming platform is logistically complex. 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 DSPs do not have the administrative capacity to deal with tens (or hundreds) of thousands of individual rightsholders.[121]

This is the market niche that distributors and aggregators occupy.[122] These firms bundle catalogs, negotiate rates, and collect and disburse funds on behalf of their rightsholder clients.[123] Bundled catalogues provide the best of both worlds: DSPs enjoy greater efficiency than they would with piecemeal licensing, and rightsholders enjoy greater negotiating leverage as a collective than they

---

WALL ST. J. (June 5, 2023), https://www.wsj.com/articles/spotify-to-cut-200-jobs-as-it-reorganizes-podcasting-division-39720004; Jess Weatherbed, *Spotify Cuts 200 Roles from Its Podcast Division*, VERGE (June 5, 2023), https://www.theverge.com/2023/6/5/23749351/spotify-podcast-layoffs-parcast-gimlet.

[121] Spotify discontinued its direct-upload program in 2019. *We're Closing the Upload Beta Program. Here's What Artists Need to Know*, SPOTIFY (July 1, 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 visited Feb. 2, 2023).

[122] 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, 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 and strategy, catalog and metadata delivery, and facilitating payouts—or only one.

[123] *The Mechanics of Music Distribution: How It Works, Types of Music Distribution Companies + 35 Top Distributors*, SOUNDCHARTS (June 29, 2022), https://web.archive.org/web/20230218163202/https://soundcharts.com/blog/music-distribution.

would separately. The result is that these firms stand "as the middleman between rightsholders and music streaming services."[124]

The market for distributors and aggregators is extremely concentrated. On paper, it appears relatively robust; a profusion of distributors and aggregators has sprung up in recent years, offering varying service rates, models, and commitments to artists.[125] Despite this, the Big Three still overwhelmingly dominate. Sony, Warner, and Universal's in-house distributors represent not only their own catalogues, but also offer third-party distribution services for independent labels. In total, distributors owned and controlled by the Big Three collected more than 87 percent of all U.S. digital royalties in 2017.[126]

This overwhelming market share and the accompanying culture of opacity raise serious concerns about the ability of the Big Three to manipulate both the DSP and artist ends of the market. Distributors are incentivized to provide the best deals for their biggest clients, often at the expense of smaller accounts. The Big Three distributors have both the incentive and the ability to self-preference their parent companies' catalogues over those of their independent clients. Combined with the information vacuum created by NDAs, smaller independent artists are often forced into an unenviable position; their best chance of securing a decent per-stream rate is to sign with a distributor controlled by one of their Big Three competitors and to hope, in the closed doors of negotiation, that these competitors will represent their interests as independent artists:

> 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' 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."[127]

Experiments to allow artists to bypass the Big Three distributors and directly access the DSPs have been largely unsuccessful, due to a combination of the heavy administrative burden and (speculated) pressure exerted by the Big Three against DSPs. In 2018, Spotify agreed to pay the Big Three (plus major indie distributor Merlin) 52 percent of all revenue generated by their artists.[128] In that same period, Spotify's short-lived direct upload program—which allowed artists to bypass distributors entirely and deal directly with Spotify—paid artists 50 percent of the program's prorated net revenue.[129] When accounting for the share

---

[124] PARLIAMENTARY REPORT, *supra* note 11, at 16.

[125] Notably, 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." SOUNDCHARTS, *supra* note 123.

[126] *Id*.

[127] PARLIAMENTARY REPORT, *supra* note 11, at 69.

[128] Tim Ingham, *Spotify's Direct Distribution Deals: What Do Artists Get Paid?*, MUSIC BUS. WORLDWIDE (Sept. 23, 2018), https://web.archive.org/web/20230217200157/https://www.musicbusinessworldwide.com/spotifys-direct-distribution-deals-what-do-the-artists-get.

[129] *Id.*

taken by the distributors and intermediate rightsholders, this all but guaranteed a higher pass-through rate for participating artists.[130] However, the program lasted for less than a year and did not even exit its beta phase before Spotify abandoned it, opting instead "to lean into the great work our distribution partners are already doing to serve the artist community."[131]

b. Collective Rights Management Societies

Many (though not all) songwriters also rely on Collective Rights Management Societies (CRMs) to manage the various licenses required for streaming. There are multiple kinds of CRMs, dedicated to managing different bundles of licenses. Mechanical Rights Organizations (MROs), as the name implies, license reproduction and distribution rights, also known as "mechanical" rights. The largest MRO is the Mechanical Licensing Collective (MLC), established in 2018 by the Music Modernization Act.[132] Another statutory CRM, SoundExchange, was designed to administer certain statutory licenses covering the digital public performance right for sound recordings.[133]

---

[130] *See id*.

