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STUDY ON THE ARTISTS IN THE DIGITAL MUSIC MARKETPLACE: ECONOMIC AND LEGAL CONSIDERATIONS

prepared by Christian L. Castle, Esq. and Prof. Claudio Feijóo

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EXECUTIVE SUMMARY

The Streaming Imbalance

The recorded music business has radically changed since the WIPO Internet Treaties. Commercial and technological drivers of change have been on an accelerated pace since Napster. The trend has been particularly pronounced over the last five years driven by the dominant music streaming¹ platforms, such as Apple Music² and Spotify.³ Spotify's 2018 direct public offering⁴ as a "pure play" music service demonstrated the value⁵ of the recordings created by performers and did so with disproportionately little revenue paid⁶ to featured performers⁷ and no revenue paid to non-featured performers. These market forces have exposed a pronounced imbalance between the significant market benefit to streaming music platforms derived from the world's performers compared to the relatively scant financial benefit received by these same performers. The systemic imbalance is particularly acute for non-featured performers. This study analyzes some of its causes and, after examining different alternatives, suggests a path forward to require an additive payment to both featured and non-featured performers paid by streaming platforms as the best option possible.

The rise of interactive streaming⁸ as the dominant music configuration has overtaken the equilibrium, even if imperfect, achieved some twenty years ago in the Treaties. The existing inequality has attracted considerable attention—and frustration—from performers⁹ who ask why does everyone in the streaming economy seem to be prospering¹⁰ except performers whose work drives it all? The imbalance is particularly acute in the COVID-19 era and is likely to remain due to the long-term economic scarring of the creative community by the pandemic.

For example, the dominant streaming platform Spotify established an entire website¹¹ that documents its aggregate royalty payments. Spotify's "Loud and Clear" website emphasizes that Spotify pays billions in royalties under its licensing agreements including "over \$5 billion in 2020

¹ The study focuses primarily on streaming and only considers tangentially permanent digital downloads or other similar technologies due to the sharp and continued decline of permanent downloads in the digital music current product mix. Unlike downloads which are typically treated as a royalty base price sale in recording artist agreements for which a published price or constructed retail price is available, streaming uses an entirely different method of royalty calculation. This method is referred to as the "market centric" or "big pool" method which results in users paying for music they do not stream and featured performers competing with all other national and international artists in a "celestial jukebox" with over 40 million selections available to all users all the time. However, from performers' rights perspective, downloading is basically similar to streaming. For contract artists, the same right of "making available on demand" is transferred to producers. Equally to streaming, non-featured performers do not receive any income from this type of business model with minor exceptions in the U.S.

² As of April 21, 2020, Apple Music is available in 167 countries <https://www.apple.com/newsroom/2020/04/apple-services-now-available-in-more-countries-around-the-world/>

³ As of March 16, 2021, Spotify is available in 182 countries <https://support.spotify.com/us/article/full-list-of-territories-where-spotify-is-available/>

⁴ Harvard Law School Forum on Corporate Governance, *Spotify Case Study: Structuring and Executing a Direct Public Offering* (July 5, 2018) available at <https://corpgov.law.harvard.edu/2018/07/05/spotify-case-study-structuring-and-executing-a-direct-listing/>

⁵ Shobet Seth, *Spotify Files for \$1 Billion IPO*, Investopedia (March 1, 2018) available at <https://www.investopedia.com/news/spotify-files-1-billion-ipo/>

⁶ Music Business Worldwide, *Warner Sells Entire Stake in Spotify, Crediting Artists with [25%] of the Money* (August 7, 2018) available at <https://www.musicbusinessworldwide.com/warner-sells-entire-stake-in-spotify-crediting-artists-with-126m-as-a-result/> (proceeds from stock sale applied against unrecouped balances of artists)

⁷ See, e.g., Testimony of Horace Trubridge, Q525 DCMS Inquiry (Feb. 4, 2021) available at <https://committees.parliament.uk/oralevidence/1677/pdf/>

⁸ This study will focus on music services offering full-length recordings licensed by rights holders and not user generated short-form services such as TikTok.

⁹ See, e.g., Mark Savage, *Paul McCartney and Kate Bush Among Stars Calling for Change to Streaming Laws*, BBC News (April 20, 2021) available at <https://www.bbc.com/news/entertainment-arts-56815282>.

¹⁰ See generally Tim Ingham, *It's Happened: Major Labels Are Now Generating Over \$1million Every Hour from Streaming*, Music Business Worldwide (Feb. 25, 2020) available at <https://www.musicbusinessworldwide.com/its-happened-the-major-labels-are-now-generating-over-1m-every-hour-from-streaming/>.

¹¹ Loud and Clear available at <https://loudandclear.byspotify.com>.

alone”¹² (inclusive of recording and song royalties) as one would expect from the largest music service in the world that rolls up retail sales and is a growing alternative to radio. Those billions highlight the fact that non-featured performers receive zero payment for this value transfer and all but the most popular featured artists are poorly compensated. The Loud and Clear site does not address the billions in market valuation derived from that value transfer¹³ which the authors and performers believe must be included in the discussion. Spotify’s artist payment problems are common to other smaller streaming platforms.

Some performers have turned to their national governments for relief.¹⁴ Policymakers are increasingly searching for a solution to the disparities in the digital music marketplace, such as the recent inquiry into the music streaming economy conducted by the UK Parliament’s Digital, Culture, Media and Sport Committee (the “DCMS Inquiry”)¹⁵ as well as France, the US and this study.¹⁶

New Approaches to Performers’ Remuneration

There are various proposals in the market to solve the imbalance for featured performers.¹⁷ Platforms may opt for a user-centric alternative with “fan powered” royalty payments.¹⁸ This would be an example of a platform making performer payments into an advantage against its competitors.¹⁹ Dominant streaming platforms seem open to discussing “user centric” in recognition of the imbalance. However, while a user-centric model might better connect actual listening to royalties paid, the overall distribution of royalties would remain and the imbalance between billions in market valuation and fractions of a penny in streaming payments would likely remain.