[131] *We're Closing the Upload Beta Program. Here's What Artists Need to Know*, SPOTIFY FOR ARTISTS (July 1, 2019), https://artists.spotify.com/en/blog/we%27re-closing-the-upload-beta-program. Spotify's vague statement prompted endless speculation about the reason for the closure. *See, e.g.*, Todd Spangler, *Spotify Shuts Down Ability for Independent Artists to Upload Music Directly*, VARIETY (July 1, 2019), https://variety.com/2019/digital/news/spotify-shuts-down-artist-direct-upload-1203256886 ("[T]he company seems to have determined the complexity involved in monitoring the rights associated with music distribution made the whole thing more trouble than it was worth . . . ."); Stuart Dredge, *Spotify closes its direct-upload test for artists*, MUSIC ALLY (July 1, 2019), https://musically.com/2019/07/01/spotify-closes-its-direct-upload-test-for-artists ("The temptation to see this as the shutdown of a feature that raised the hackles of some labels, at a time when Spotify is preparing to renew its licensing deals, is nigh-on irresistible."); Bobby Owsinski, *Why Can't You Upload Music Directly to Spotify, Apple Music, Amazon?,* Hypebot (Jan. 5, 2022), https://www.hypebot.com/hypebot/2022/01/why-cant-you-upload-music-directly-to-spotify-apple-music-amazon.html ("The reason is that the major labels pressured all the streaming services to restrict direct uploads to only the labels as they don't want to be bypassed as the middleman."); *cf.* Sarah Perez, *Spotify Shuts Down Its Music Upload Beta Program for Artists*, TECHCRUNCH (July 1, 2019), https://techcrunch.com/2019/07/01/spotify-shuts-down-its-direct-music-upload-beta-program-for-artists ("The feature to offer direct uploads may have also caused tension with labels, but that wasn't mentioned — or even referenced between the lines of the official announcement today.").

[132] Notably, the MLC is statutorily enabled to issue blanket mechanical licenses for all compositions—even in situations where the rightsholder is unknown or unable to be located. 17 U.S.C. § 115(d).

[133] 17 U.S.C. § 114(g)(2); Determination of Reasonable Rates and Terms for the Digital Performance of Sound Recordings, 63 Fed. Reg. 25394, 25395 (May 8, 1998). SoundExchange began life as an arm of the Recording Industry Association of America before becoming an independent nonprofit in 2003. Eduardo Loret de Mola, *Sound Exchange Explained,* MUSIC BUS. J. (Oct. 25, 2015), https://www.thembj.org/2015/10/soundexchange-explained/. Despite this limited mandate, it has distributed over $5 billion in royalties to date. Variety Staff, *SoundExchange Passes $5 Billion Mark in Streaming Royalty Distributions*, VARIETY (Mar. 15, 2018), https://web.archive.org/web/20230218165419/https://variety.com/2018/biz/news/soundexchange-passes-5-billion-mark-in-streaming-royalty-distributions-1202728206. Notably, SoundExchange is required by law to divide royalties according to a set formula: 45 percent of royalties go to featured

The oldest and most well-known of these are Performing Rights Organizations (PROs), which bundle and license members' public performance rights.[134] Unlike MROs and SoundExchange, these composition-rights PROs are exceptionally powerful market players with a long and documented history of competition concerns.

i. The PRO Landscape

There are four dominant PROs that administer public performance rights for songwriters in the United States: the American Society for Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); SESAC (formerly the Society of European Stage Authors and Composers, and now simply known by its acronym); and Global Music Rights (GMR).[135] Each of these have a mix of songwriter members and publisher members. While a songwriter can only sign with one PRO, a publisher can split its catalog among multiple PROs.[136]

ASCAP and BMI, the oldest and largest by catalog size, were founded in the early 20th century. Both offer sweeping "blanket" licenses of bundled public performance rights in compositions. 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.[137] However, the temptation of this market power led to predictable anticompetitive results. In the 1930s, ASCAP refused to offer individual or per-use licenses, while simultaneously prohibiting its members from directly negotiating with licensees. This achieved its intended aim; all purchasers, regardless of size or need, were forced to take out sweeping blanket licenses priced at ASCAP's sole discretion.[138] The predations of music publishing were well known and much

---

artists, 5 percent to a fund for non-featured artists, and the remaining 50 percent to the rightsholder (typically the record label). 17 U.S.C. § 114(g)(2).

[134] Specialty PROs—such as MusicReports, which licenses primarily for television and film—also exist, but do not deal with DSPs.

[135] 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.

[136] *See What to Do If the Writer and Publisher PROs Are Different*, TUNEREGISTRY HELP CTR., http://help.tuneregistry.com/en/articles/2447690-what-to-do-if-the-writer-and-publisher-pros-are-different (last visited Jan. 8, 2024).

[137] "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." Sigmund Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 L. & CONTEMP. PROBS. 294, 297 (1954).

[138] 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.

lamented; one scholar opined that "[o]nce 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."[139]

These market abuses, among others,[140] led the Department of Justice to sue ASCAP for antitrust violations. Both PROs entered into roughly parallel consent decrees in 1941 and remain under them today.[141] Under the terms of the decrees, ASCAP and BMI may not interfere with their members' ability to directly license;[142] deal in licenses *other* than for public performance;[143] discriminate between similarly situated licensees;[144] or base their licensing rates upon performance of works not within their own catalog.[145] In addition to blanket licenses, both PROs must offer per-program licenses.[146] And, importantly, all licenses must be technologically neutral and "through-to-the-audience."[147] This means that the license encompasses public performance by the licensee *and* any intermediary necessary to deliver the performance to the end audience—an important distinction as new technologies develop layered delivery

---

MEDIA & ENT. L.J. 733, 743 (1998).

139 Timberg, *supra* note 137, at 294.

140 Black and rural songwriters famously could 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 otherwise underrepresented songwriters. *See* DIANE PECKNOLD, THE SELLING SOUND: THE RISE OF THE COUNTRY MUSIC INDUSTRY 54-55 (2007); 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, 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. REV. 687 (2013).

141 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." Timberg, *supra* note 137, at 306. 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*, BROAD. MAG. (Jan. 27, 1941), 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.

142 United States v. Am. Soc'y of Composers, Authors & Publishers, Civ. Action No. 41-1395 (WCC) at 6 (S.D.N.Y. Jun. 11, 2001) (Second Amended Final Judgment) [hereinafter ASCAP Consent Decree]; United States v. Broad. Music, Inc., No. 64-Civ-3787, at 3 (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment) [hereinafter BMI Consent Decree].

143 ASCAP Consent Decree, *supra* note 142, at 6; BMI Consent Decree, *supra* note 142, at 2.

144 ASCAP Consent Decree, *supra* note 142, at 7; BMI Consent Decree, *supra* note 142, at 4.

145 ASCAP Consent Decree, *supra* note 142, at 8; BMI Consent Decree, *supra* note 142, at 5.

146 ASCAP Consent Decree, *supra* note 142, at 9–11; BMI Consent Decree, *supra* note 142, at 5.

147 ASCAP Consent Decree, *supra* note 142, at 8; BMI Consent Decree, *supra* note 142, at 2.

mechanisms.[148]

Until recently, both ASCAP and BMI operated as nonprofits; BMI declared its intent to switch to a for-profit model in late 2022.[149] Both, by the terms of their consent decrees, must accept any published songwriter who wants to join.[150] Combined, the two control over 90 percent of composition public performance rights in the United States. Their market control is so profound that the Department of Justice, even when helmed by deregulatory administrations, has repeatedly declined to rescind or substantially modify the consent decrees.[151]

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

GMR, meanwhile, exclusively services "superstar" songwriters such as Bruce Springsteen, Bruno Mars, Lizzo, and the estates of John Lennon and Ira Gershwin.[152] They control a small but high-demand segment of the market, and there are indications that competition for blockbuster talent is becoming fiercer.[153]

ii. Antitrust Concerns

PROs provide significant efficiency but also carry a risk of anticompetitive behavior. Due to size and market dominance, ASCAP and BMI have been the subject of endless commentary.[154] There are a few crucial points about the

---

[148] *See, e.g.*, Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., "And the Beat Goes On": The Future of the ASCAP/BMI Consent Decrees, Remarks as Prepared for the Vanderbilt University Law School (Jan. 15, 2021), https://web.archive.org/web/20230217220619/https://www.justice.gov/opa/speech/file/1355241/download.

[149] Jem Aswad, *BMI Is Changing to a For-profit Business Model*, VARIETY (Oct. 12, 2022), https://web.archive.org/web/20230217220619/https://www.justice.gov/opa/speech/file/1355241/download.

[150] ASCAP Consent Decree, *supra* note 142, at 18; BMI Consent Decree, *supra* note 142, at 2.

[151] *See* Delrahim, *supra* note 148.

[152] *Catalog*, GLOB. MUSIC RTS., https://globalmusicrights.com/Catalog (last visited Feb. 17, 2023).

[153] Ed Christman, *As Competition Heats Up, Performance Rights Organizations Respond to Market Changes*, BILLBOARD (July 1, 2019), https://web.archive.org/web/20230203161001/https://www.billboard.com/music/music-news/competition-heats-up-performance-rights-organizations-respond-market-changes-8518214.

[154] *See, e.g.*, Hillman, *supra* note 138; Sigmund Timberg, *ASCAP, BMI and the Television Broadcasters – A Postscript*, 13 INT'L BUS. L. 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 & Allen P. Grunes, *Potential Legal Issues in Terminating the ASCAP and BMI Decrees*, U. TENN. KNOXVILLE L. FAC. PUBL'NS 133 (2018); Jay M. Fujitani, *Controlling the Market Power of Performing Rights Societies: An Administrative Substitute for*

business model itself that are worth highlighting.

First, the Supreme Court 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.[155] 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. For example, in 2011, ASCAP failed to follow its own internal transparency rules because a member publisher believed that doing so would put it at a negotiating disadvantage.[156] Comments during the Department of Justice's 2014 consent decree review repeatedly highlighted this incentive failure.[157]

Antitrust Regulation, 72 CALIF. L. REV. 103 (1984).

[155] When considering the dispute between BMI and broadcasting giant CBS, the Court went out of its way to emphasize the necessity of both the rate court and the standing decrees:

> [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.

Broad. Music, Inc. (BMI) v. Columbia Broad. Sys. (CBS), Inc., 441 U.S. 1, 13 (1979).

[156] *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'y of Composers, Authors & Publishers, 785 F.3d 73 (2d Cir. 2015).

[157] *See, e.g.*, Comput. & Commc'n Indus. Ass'n, Comments on ASCAP/BMI Antitrust Consent Decree Review 4–7 (Aug. 6, 2014), https://www.justice.gov/atr/page/file/1095876/dl?inline ("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."); Future of Music Coal., Comments on the Review of Antitrust Consent Decrees for American Society of Composers, Authors and Publishers I Broadcast Music, Inc. 12 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/13/307749.pdf ("Under the Consent Decrees, ASCAP and BMI have struggled with transparency in internal and external matters."); Nat'l Ass'n of Broads., Comments on In re Antitrust Consent Decree Review: American Society of Composers, Authors and Publishers/Broadcast Music, Inc. 4, (Aug. 6, 2014), https://www.justice.gov/atr/page/file/1083571/dl?inline ("Lack of meaningful access to [licensing] information has increased transaction costs and hindered licensing activities – both direct and collective."); Nat'l Cable & Telecomms. Ass'n, Comments on ASCAP/BMI 5 (Aug. 6, 2014), https://www.justice.gov/atr/page/file/1079381/dl?inline ("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 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."); Nat'l Religious Broads. Music Licensing Comm., Comments on ASCAP and BMI Consent Decree Review 10 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/14/307806.pdf ("The PROs themselves disclaim the accuracy of their databases."); Netflix, Comments on Consent Decrees 17 (Aug. 6, 2014), https://www.justice.gov/sites/default/files/atr/legacy/2014/08/20/307908.pdf ("[T]he lack of transparency to users can lead to material information imbalances or asymmetries between licensors and licensees – which render a marketplace setting demonstrably

Second, direct licensing checks the anticompetitive power of PROs. It prevents PROs from forcing licensees who seek to make limited use of a song into over-inclusive blanket licenses. Moreover, allowing member songwriters and publishers to engage in direct licensing arrangements can exert some (incomplete) pressure on the pricing and terms of the PROs' other licensing products. Ultimately, direct licensing ensures that the blanket license acts as a floor, rather than a ceiling; songwriters will always have their works included in the blanket license but retain the option to directly negotiate for better terms or rates. Unsurprisingly, PROs have historically resisted the practice.