There seems to be little doubt that the problem of sustainability exists and obtains broadly with performers throughout the world.²⁰ This study explores the business terms of the standard “big pool” or market-centric royalty model in current use by streaming platforms compared to the “user-centric” proposals. We find that both these models fail to compensate performers adequately for different reasons and also fail to adequately compensate non-featured performers.

¹² Spotify, *Revenue Generation Over the Years*, Loud and Clear by Spotify.

¹³ The value transfer was recognized by Judge Aleta A. Trauger in her ruling against the defendant Harry Fox Agency’s motion to dismiss HFA from the Spotify copyright litigation over the Eminem catalog because Spotify failed to license songs like *Lose Yourself*. The judge said, “[I]t is undisputed that [Eminem, aka Marshall] Mathers is an artist who has enjoyed extraordinary commercial success and has built a large, dedicated fanbase, such that his omission from a major streaming platform might discourage some meaningful number of potential users from subscribing.” Trauger, J., Memorandum and Order (Dkt. 165), *Eight Mile Style LLC and Martin Affiliated LLC vs. Spotify USA, Inc. and the Harry Fox Agency* Case No. 3:19-cv-00736 (U.S.D.C. Mid. D. of Tenn. Nashville Div. April 22, 2021).

¹⁴ See, e.g., Ben Beaumont-Thomas, *Paul McCartney and Kate Bush Lead Call for Change to Music Streaming Payments*, The Guardian (April 20, 2021) available at <https://www.theguardian.com/music/2021/apr/20/paul-mccartney-kate-bush-law-change-music-streaming-payment> (156 artists call for extending equitable remuneration to streaming in the UK); but see Andre Paine, *AIM Responds to Artists Call for Streaming Royalty Reform*, Music Week (April 20, 2021) available at <https://www.musicweek.com/labels/read/aim-responds-to-artists-call-for-streaming-royalties-reform/083086> (AIM CEO Paul Pacifico rejects artists’ call for reform in favor of IMPALA 10 point plan).

¹⁵ UK Parliament, Digital, Culture, Media and Sport Committee, *Inquiry into the Economics of music streaming* (Jan. 19, 2021) available at <https://committees.parliament.uk/work/646/economics-of-music-streaming/>

¹⁶ It is well to remember that the DCMS Inquiry was held largely in response to the grassroots “#BrokenRecord” social media campaign by performers and songwriters in the UK claiming that the current streaming royalty practices have produced an unsustainable commercial result for many creators. The #IRespectMusic campaign in the US has raised similar issues.

¹⁷ Independent Music Companies Association, *It’s Time to Challenge the Flow* (March 23, 2021) available at <https://impalamusic.org/wp-content/uploads/2021/03/IMPALA-streaming-ten-point-plan-March-2021.pdf>

¹⁸ SoundCloud, *Fan Powered Royalties* (March 2, 2021) available at <https://community.soundcloud.com/fanpoweredroyalties>

¹⁹ See, e.g., Anne Steele, *Apple Music Reveals How Much It Pays When You Stream a Song*, Wall Street Journal (April 16, 2021) available at <https://www.wsj.com/articles/apple-music-reveals-how-much-it-pays-when-you-stream-a-song-11618579800> (Report of Apple asserting in its newsletter that it pays approximately 1¢ per stream).

²⁰ See, e.g., Annex of Concerned Artists and testimonials from interviews throughout the text.

The study highlights that one potential solution to the imbalance could be to acknowledge the hybrid nature of interactive streaming and enterprise playlists by requiring streaming platforms to pay remuneration directly to performers in a way that is similar to, but distinct from, the current communication to the public payments. This approach avoids expanding the compulsory digital broadcast radio license while maintaining the exclusive rights of producers and does not change the private licensing regime for interactive streaming. This “streaming remuneration” would be additive and would not diminish existing communication to the public remuneration and would recognize the many benefits that performers confer on streaming platforms that are not compensated by the current royalty regime.

As discussed extensively for instance at the DCMS Inquiry, communication to the public remuneration is being cannibalized by “lean back” enterprise playlists distributed by the dominant streaming platforms that are intended to directly compete with broadcast radio on a global scale. Streaming remuneration would require streaming services to make royalty payments directly to performers akin to a communication to the public royalty.

The streaming remuneration solution would allow Member States to leave in place the licensing arrangements between producers and the music streaming platforms²¹ while establishing a new direct payment to performers administered by the existing CMO system around the world. If user-centric or other more accurate and transparent methods of compensating performers evolve in the marketplace, adopting a streaming remuneration regime would not impede platforms and rightsholders from entering new contracts on those terms nor enhancements of existing contracts. Obviously, such a solution would require a higher performance of international reciprocity agreements between CMOs.

Current Exploitation Models

Currently, the digital music marketplace includes four basic types of exploitation models: downloading (permanent or limited), podcasting, interactive streaming and non-interactive streaming. A music streaming platform can use several of these configurations at the same time. According to the latest available data from the recording industry (IFPI, 2020, 2021), streaming services made the most money with 62.1% share of the total global recorded music revenues allocated 46% to subscription audio streams and 16.1% to ad-supported streams. Downloads together with podcasts and non-interactive services accounted for 5.8% of the total global recorded music revenues. Streaming revenues increased by 22.9% in 2019 to US\$11.4 billion globally, and a further 19.9% in 2020 to reach US\$13.4 billion. Paid -subscription-based-streaming grew 24.1% year on year in 2019 and 18.5% in 2020. Downloads dropped 15.3% year-on-year in 2019 and also declined a further 17.3% in 2020. Income from physical sales represented 21.6% of the total music market. These look like consolidated trends from the last six years.

Typical music streaming revenues are paid by a streaming platform to record companies or distributors under licenses²² to the platform covering existing catalog as well as new releases on an output basis; according to reports, Spotify’s total music offering will exceed 100,000,000 tracks by 2022²³. The licensor will receive a negotiated rate for all recordings subject to the license and will later account and pay the licensor’s featured performers under the terms of their artist agreements.²⁴ Also, in a handful of Member States that have a solution in place, CMOs collect remuneration directly from streaming platforms as noted below.