While the consent decrees explicitly require ASCAP and BMI to allow direct negotiation among their members,[158] GMR and SESAC—both outside the ambit of the decrees—have been accused of blocking attempts by their members to directly license their work.[159] A court determined that SESAC had obscured the contents of its repertory specifically to prevent licensees from identifying the parties with whom they needed to negotiate;[160] GMR was accused of a similar practice, but the case settled before the court could rule on the merits.[161]

Finally, it is important to note that although PROs compete for membership (with better rates, transparency, and representation),[162] they do not need to compete for blanket licensees. DSPs are captive buyers for all four PROs' blanket licenses. This is largely due to the practice of fractional licensing—a system under which any joint rightsholder (such as one songwriter out of four credited for a given song) can only license their "fraction" of the work. To stream

noncompetitive."); Radio Music Licensing Comm., Inc. & Television Music License Comm., LLC, Comments on the Consent Decrees 32 (Aug. 6, 2014), https://www.justice.gov/atr/page/file/1082141/dl?inline ("The PROs, however, have gone to great lengths to ensure that users do not have access to any of [their PRO affiliation] databases. This anticompetitive practice, which further entrenches PRO blanket licenses and discourages competitive licensing transactions between individual copyright owners and music users, should be eliminated.").

158 ASCAP Consent Decree, *supra* note 142, at 6.

159 "[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 at 3, Radio Music License Comm. v. Glob. Music Rts., No. 16-6076 (E.D. Pa. Mar. 29, 2019). The case settled in 2022.

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

161 Gene Maddaus, *Irving Azoff's Music Rights Firm Ends Legal Battle with Radio Stations*, VARIETY (Feb. 7, 2022), https://variety.com/2022/music/news/irving-azoff-global-music-rights-rmlc-settlement-1235174154/.

162 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 visited Feb. 17, 2023); *How We Pay Royalties: General Royalty Information*, BROAD. MUSIC INC., https://web.archive.org/web/20230217200535/https://www.bmi.com/creators/royalty/general_information (last visited Feb. 17, 2023).

a song with multiple credited songwriters, a DSP must clear each writer's share separately, even when the writers are represented by different PROs. Failure to clear all relevant rights constitutes copyright infringement. While this system may be administrable in a universe where most songs have one or two songwriting credits, we do not live in that world.[163] In 2016, most "popular mainstream songs ha[d] (on average) at least four writers and six publishers each,"[164] and thirteen of that year's top 100 hits had eight or more songwriter credits attached.[165] DSPs cannot, therefore, reasonably avoid contracting with a disfavored PRO. Thus, PROs, while incentivized to compete for *members*, have no need to compete against one another for *licensees*.

3. *Advances and Non-Cash Compensation*

Per-stream payments, as noted above, are not the only component of a major licensing deal. Firms transfer significant value through other compensation vehicles. Thanks to NDAs, most of these terms are hidden from view. However, leaked contracts and the work of independent researchers have identified several methods by which DSPs compensate the largest rightsholders at the expense of smaller and independent actors.

a. *Advances and Breakage*

Major rightsholder licensing deals require DSPs to pay advances against future royalties. This upfront payment 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. These advances can reach seven- to eight-figure sums. Leaked documents showed that Spotify paid Sony Music $9 million in advances in their deal's first year, $16 million in the second, and $17.5 million in the third.[166] Analysis shows that Spotify paid out a full 82 percent of its total 2015 revenues in advance payments alone.[167] While advantageous for labels, this practice takes money off

[163] Nor, of course, do consumers structure their preferences around PRO affiliation.

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

[165] There are multiple reasons for this 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.

[166] *See, e.g.*, Sisario, *supra* note 105; Micah Singleton, *This Was Sony Music's Contract with Spotify*, VERGE (May 19, 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 (May 21, 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.

[167] Mark Mulligan, *Just How Well Is Streaming Really Doing?*, MUSIC INDUS. BLOG (Aug.

the table for smaller, less powerful licensors such as independent labels.

However, if the catalog *fails* to recoup the advance payment, the remaining 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 generates only $750,000 under its revenue share or minimum guarantee arrangement, the rights owner gets to keep the extra $250,000."[168] The ultimate fate of this this $250,000 surplus (colloquially known as "breakage"[169]) is a source of endless speculation within the industry.[170] While the Big Three and many independent labels have publicly committed to sharing breakage fees with artists,[171] "it remains unclear exactly what these commitments … mean in real terms, i.e., how surpluses are allocated to artists and when such allocations began."[172]

b. Non-cash compensation

Licensing deals between DSPs and major rightsholders typically include kickbacks and other non-cash payments. Labels have leveraged their catalog to secure equity stakes,[173] algorithmic amplification for preferred artists,[174] user

---

31, 2016), https://web.archive.org/web/20230206201550/https://musicindustryblog.wordpress.com/2016/08/31/just-how-well-is-streaming-really-doing.

[168] COOKE, *supra* note 57, at 101.

[169] Not to be confused with "breakage" fees that labels charge artists. *Id*. at 102.

[170] *See* Marvin Jules, *All Three Major Record Labels Say They Pay Their Artists "Breakage" Money from Digital Streaming*, CELEBRITY NET WORTH (June 9, 2015), https://www.celebritynetworth.com/articles/entertainment-articles/three-major-record-labels-say-pay-artists-breakage-money-digital-streaming.

[171] Glenn Peoples, *Warner Music Group CEO: 'We Will Share' with Artists Any Proceeds from Sale of Our Stake in a Streaming Service*, BILLBOARD (Feb. 4, 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 Wwith Artists*, BILLBOARD (Feb. 5, 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 BUS. WORLDWIDE (June 2, 2015), https://web.archive.org/web/20230206201114/https://www.musicbusinessworldwide.com/universal-yes-share-breakage-payments-artists.

[172] COOKE, *supra* note 57, at 102.

[173] *Id*. at 99; Tim Ingham, *If Universal Music Sells Its Spotify Stock Right Now, Artists Get $500 Million*, ROLLING STONE (Feb. 11, 2021), https://web.archive.org/web/20230206202326/https://www.rollingstone.com/pro/features/universal-music-spotify-ownership-artists-1126893.

[174] *See* Glenn Peoples, *How 'Playola' Is Infiltrating Streaming Services: Pay for Play Is 'Definitely Happening'*, BILLBOARD (Aug. 19, 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…*, DIGIT. MUSIC NEWS (May 20, 2016), https://web.archive.org/web/20230226224106/https://www.digitalmusicnews.com/2016/05/20/playlist-payola-real-killing-artist-careers.

demographic and consumption data,[175] and advertising discounts.[176] The aggregate result is that major rightsholders negotiate for and secure numerous non-liquid forms of compensation that influence both the streaming service and the labels' payment to their own artists.

Pay-to-play schemes have been a staple of the modern music industry almost since its inception.[177] Although the avenues and players have shifted over the years, the core dynamic—"the undisclosed payment, or acceptance of payment, in cash or in kind, for promotion of a song, album, or artist"—remains unchanged.[178] 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 its competitors. Evidence suggests that majors are negotiating for playlist positioning and inflated recommendations. Researchers have discovered that songs from major labels "feature on popular Spotify playlists at a disproportionately higher rate than independent songs"[179] 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's results.[180] DSPs, for their part, have actively solicited similar models as they strive to minimize their licensing costs; 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.[181] Artist advocates have thoroughly lambasted it as its own form of

---

[175] *See* Jack Morse, *How to Stop Spotify from Sharing Your Data, and Why You Should*, MASHABLE (Apr. 5, 2022), https://web.archive.org/web/20230209160323/https://mashable.com/article/spotify-user-privacy-settings.

[176] 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, *supra* note 57, at 102; *see also* Micah Singleton, *This Was Sony Music's Contract with Spotify*, VERGE (May 19, 2015), https://web.archive.org/web/20230206201939/https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract ("In addition to the advance Spotify must pay Sony Music, it is also required to give the music label free ad space on its service. The 'credit for advertising inventory' clause mentioned in section 14(a) grants Sony Music a total of $9 million in ad space ($2.5 million in the first year, and $3 million and $3.5 million in the subsequent years). And the free ads don't come at market rates either — they must be given to Sony Music at a heavily discounted rate.").

[177] Christopher Buccafusco & Kristelia García, *Pay-to-playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 805, 805 (2022).

[178] *Id.*

[179] PARLIAMENTARY REPORT, *supra* note 11, at 69.

[180] 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.

[181] *Discovery Mode: Meet Your Next Fans*, SPOTIFY, https://web.archive.org/web/20230220225302/https://artists.spotify.com/en/discovery-mode (last visited Feb. 20, 2023).

payola,[182] and it even prompted a Congressional letter expressing concern.[183] Taken together, this 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.[184]

These deals are not merely appealing to DSPs; they may also minimize the financial obligations of labels toward their 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 some artists to express concern that labels are prioritizing equity and other payola mechanisms specifically to reduce their financial obligation to artists and maximize profits.[185] 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."[186] 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; however, "the secrecy that surrounds so many digital deals adds to this [systemic] distrust."[187]

C. Rightsholders Paying Musicians (Unknown Amount)

The most critical step in the music streaming value chain—how payment flows from rightsholders to artists—is the one we know the least about. We have a rough idea of how some payments are made on the composition side; as noted, *supra*, ASCAP and BMI disclose significant information about their royalty schedules. The MLC has statutory mandates to conduct regular self-audits, publish annual reports, allow artists audit privileges, and implement other various transparency mechanisms.[188] 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 surface level, at least moderately observable to policy makers and participants.

The recording industry, by contrast, is a black box. We have no way to know how much money is ultimately making it to recording artists, even in the

---

[182] The Artist Rights Alliance, *Op-Ed: Spotify's New 'Discovery Mode' Is Just Payola*, ROLLING STONE (May 18, 2021), https://www.rollingstone.com/pro/music-biz-commentary/spotify-payola-artist-rights-alliance-1170544.

[183] Ashley Cullins, *Spotify's "Discovery Mode" Being Probed by House Judiciary Committee*, HOLLYWOOD REPORTER (June 3, 2021), https://web.archive.org/web/20230220224113/https://www.hollywoodreporter.com/business/digital/spotify-discovery-mode-congress-1234962754.