²¹ It would also leave intact existing individual contracts between performers and producers.

²² Testimony of Paul Firth (Amazon Music), DCMS Inquiry Q600 (Feb. 23, 2021) available at <https://committees.parliament.uk/oralevidence/1747/html/>

²³ Bruce Houton, *60,000 Tracks Are Uploaded to Spotify Every Day*, Hypebot, (Feb. 25, 2021) available at <https://www.hypebot.com/hypebot/2021/02/60000-tracks-are-uploaded-to-spotify-every-day.html> (“[B]y early next year, every artist’s new song will be competing with more than 100 million tracks for a fan’s attention.”)

²⁴ In the case of the US, performers unions may receive additional -minor- payments from the signatory record company. These are often paid as contributions to pension funds or other trust funds that distribute monies to union

Non-interactive streaming royalty rates for services such as webcasting, broadcast digital radio simulcasting or satellite radio, are usually set by tariff. Under national laws emanating from international treaties, in some countries there are tribunals that set the rates; in others, there are voluntary negotiations between CMOs and relevant players -such as broadcasters or platforms- that determine the rate that can be appealed to a tribunal if negotiations fail. Some territories have “extended collective licensing” regimes where a representative set of owners (often through a CMO) negotiate rates with users which then apply to everyone, similar to a statutory license. These non-interactive streaming royalties are typically allocated for one half to the phonographic producers²⁵ and for the other to the featured performers and non-featured performers. Royalties are usually collected by a CMO and are paid out directly to participants in the recording. This means that non-interactive streaming royalties typically are paid outside of a term recording artist agreement and are not applied to recoupment of advances.

All of these royalty payment structures allocate the platform’s revenues; none take into account the increase in enterprise valuation contributed by the performers that makes streaming services into multibillion dollar operations while paying what amounts to fractions of a penny per stream to featured performers and nothing to non-featured performers.

Performers Drive Uncompensated Benefits to Streaming Platforms

Performers drive fans to streaming platforms through their recordings and marketing efforts, thus contributing to a reduction in the platform’s subscriber acquisition costs. Performers help streaming platforms to capture and maintain the consumer’s attention for as long as possible reducing subscriber “churn”.²⁶ Platforms use fans as assets to build personalized offers based on user tastes, preferences and behavior that powers algorithms to extract information by creating consumer profiles, later used to customize the service offer. Platforms do not compensate performers for these efforts or the valuable data they extract, yet attracting fans is a major factor driving valuation metrics (such as the “average revenue per user,” monthly active users and the ratio between subscriber lifetime value and subscriber acquisition costs).

The research conducted for this study shows that main digital music platforms combine “lean back” consumption modes with limited interactivity with modes of full interactivity. It is primarily the “lean back” enterprise playlists that makes interactive streaming a substitute for radio.

It should not be surprising that the business model for interactive streaming combines rights nominally compensated under the making available right with the “lean back” enterprise playlist model that is easily analogized to broadcast radio. While consumers may always be able to use interactive functionality, a large number of users simultaneously take advantage of “music discovery” or “lean back” playlists that are algorithmically derived by a service from fan data in various ways.

Because streaming license agreements typically sweep all rights under one royalty payment, it is difficult to separately value these functionalities (e.g., one agreement might cover non-interactive Internet radio as a direct license outside of any statutory framework as well as interactive streaming subject to customary direct licenses). Accordingly, responsible copyright policy should recognize that principles of equitable remuneration should take into account both simple interactivity and complex algorithmic enterprise or curated playlists. However, streaming licenses focus on revenue sharing and exclude the enterprise valuation benefits conferred on the service by performers.

The “Big Pool” Market Centric Revenue Allocation Royalty Model

members, both featured and non-featured performers. It should be noted that these payments are conceptually carried forward from historical payments negotiated for physical carriers and originally styled as the Phonograph Record Manufacturers Special Payments Trust Fund, now titled the Sound Recording Special Payments Fund.

²⁵ In countries with common law principles these are known as the “sound recording copyright owner”, usually the record label or the independent artist.

²⁶ “Tell your fans about SoundCloud’s fan powered royalties; SoundCloud Pays Artists Fairly.” SoundCloud, *Fan Powered Royalties* available at <https://community.soundcloud.com/fanpoweredroyalties>

This study also addresses royalties payable to featured performers and non-featured performers based on a “revenue share” royalty calculation. This is the so-called “big pool”, “pro-rata” or “market-centric” model that is at the heart of the systemic imbalance. It pools subscriber revenue and weights earnings distributions to the sound recording owners (and their featured performers) who brought in the most streams in the accounting period on a jurisdiction-by-jurisdiction basis. As of the first calendar quarter of 2021, all major streaming services use this “market centric” model for payment to producers (and subsequently to some performers by producers) with minor exceptions of a “fan powered royalty” model for some independent performers. The market centric model has been the standard business practice since the inception of streaming.²⁷

Streaming platforms use the “big pool” to distribute a part of the platform’s revenue to producers in a ratio of the number of their streams compared to the total number of streams by all sound recordings occurring during the accounting period. Next, labels -or digital aggregators in the case of independent artists- then pay their artists a royalty based on the individual artist’s streams under individual agreements. As a result, major-label superstars tend to derive the bulk of the revenue from streaming platforms.

User payments are not solely allocated to artists who users actually listen to, and some portion of fan payments always will be attributed to artists that the fan did not listen to.²⁸ Two predictable harms result from the “big pool” method: subscribers pay for music they do not listen to and whatever the payable royalty is will likely decline over time unless revenues increase at a faster rate than the number of streams—and pricing has been relatively constant over the last decade which tends to suppress revenue growth.²⁹

Current Legal Mandates and Private Contract Efforts to Correct the Streaming Imbalance Fall Short

CMOs have currently and in general a very limited role in performers’ rights in streaming music platforms other than non-interactive streaming³⁰. A performers’ CMO general functions consist of (i) collecting remuneration rights, (ii) identifying the performers involved and (iii) distributing of the collected money. Therefore, they can only act with a legal mandate for collection.

The right of making available of performances fixed in phonograms appears in the WIPO Performances and Phonograms Treaty (WPPT), adopted in 1996, (art. 10³¹) and it is defined as an exclusive right for artists and producers (under art. 14) in the digital music marketplace. Performers are typically required to transfer their making available rights under recording artist agreements with producers, who then license both performers’ and their own rights to streaming (and other) platforms. Few countries grant performers a right of making available that survives that transfer or is nontransferable and is available to collective management.

Beyond the reform of existing legal regulations, the most prominent alternatives to the “market centric” or “big pool” model are the “user-centric” and a new streaming remuneration royalty. A healthy and sustainable streaming market may require these alternatives and other intellectual

²⁷ Glenn Peoples, *Fare Play: Could SoundCloud’s User-Centric Streaming Payouts Catch On?*, Billboard (March 12, 2021) available at <https://www.billboard.com/index.php/articles/business/streaming/9539421/use-centric-streaming-soundcloud-explainer-analysis>

²⁸ Tatiana Cirisano, *The Fan Data Goldmine*, Billboard (Feb. 24, 2021) available at <https://assets.billboard.com/articles/deep-dive/the-new-science-of-superfans/9529640/the-fan-data-goldmine>
In fact, “User centric” alternatives to the big pool attempt to correct this imbalance.

²⁹ See, e.g., Tim Ingham, *Over 60,000 Tracks Are Now Uploaded to Spotify Every Day*, Music Business Worldwide (Feb. 24, 2021) available at <https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/>

³⁰ Full nomenclature for non-interactive music services is controversial, but examples where there is a general agreement are simulcasting or webcasting

³¹ WPPT Article 10 Right of making available of fixed performances:

“Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place at a time individually chosen by them.”

property regulations to correct the streaming imbalance and other market failures. These alternatives and regulations further the legitimate policy goal of protecting the most vulnerable links in the value chain: songwriters and performers due to asymmetries in market power and information.

Yet, it is unlikely that market centric will be entirely abandoned. This is why a streaming remuneration payment by the services to performers is such a compelling long-term solution.

A New Communication to the Public Remuneration

A different approach would be creating a new royalty payable by interactive music services in respect of phonograms for communication to the public ("streaming remuneration"). Streaming remuneration would not be an expansion of compulsory licensing for phonograms that would trump the existing making available licensing structure or the authority of producers or performers to permit the exploitation of recordings in the streaming configuration³². Rather, streaming remuneration would be an additional payment paid by platforms directly to performers (and potentially to producers) through their CMOs.

The effort to support a new streaming remuneration payment is driven by several forcing functions in the music economy: the fundamental and potentially permanent collapse of performer sustainability, that making available royalties for interactive streaming miss the conventional communication to the public benefit, and the accelerated trend of low value streaming royalties cannibalizing higher value sales.

These forcing functions highlight the compelling need for a new streaming remuneration. Based on current data, it appears that user centric will not offer a significant enough change for performer revenues and would not impact non-featured performers at all. While user-centric is a step in the right direction it may just rearrange the deck chairs. A new streaming remuneration would be additional revenue to both featured and non-featured performers to improve the sustainability issues.

Beyond remuneration, some other features of the digital music marketplace need also a thorough assessment to assure that music retains its social value. Recommendation algorithms based on AI are increasingly used by music platforms. Many consumers have expressed concern about transparency regarding how their private data are used in these algorithms. Likewise, it is vital that the musical work remains the heart of the system. Creation shaped by authors, composers and performers must not be lowered to the rank of "product", in competition with "content" such as background music per kilometer possibly produced by computers,³³ or even non-audio services. Sustaining cultural diversity is an objective which must also apply to streaming platforms that have become essential players in music distribution which is undercut by the "market centric" royalty allocation.

Authors, composers and performers continue their struggle for sustainable and transparent remuneration for their work. Proposals for fair remuneration ought to be assessed and tested. The good news is that streaming is rich in opportunities to find a better balance for all the stakeholders in the music industry. It should be possible to find the legal means to arrive at it.

³² This document is agnostic regarding the possible implementation of such a remuneration. It could be an extension of the communication to the public right (as artists in the UK have suggested, see for instance <https://www.theguardian.com/music/2021/apr/20/paul-mccartney-kate-bush-law-change-music-streaming-payment>), it could be collective remuneration from the making available right (as countries such as Spain are already doing) or it could be new remuneration right (based or not in existing legislation).

³³ Laura Kobylecky, *Making Fake Art, 1984, the New Rembrandt and the "Fake Artist,"* Music Tech Policy, (Aug. 4, 2017) available at <https://musictechpolicy.com/2017/08/04/guest-post-making-fake-art-1984-the-new-rembrandt-and-the-fake-artist/>; Tim Ingham, Spotify is Making Its Own Records...and Putting Them on Playlists, Music Business Worldwide (Aug. 31, 2016) available at <https://www.musicbusinessworldwide.com/spotify-is-creating-its-own-recordings-and-putting-them-on-playlists/>

BACKGROUND TO REMUNERATION IN THE DIGITAL MUSIC MARKETPLACE

The recorded music business has radically changed since the time of the WIPO Internet Treaties (WIPO, 1996). The commercial and technological drivers of change in the music business, or what this study describes as “forcing functions,” have been on an accelerated pace particularly over the last five years.³⁴ These forcing functions exposed a pronounced imbalance between the financial benefit derived by new music services from the world’s performers and the financial benefit that performers receive from these new music services. The imbalance is particularly acute for non-featured performers as explained in this study—for example, according to the Digital Media Association, unions representing U.S. non-featured performers receive 63¢ from every \$100 paid in streaming revenue collected from the consumer³⁵ and in almost all other countries they receive nothing.