[184] PARLIAMENTARY REPORT, *supra* note 11, at 69.

[185] COOKE, *supra* note 57, at 103.

[186] *Id.*

[187] *Id.*

[188] *See, e.g.*, Transparency of the Mechanical Licensing Collective and Its Database of Musical Works Information, 85 Fed. Reg. 22568, 22570–71 (Apr. 22, 2020) (to be codified at 37 C.F.R. pt. 210).

aggregate. Recording artists are generally paid by their record label, under the terms of their contract (subject, again, to NDAs). However, what we do know paints an unflattering portrait of how artists are treated by their labels—particularly at the Big Three—when it comes to streaming. Leaks, though infrequent, tend to "confirm what [artist advocates] are hearing anonymously or from off-the-record sources."[189] Various estimates place the pass-through royalty rate anywhere from 8 percent[190] to 20 percent—meaning that for every dollar of streaming revenue a DSP pays to the label, the label keeps between $0.80 and $0.92.[191]

A 2014 leak of Universal's contract with Lady Gaga revealed that it contained a clause disqualifying her from claiming *any* streaming royalties generated in situations where her label, Interscope, had licensed its whole catalog at once.[192] Lady Gaga's former manager confirmed this arrangement, adding that "Spotify is paying out a lot of money, it's just not finding its way into the hands of the artists."[193] In short, by opting for market efficiency and electing to license its entire catalog at once, Interscope avoided paying one of its biggest acts even a single cent in streaming revenues.

The failure of recording contracts—particularly among the Big Three—to fairly compensate artists has been raised time[194] and time[195] again,[196] over

---

[189] 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 (June 2, 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.

[190] ReThink Music, *supra* note 62, at 20.

[191] *See also* Lizzie Plaugic, *Spotify's Year in Music Shows Just How Little We Pay Artists for Their Music*, VERGE (Dec. 7, 2015), https://www.theverge.com/2015/12/7/9861372/spotify-year-in-review-artist-payment-royalties ("And not all artists get the same cut of Spotify revenue either: depending on their contracts with the label, some musicians might only recoup 15 to 20 percent of the streaming revenue they brought in.").

[192] *See* Paul Resnikoff, *Universal Music Stole Streaming Royalties from Lady Gaga, Ex-Manager Says*, DIGIT. MUSIC NEWS (Sept. 25, 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; Timberg, *supra* note 189.

[193] Kok, *supra* note 55, at 7.

[194] Drew Schwartz, *Bad Deals Are Baked into the Way the Music Industry Operates*, VICE (Oct. 21, 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.

[195] Mike Masnick, *RIAA Accounting: How to Sell 1 Million Albums and Still Owe $500,000*, TECHDIRT (July 7, 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.

[196] *SLIPKNOT's COREY TAYLOR: Why Most Artists Get 'Screwed' by Music-Streaming Services*, BLABBERMOUTH.NET (Aug. 19, 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

decades[197] and across genres.[198] 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.[199]

III. Possible Solutions and Recommendations

The inequity of music royalties in the United States is not attributable to any one cause or actor. However, taken collectively, the maze of legal and business frameworks that undergirds the industry creates "a weird franken-monster . . . that has resulted from a new music business model built on consumers paying to have access to music, rather than paying to own it."[200]

The status quo is failing consumers, artists, and independent DSPs and labels alike. Consumers benefit from knowing, with certainty, that the money they are paying makes its way to artists rather than arbitrage agents. Artists benefit from knowing, with certainty, how much money is being diverted from consumer spending, and by whom. Independent labels and artists benefit from a fair seat at the negotiating table, and everyone benefits from a fair, competitive market with multiple avenues for music to reach it. The sole remaining question is what kinds of interventions can promote a competitive and dynamic ecosystem, while securing better outcomes for artists and consumers alike.

A. The Federal Trade Commission's Section 6(b) Authority

The fundamental problem in streaming is incentive misalignment, enabled by information asymmetry. In theory, negotiation between rightsholders and DSPs should ensure proper compensation for artists. We know, however, that this is not the case. This is largely due to information hoarding by major players via broad use of non-disclosure agreements. While we cannot ban NDAs wholesale,[201] the Federal Trade Commission (FTC) has the statutory ability to

---

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.").

197 *See, e.g.*, Mark Savage, *From Prince to Megan Thee Stallion: When record Contracts Go Wrong*, BBC (Mar. 3, 2020), https://web.archive.org/web/20230220043222/https://www.bbc.com/news/entertainment-arts-51704533.

198 Jon Blistein & Delisa Shannon, *Bad Contracts Are a Music Industry Standard. Why Haven't They Evolved?*, Rolling Stone (Nov. 17, 2021), https://web.archive.org/web/20230220043732/https://www.rollingstone.com/music/music-news/music-industry-bad-contracts-summer-walker-1258695.

199 *See id*.