Changes in consumption, technology and business practices³⁶ are just part of this imbalance today. The onset of the world-wide recession caused by the global pandemic and the sudden contraction of live music as a revenue source for performers³⁷ simply makes the imbalance all the more obvious and long lasting, if not permanent.³⁸ Performers are likely susceptible to what U.S. Treasury Secretary Janet Yellen described as “long-term scarring.”³⁹

The [World Bank’s 2020] baseline forecast envisions a 5.2 percent contraction in global GDP in 2020...the deepest global recession in decades, despite the extraordinary efforts of governments to counter the downturn with fiscal and monetary policy support. Over the longer horizon, the deep recessions triggered by the pandemic are expected to leave lasting scars through lower investment, an erosion of human capital through lost work and schooling, and fragmentation of global trade and supply linkages. (The World Bank, 2020)

A systemic problem cries out for a systemic solution. Accordingly, this study argues that one solution might be for WIPO Member States to revisit the principles of performer equitable remuneration without necessarily disturbing the underlying rights regime. The need becomes

³⁴ Tatiana Cirisano, *The Fan Data Goldmine*, Billboard (Feb. 24, 2021) available at <https://assets.billboard.com/articles/deep-dive/the-new-science-of-superfans/9529640/the-fan-data-goldmine> (“The way revenues are distributed in the streaming realm means that superfans determine where almost all the money goes,” says Thomas Hesse, a music industry veteran....“If you get to superfans, who listen to music all the time, you get to all the money — not just from those people, but you get all the money from everybody.”)

³⁵ *Who Gets Paid and How Much?*, Digital Media Association (Aug. 2020) available at https://dima.org/wp-content/uploads/2020/08/DiMA_Who-Gets-Paid_Infographic.pdf (“AFM and SAG-AFTRA are each paid .55% of what the record company receives in streaming revenue in the US. SAG-AFTRA also receives an additional payment of 13% of 50% of .55%. [The 63¢] is calculated as . 55% + .55% + .0003575% of the amount the record company receives. This value is not deducted from the artist’s royalties.”) It must be said that earning each \$100 increment requires driving approximately 33,000 streams.

³⁶ Glenn Peoples, *Fare Play: Could SoundCloud’s User-Centric Streaming Payouts Catch On?*, Billboard (March 12, 2021) available at <https://www.billboard.com/index.php/articles/business/streaming/9539421/use-centric-streaming-soundcloud-explainer-analysis> (“When Spotify first negotiated its initial licensing deals with labels in the late 2000s, both sides focused more on how much money the service would take in than the best way to divide it. The idea they settled on, which divides artist payouts based on the overall popularity of recordings, **regardless of how they map to individuals’ listening habits**, was ‘the simplest system to put together at the time,’ recalls Thomas Hesse, a former Sony Music executive who was involved in those conversations.” Emphasis added. Hereafter “Peoples”).

³⁷ See, e.g., Abacus Data, *The Lockdown Blues: Canadians, Live Music and the Pandemic* (May 14, 2020) available at <https://abacusdata.ca/live-music-after-pandemic/> (Poll of Canadians shows systemic resistance to attending live music concerts even after restrictions are lifted).

³⁸ The January 2021 Workforce Statistics for the Arts, Entertainment and Recreation Sector (NAICS 71) prepared by the U.S. Bureau of Labor Statistics shows the sector with an unemployment rate of 19.1% available at <https://www.bls.gov/iag/TGS/iag71.htm#workforce>

³⁹ David Lawder, Andrea Shalal, ‘Act Big’ Now To Save Economy, Worry About Debt Later, Yellen Says In Treasury Testimony, Reuters (Jan. 19, 2021) available at <https://www.reuters.com/article/us-usa-biden-yellen-idUSKBN29O1WX>.

more urgent with each passing day as low margin streaming revenues increase and sales of higher margin configurations such as downloads and physical decline.⁴⁰ When one adds the effects of “lean back” enterprise playlists from streaming platforms that target broadcast radio, performers may be on trend to a further reduction in communication to the public royalties in many Member States.

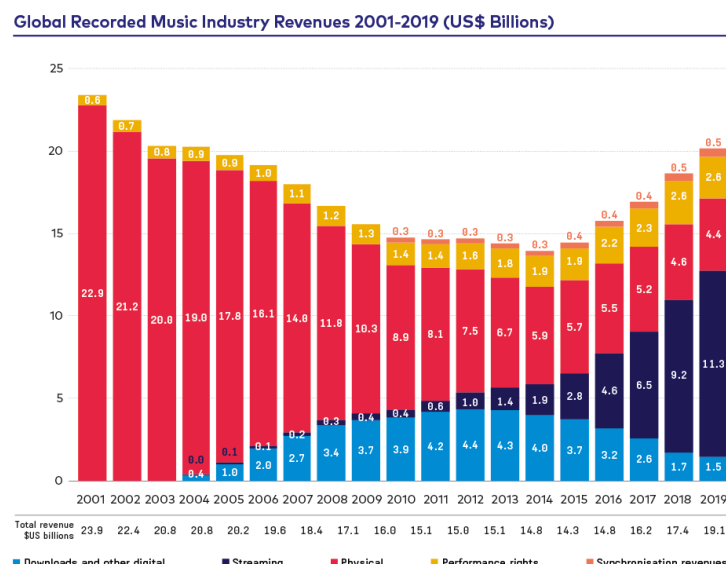


Figure 1. IFPI Global Recorded Music Industry Revenues 2001-2019

The rise of streaming and decline of both downloads and physical sales has been on a steady pace since iTunes Music Store broke up the album format in 2003.⁴¹ While streaming platforms and the owners of large and popular sound recording catalogs have thrived in the streaming format,⁴² performers who were already struggling with interactive streaming and its enterprise playlists before the pandemic have not. One could argue that the impact of streaming on performers around the world was itself a necessary and sufficient reason to revisit copyright policy at any point in the last five years; the onset of the pandemic removes all doubt. It is well for WIPO Member States to revisit this imbalance now.

As this study argues, the customary “market centric” royalty structure for interactive streaming predictably results in a hyper-efficient market share distribution of platform revenues⁴³ that does not take into account or capture the ongoing enterprise valuation benefit transferred to digital music platforms by performers.⁴⁴ Many featured and non-featured performers around the world

⁴⁰ Given current long-term trends, it seems unlikely that the sustained decline in permanent downloads will reverse and retrace past sales levels. This study does not address other trends in download sales.