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

201 Although some states have outlawed NDAs in employment contracts, these rationales largely rely on the idea that these terms are imposed unilaterally, as a result of unequal bargaining

pierce NDAs in specific contexts.[202]

The FTC and Department of Justice are both tasked with enforcement of antitrust law. The FTC, however, enjoys "unique fact-finding powers to conduct studies and issue reports."[203] As one Commissioner explained:

> That mandate differentiates the FTC from most other antitrust or consumer protection agencies in the world in that it enables the agency to use compulsory process to gather data in a context other than law enforcement. From its inception, the FTC carried on a general investigative function that complemented its law enforcement activities. The results of the investigations were compiled in reports that were intended to shed light on various questionable business practices of the day. That activity was the precursor of what is now thought of as research and policy R&D at the FTC.[204]

Section 6(b) for the Commission's organic statute, the FTC Act, grants the Commission the authority "to conduct wide-ranging studies that do not have a specific law enforcement purpose," including the ability to compel studied parties to produce relevant documents.[205] Importantly, the Act also includes a mechanism to maintain the confidentiality of material requested by the Commission.[206] Confidentiality is crucial for two reasons. First, it makes the request more politically feasible, thus increasing the likelihood of action. Second, the fear of retaliation within the industry is very real. The Parliamentary Report noted that assurances of confidentiality were critical to securing artist buy-in and participation:

> We have been told from many different sources that some of the people interested in speaking to us in relation to this inquiry have become reluctant to do so, because they fear action may be taken against them if they speak in public . . . . Anyone who wants to come forward to speak

---

power. Andrea Johnson et al., Nat'l Women's L. Ctr., *Progress in Advancing MeToo Workplace Reforms in #20StatesBy2020* 5–8, 11, 13 (2019), https://perma.cc/7SCA-Q6TU. While this logic may extend to prohibiting NDAs between labels and individual artists, it is less persuasive when discussing deals between DSPs and distributors—the contracts at the heart of the ecosystem's dysfunction.

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

203 Matthew Lane, *The FTC's Section 6(b) Study Authority: An Important Tool for Policymakers*, DISRUPTIVE COMPETITION PROJECT (Apr. 9, 2019), https://www.project-disco.org/competition/040919-the-ftcs-6b-study-authority-an-important-tool-for-policymakers.

204 WILLIAM E. KOVACIC, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 92–93 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

205 FED. TRADE COMM'N, *supra* note 202.

206 15 U.S.C. § 57b-2.

> on this issue or any other issue should get in touch with the Committee and will be treated in confidence.[207]

The elevated stakes of an investigation into DSP dealings with major labels only heighten the need for confidentiality. The FTC is thus uniquely well-positioned among agencies to conduct this inquiry.

Substantively, a 6(b) study should cast a wide net to comprehensively understand the ecosystem and the dysfunction within it. It should also give special focus to the issues highlighted above, including the role of non-cash compensation in DSP/distributor agreements; the impact of those payments on downstream artist payments; advances and breakage; concentration among record companies, including whether their distributors have the incentive and ability to self-preference in contracts with DSPs; the prevalence and impact of NDAs in artist and distributor contracts; and the risks of bundling, self-preferencing, and anticompetitive behavior by integrated DSPs such as Amazon, Google, and Apple.

The Department of Justice, as the expert agency in competition within composition and publication markets, also has a role to play. The Department should conduct a companion review to evaluate market effects of the Big Three's ownership of the three largest music publishers, including whether such ownership creates downward pricing pressure on composition rights in favor of sound recordings; whether there is anticompetitive behavior among unregulated PROs; and whether BMI's decision to move to a for-profit model has had market effects.

A second, more targeted solution under the FTC's Section 6(b) authority 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."[208] Public disclosure of this information would itself be a useful tool, as it would allow artists, consumers, and policymakers to police the proliferation of "black box" deals.

B. 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

---

[207] Comments of Julian Knight, Chair, *Sport in Our Communities: Hearing Before Digital, Culture, Media and Sport Committee of the UK House of Commons* (Dec. 1, 2020).

[208] 15 U.S.C. § 46(b).

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."[209] In other words, collusive behavior is not an outlier—it is the rational norm.

The risks of anticompetitive behavior, information silos, and misaligned incentives are inherent and structural. Increased efficiency and antitrust risk will always be kissing cousins; we need not look any further than the PRO landscape for evidence. Collective blanket licensing is, as the Supreme Court noted, illegal collusion redeemed *only* by the existence of regulatory controls.[210]

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 *deregulatory* parity, as ASCAP and BMI have argued, but unified standing oversight of all four major PROs. One option would be to impose consent decrees on SESAC and GMR similar to those currently governing ASCAP and BMI.[211] However, while consent decrees have immense benefits as short- and medium-term guardrails, they are generally ill-suited to long-term oversight.[212] They also do not prevent behavior that, while not strictly violating antitrust laws, is broadly anticompetitive.[213]

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."[214] The MLC 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 (PRLC) 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

[209] Hillman, *supra* note 138.

[210] Broad. Music, Inc. (BMI) v. Columbia Broad. Sys. (CBS), Inc., 441 U.S. 1, 13 (1979).

[211] For a defense of the consent decree model as a tool to address anticompetitive behavior in copyright markets, see Noti-Victor & Tang, *supra* note 23, at 39–50.

[212] *See* Michael E. DeBow, *Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees*, 1987 U. CHI. LEGAL F. 353, 361 (1987).

[213] For a fuller accounting of anticompetitive PRO behavior under the consent decrees, see Hillman, *supra* note 138, at 758. ("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.").

[214] 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).

to the PRLC.

Moreover, the sound recording marketplace cannot be allowed to continue as it is. 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 can starve out competitors by demanding most of the DSP's licensing budget. In short, there is no need to compete with a rival if you can simply eat their lunch—or drown them out with preferential placement on playlists and recommendation algorithms.[215] The Big Three's overwhelming concentration of wealth and power gives them the incentive and ability to unilaterally dictate market 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.

Although there is no shortage of independent record companies, their collective 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."[216] A similar requirement, whether imposed by law or regulation, would restrict DSPs' ability to offer sweetheart deals to major rightsholders at the expense of their smaller, competing rightsholders.

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.

C. User-Centric Compensation Models

Although it would provide only marginal improvements, one potential stopgap solution would be for large DSPs to voluntarily adopt user-centric compensation models. The methodologies of calculating per-stream revenue are a source of endless contention. [217] Currently, the largest DSPs use what is known

[215] 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. STAFF OF H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 263 (Comm. Print 2022).

[216] ASCAP Consent Decree, *supra* note 142, at 11.

[217] Caleb J. Murphy, *On Streaming Payouts: Is a User-Centric Payment System Better for Indie Musicians?*, DIGIT. MUSIC NEWS (Aug. 2, 2022),

as a "market share" or "pro rata" system. In this model, all revenue goes into one commingled pool and is divided by the total number of "spins" (streaming plays which last longer than a certain duration). In practice, different subscription tiers each have their own "pool" of revenues, resulting in higher rates for spins attributable to more expensive subscriptions and lower per-spin rates for those made on a freemium or ad-supported tier.

Some DSPs, however, are experimenting with "user-centric" models. Deezer, Tidal, and SoundCloud (where it is baked into SoundCloud's licensing agreement with Warner Music Group) have all moved to this model.[218] Rather than pooling revenues by subscription tier, user-centric models divide revenue on the level of the individual user.

The differences in allocation can be stark. Say, for example, that my friend Nick and I generate $10 per month in licensing revenues for a hypothetical DSP. In one month, I generate 1000 spins, with 500 attributable to Band A, and 500 attributable to Band B. Nick, on the other hand, generates 9000 spins, spread across 300 different artists. The DSP must now split our $20 of revenue among 302 artists.

Under a market share system, that $20 would be divided by 10,000 spins, creating a rate of $0.002 per spin. Bands A and B would receive $0.002 x 500, or $1 each. Under a user-centric model, however, my $10 and Nick's $10 would be treated as separate pools. Because I generated an equal number of spins for both Band A and Band B, my $10 would be split evenly between them; Band A would receive $5 of my share, and Band B another $5. Nick's $10 would be separately split among his 300 artists, proportional to their share of his spins. My bands would be better off; Nick's bands, possibly worse.

Although the user-centric model has found traction in recent years, it is not without its drawbacks.[219] It carries higher administrative costs due to the increased complexity of accounting. It also requires the cooperation of the label to ensure that the bulk sum transferred from the DSP to the label is then disbursed along the same proportional lines as it was calculated.

The benefits, however, are substantial. Research shows that although user-centric payment models would decrease payouts for the top 10 most-streamed artists, they would *generate* a significant increase (between 0.6-2.2 percent) in royalties for the rest of the top 1,000 most-streamed artists.[220] It is not a

https://www.digitalmusicnews.com/2022/08/02/streaming-payouts-user-centric-payment-system-market-share-payment-system.

[218] Ariel Shapiro, *Warner Music Adopts Soundcloud's User-centric Revenue Model*, VERGE (July 21, 2022), https://web.archive.org/web/20230221011554/https://www.theverge.com/2022/7/21/23272548/warner-music-soundcloud-user-centric-model-spotify.

[219] For an overview of the debate surrounding user-centric payment, see Caleb J. Murphy, *supra* note 217.

[220] Emmanuel Legrand, *User-centric Model Would Not Lead to Significant Changes in the Distribution of Music Streaming Royalties*, LEGRAND NETWORK (Feb. 2, 2021),

panacea—the model's benefits may accrue more significantly to some genres than others, while actively disadvantaging others[221]—but it does represent a fundamental improvement in fairness over the current system.

This model also has benefits outside of broader payouts. First, it protects less powerful rightsholders from royalty encroachment by larger, more powerful rightsholders. Because it eliminates system-wide pooling, it minimizes the ability of major labels to use higher rates, advances, or other "sweetheart deal" arrangements to drain the financial pool before smaller rightsholders can be compensated.

Consumers also benefit. When we pay for music, all but the most cynical among us[222] generally expect that they are directly supporting the artists they love—or, at least, the proximate rightsholders representing those artists. These models ensure that consumer money goes to the artists whose music they consume, rather than to the rightsholder who extracted the best deal.

It is unlikely that a user-centric model would, by itself, level the playing field. It would not address the ecosystem's numerous competition problems, bottleneck issues, or information asymmetries. It would, however, ease the burden of smaller musicians and rightsholders around the margins, and for that alone, it is worth pursuing.

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.

The current system is, by all accounts, unsustainable from an economic or equitable perspective. There is, luckily, significant room for reform. The first step is to launch an information-gathering study under the FTC's Section 6(b) authority to pull back the proverbial NDA curtain. This would both ease longstanding information asymmetries, and allow lawmakers, artists, and consumers alike to understand the fate of billions of dollars in consumer spending. 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

---

https://web.archive.org/web/20230221005957/https://legrandnetwork.blogspot.com/2021/02/user-centric-model-would-not-lead-to.html.

[221] Stuart Dredge, *Deezer Steps Up Its Efforts to Introduce User-centric Payments*, MUSIC ALLY (Sept. 11, 2019), https://musically.com/2019/09/11/deezer-steps-up-its-efforts-to-introduce-user-centric-payments ("[L]ocal pop, classical, jazz, and region-specific genres (gospel and sertanejo in Brazil, for instance, or schlager in Germany) would see gains under UCPS, while hip-hop, R&B and EDM would be among the genres to see losses."); RASMUS REX PEDERSEN, A META STUDY OF USER-CENTRIC DISTRIBUTION FOR MUSIC STREAMING 13 (2020), https://www.koda.dk/media/224782/meta-study-of-user-centric-distribution-model-for-music-streaming.pdf.

[222] This category includes copyright scholars.

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.