⁴¹ See Fig. 3, IFPI Global Recorded Music Industry Revenues 2001-2019.

⁴² See generally Tim Ingham, *It's Happened: Major Labels Are Now Generating Over \$1million Every Hour from Streaming*, Music Business Worldwide (Feb. 25, 2020) available at <https://www.musicbusinessworldwide.com/its-happened-the-major-labels-are-now-generating-over-1m-every-hour-from-streaming/>.

⁴³ See, e.g., Peoples “[A] least some of their wins [from the market centric model] come at the expense of acts in other genres, especially those that appeal to older audiences, who generally spend less time streaming music.”

⁴⁴ One leading investor in Spotify has told its clients that Spotify will be valued at five times its current price by 2030, see Guardian Fund, *Investor Letter 2020* (Jan. 8, 2021) at 9 (available at <https://musictechpolicy.files.wordpress.com/2021/02/guardian-fund-2020-investor-letter-v4.pdf>) (“The music catalogue is not the business model. The value lies in the machine learning that drives discovery and engagement...the data analytics and distribution for artists, the direct and social relations artists can have with fans through music and videos. We believe that Spotify will be worth at least five times more in 2030.”)

strongly object⁴⁵ to the market centric model due to low payouts, consumer confusion,⁴⁶ weighting toward hit product in certain genres and weighting toward Anglo-American repertoire to the detriment of local repertoire—even a kind of uncompensated forced investment by performers.⁴⁷

“I’ve complained about the streaming rates at Spotify. But that’s a distraction. That’s just pickpocketing. The bank heist is songwriters and artists basically forced into funding a tech startup with below market royalty rates. But didn’t get any of the \$60 billion in stock” (David C. Lowery, 2021)

Moreover, the uncompensated enterprise valuation benefits⁴⁸ place some of these digital platforms such as Spotify at market valuations in the range of billions of dollars while paying nominal royalties of half a cent (dollar or euro) or less per stream, and at that only to featured performers and independent artists.⁴⁹

During these last 12 months [2020] I had to learn about new ways to get some income from music, I had to learn digital marketing, music promotion in social networks and fan engagement. (Allova – Artist / Producer / Songwriter - Electronic)

The market centric model is also difficult for consumers to understand when they become aware of how revenues derived from their purchases are allocated by streaming services—some consumers pay for music they never listen to. But as this study argues, per-stream payments for interactive streaming are so small that even for unsigned featured performers who collect 100% of the available streaming royalty, royalty payments are both unsustainable and out of balance compared to the value transferred to the streaming services.⁵⁰ Featured performers signed to recording artist agreements must also share already low payments with their record companies

⁴⁵ See Paul Resnikoff, *16 Artists are Now Speaking Out Against Streaming Music*, Digital Music News (Dec. 2, 2013) available at <https://www.digitalmusicnews.com/2013/12/02/artistspiracy/>; Jimmy Page, Instagram (Dec. 9, 2020) available at <https://www.instagram.com/p/CllodOjvUJ/>; Ivors Academy, *8 out of 10 music creators make less than £200 a year from streaming* (Dec. 7, 2020) (survey of UK performers by Ivors Academy and Musicians Union).

⁴⁶ Sharky Laguana, *Streaming Music is Ripping You Off*, Medium (April 17, 2015) available at <https://medium.com/cuepoint/streaming-music-is-ripping-you-off-61dc501e7f94> (“[The market centric model] communicates to most streaming music subscribers a simple, awful, message: Your choices don’t count, and you don’t matter.”)

⁴⁷ See, e.g., Recording Industry of South Africa, *2018-19 Digital Breakdown (as of Dec. 2019)*. Local repertoire earned R5.4 million compared to international repertoire earning R28.8 million.

⁴⁸ See, e.g., Tim Ingham, *Spotify, Worth \$67 billion, has seen its share price triple in 10 months. Should Daniel Ek pay artists a bonus to say thank you?* Music Business Worldwide (Jan. 11, 2021) available at <https://www.musicbusinessworldwide.com/spotify-worth-67bn-has-seen-its-share-price-treble-in-10-months-should-daniel-ek-hand-cash-to-artists-as-a-thank-you/>; FIM Conference on Online Music, Budapest Declaration (Nov. 20, 2014) available at <https://www.dropbox.com/s/4bfkm9cf0bmttm/budapest-declaration-EN.pdf?dl=0> (“The share performing artists receive from online uses is neither fair, nor proportional to its value, nor balanced with other contributors.”)

⁴⁹ It has long been a complaint against Apple in the music industry that music drove iPod sales which in turn drove Mac sales and in part contributed to Apple’s straight line advance from near bankruptcy in 1997 to a trillion dollar market capitalization today. While Apple has recently pushed back against Spotify’s low royalty payouts with claims of its own payment of a penny per stream, it must be said that it is an odd thing to be commending a company with a trillion dollar market capitalization for paying performers a penny per stream, more or less the same as another company with a multi-billion dollar market capitalization when neither company recognizes the value transfer by performers to their market capitalization. See, e.g., Steve Jobs’ discussion of launching iTunes for Windows: “The biggest risk [of the Windows version of iTunes] was that we saw people buying Macs just to get their hands on iPods. I’m sure we’re losing some Mac sales, but half our sales of iPods are to the Windows world already.” Jeff Goodell, *Steve Jobs: The Rolling Stone Interview [2003]*, Rolling Stone (2003) available at <https://www.rollingstone.com/culture/culture-news/steve-jobs-rolling-stones-2003-interview-243284/>.

⁵⁰ We are not recommending any interference with private contracts by multilateral norm-setting. Term recording artist agreements, for example, are complex documents of a business relationship that are best left to private negotiations.

and creative producers making the net payment even lower, so that revenue split does not tell the whole story.

"Pandemic has shown that it is very difficult to convert the 'engagement' of your 'followers' into monetization when it comes to music. The investment required to achieve visibility and monetization is not acceptable for an independent artist". (National artist#2, 2021)

This economic imbalance shocks the conscience however lawful it may appear. As streaming becomes a greater share of recorded music revenues, the market centric model may ultimately signal a devaluation and even commoditization of culture.⁵¹ That trend seems definitively out of step with, if not antithetical to, international cultural goals and preservation.

Artists' definition of success is very much culture first, then cash. They are looking for respect and recognition first and foremost. With this respect and recognition, they can become viable touring acts with the chance to earn loyal fan bases. (Jopling & Mulligan, 2019)

Cultural Values

Beyond economics, the Universal Declaration of Human Rights recognizes the fundamental truth of the human rights of creators: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."⁵² This basic principle in the Universal Declaration resonates in a host of other human rights documents.⁵³

Following Elliott (1990), music value is twofold -not just an object for private pleasure, but also a symbol that helps define what we collectively are. People use music to embody and transmit culture. In fact, every culture has a certain music that can be attached to it. Music is part of the

⁵¹ Tim Adams, *Thom Yorke: If I can't enjoy this now, when do I start?* Guardian (Feb. 23, 2013) available at <https://www.theguardian.com/music/2013/feb/23/thom-yorke-radiohead-interview> ("[Apple and Google] have to keep commodifying things to keep the share price up, but in doing so they have made all content, including music and newspapers, worthless, in order to make their billions.")

⁵² United Nations, *Universal Declaration of Human Rights* (General Assembly Resolution 217 A) Art. 27, par. 2 (Dec. 10, 1948) (emphasis added). See also generally Christian Castle, *Artist Rights are Human Rights*, Medium (Sept. 27, 2015) available at <https://medium.com/@MusicTechPolicy/artist-rights-are-human-rights-dddb0fe194c8> ("The human rights of artists is a different concept from intellectual property rights, such as copyright. Intellectual property rights are created by national laws, and the human rights of artists are recognized as the fundamental rights of all persons by all of the central human rights documents to which hundreds of countries have agreed....It is important to remember that human rights are fundamental, inalienable and universal entitlements belonging to individuals, individual artists [and performers] in our case. As a legal matter, human rights can be distinguished from intellectual property rights as intellectual property rights are arguably subordinate to human rights and actually implement at the national level the human rights recognized as transcending international and national intellectual property laws.")

⁵³ See, e.g., United Nations, *International Covenant on Economic, Social and Cultural Rights* (General Assembly resolution 2200A (XXI)) (Dec. 16, 1966) Article 15, par. 1 (c) ("The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author.") (emphasis added); American Declaration of the Rights and Duties of Man (Inter-American Commission on Human Rights) (1948) Article 13, par. 2 ("Every person has the right...to the protection of his moral and material interests as regards his inventions or any literary, scientific or artistic works of which he is the author"); Department of International Law (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights* "Protocol of San Salvador", Article 14, par. 1 (c) ("The States Parties to this Protocol recognize the right of everyone...[t]o benefit from the protection of moral and material interests deriving from any scientific, literary or artistic production of which he is the author"); and Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (Treaty ETS 5), Article 1 Protocol No. 1 ("Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law").

fabric of everyday life (Levitin, 2006). Music is a way to improve people's lives (Center for Music Ecosystems, 2021). Thus, preserving its value goes beyond discussing the rules for business models in a particular type of market and adopting a wider perspective. The recording industry (IFPI, 2020) stresses that "policymakers should recognize that music has both cultural and economic value. Rules should ensure that all services engaging in distributing music online, regardless of how they operate, negotiate licenses with rightsholders in a fair, competitive marketplace".

Q: What have you learned about your music career in the last twelve months (i.e., 2020)?

A: "How fortunate I am to have a career doing what I love, and how much I miss it when I am not doing it. I appreciate my work so much more - what would I do for a career if I could not be a musician?" (Niche artist #1 – classical)

A: "If there are no shows, inspiration can lack, and money no longer comes in. Getting together and performing with other musicians has brought some of the magic back thankfully. We need to support one another. Together we are stronger and more inspired." (Niche artist#2 – indie)

A: "The dominant digital music platforms have a tendency to depersonalize the relationship with the user and destroy any audience that is not simply a consumer. The overcrowding of music channels guided by mere commercial criteria threatens the creation of musical culture and hides all that music that is not for mass consumption such as jazz, ethnic music or progressive rock". (Guillermo Bazzola, 2021)

We have found that it is possibly for impinging these human rights principles that performers feel outraged by the economic imbalance between the fractions of a penny for their music compared to billions in market value for the streaming platforms.

Structure of the study

Following this background on the situation of performers in the digital music markets, the next section specifies the objective and scope of the study, driving justification for the choice of platforms, types of artists and jurisdictions. The ensuing sections analyze respectively the dominant techno-economic models in the digital music marketplace, the functioning of this marketplace, a critical view on how artists' royalties are calculated in the dominant model of streaming, how value is created and the validity and availability of relevant information within this marketplace, the commoditization of music as a main market trend and, lastly, prospective scenarios to produce an equitable remuneration in an international context. The study closes with a review of some alternative models for remuneration of performers in the digital music marketplace and a summary of conclusions and main findings.

OBJECTIVES AND SCOPE OF THE STUDY

The study examines the current economics and legal aspects of the exploitation of recorded music by streaming platforms and the effects on the performers who help create it across national jurisdictions. The study identifies the determinants -the forcing functions- that lead to the current situation.

From a technological perspective, the industry distinguishes between downloading and different types of services: streaming, podcasting and the so-called non-interactive streaming. Currently, income for performers depends on these overlapping categories of technology-based business models. Therefore, these functionalities will be examined to investigate which are their differences and whether, in practice, digital music platforms conduct truly separate exploitation models for all performers.

From an intellectual property perspective, existing regulation derives from two types of rights applicable to artists in the digital music marketplace: (i) communication to the public and

broadcasting and (ii) making available of fixed performances. Both will be examined in the study together with their existing implementations and implications. In addition, the study particularly examines the possible solution of a new streaming right to remuneration payable by interactive music services in respect of phonograms made available on demand. In particular, the basic licensing terms for interactive services are not widely understood, and the study provides an explanation of those terms.

Regarding jurisdictions, the study within the scope of available resources has tried to include the perspective of main digital music platforms, originated in main countries such as US, Europe, and China, and their impact on performers from any geography, in particular those in Latin America, Asia at large, or Africa.

Finally, regarding the typology of performers, the study differentiates featured performers from non-featured performers, global artists from those niche artists of only national or regional reach with their different bargaining power vis à vis labels and platforms. The study pays particular attention to independent and emerging artists, due to their relevance for the future of music market and culture, as shown in text boxes with quotations throughout the document.

METHODOLOGY

The study has considered main digital music platforms and the services that they offer in 2021, including their evolution in the last five years. For each service, a functional and use analysis has been carried out, including modes of exploitation and the degree of interactivity and personalization of the musical content involved.

The analysis is completed and argued using references and documents from different sources - academia, industry reports, specialized magazines, international organizations- as indicated in footnotes and in the reference section, including information that platforms themselves make available to the public.

In addition, a set of interviews and a survey has been carried out using the questionnaire in the Annex. At the time of writing, 38 artists participated, as indicated in the corresponding table in the Annex, covering main typologies of artists and jurisdictions. Evidence from their contributions has been used in highlighted text across the study in addition of background for the analysis and discussion.

PERFORMERS GENERAL SITUATION IN DIGITAL MUSIC MARKETS

Artist Protests Against Streaming Royalties

There is a substantial list of artists and performers who have publicly shown their concern for low streaming royalties.⁵⁴ The list of concerned artists -see a selection in the Annex to this document- covers a wide variety of geographies and genres.

Artist concerns have caused a surge in initiatives seeking to understand how performers are compensated in the digital music marketplaces. The DCMS Inquiry in the UK is ongoing as of this writing and has produced a host of witness statements from across the industry, including performers.⁵⁵ In France, during September 2020, more than 15,000 artists publicly addressed the Ministry of Culture demanding a fair remuneration from streaming services. In October 2020, the US musicians syndicate UMAW launched the “Justice at Spotify” campaign for a better

⁵⁴ See, e.g., David Dayen, *Islands in the Stream*, The American Prospect (March 22, 2021) available at <https://prospect.org/power/islands-in-the-stream-spotify-youtube-music-monopoly/> (“Musicians, despite supplying virtually all the value for Spotify, share in none of that value.”)

⁵⁵ The DCMS Inquiry has posted its findings online on a rolling basis, available at <https://committees.parliament.uk/work/646/economics-of-music-streaming/publications/>.

remuneration of artists, and artist rights advocates David Lowery (editor of The Trichordist⁵⁶) and Blake Morgan (founder of the #IRespectMusic campaign⁵⁷ with outposts in New York, Nashville, Athens (Georgia), Austin, Los Angeles, the UK and Washington, DC) have also been prominent voices regarding low streaming royalties.

“The industry has taken a big hit and is down around 30 percent on last year [2020]. The pandemic has been especially hard on songwriters and artists. Pre-COVID, streaming was a way for artists to promote their live shows. That’s where they made their money. Now, they’re in the same situation as songwriters and are finding it difficult to earn a living. COVID has really focused attention on the unsustainability of the music industry ecosystem. It is just not working for artists and songwriters and it has to work for all the players. [...] The old CMO and music industry world will have to get used to the openness and transparency that technology enables. That is the future. The transformation is gradual, but it is happening.”
(Björn Ulvaeus – CISAC President / ABBA)

Performers voice their distress on themes ranging from lack of protection and vulnerability of new and emerging artists to the need of a joint action and support from public institutions. Their main concern, though, is the small payments or even the absence of remuneration that comes from the use of their performances in services such as Spotify or Apple Music. According to a survey taken by 5,800 artists in Europe, 90% of performers indicate that the streaming market has given them no meaningful return in income (“Survey confirms performers’ need for collective management and solutions”, 2020)⁵⁸.

Nearly three quarters of independent artists earn less than \$10,000 a year from music. Over two thirds of artists, both independent and label, feel they will have to keep up other work alongside music in order to make ends meet. (MIDIA survey, 2019)

Some featured artists⁵⁹ worry that this lack of remuneration limits their ability to pay session musicians, recording studios or post-production processes, therefore risking the continuity of music-related activities. Before streaming became the dominant configuration, artists had a possibility of an income from higher margin record sales not exclusively dependent on live performances. However, due to the cannibalization of higher margin goods by low-to-no margin streaming, this chance has mostly disappeared.⁶⁰ Some artists have gone as far as banning their music from some streaming platforms.⁶¹ But not every artist can do this, either because of lack of bargaining power or because of their label’s output licensing agreements with streaming services. They also come under tremendous pressure from streaming services not to window including pressure on superstars like Taylor Swift and Adele from the CEO of Spotify.⁶²

⁵⁶ www.thetrichordist.com

⁵⁷ www.irespectmusic.org

⁵⁸ PayPerformers, *Survey confirms performers’ need for collective management and solutions* (Sept. 24, 2020) available at <https://www.payperformers.eu/post/press-release-survey-confirms-performers-need-for-collective-management-solutions>

⁵⁹ This would be the case of independent artist or unsigned featured performers, see later on this section.

⁶⁰ Bruce Houghton, *Just 7,500 Artists Make \$100,000 a year or more on Spotify*, Hypebot (Feb. 24, 2021) (“7500 artists earn \$100,000 or more a year on Spotify, the streamer announced yesterday, despite being available in 93 markets worldwide.”)

⁶¹ Glenn Peoples, *Why Irving Azoff’s Company Has (Some) Leverage Over YouTube*, Billboard (Nov. 20, 2014) available at <https://www.billboard.com/articles/business/6327144/why-irving-azoffs-new-company-has-some-leverage-over-youtube>; Alex Hern and Stuart Dredge, *Taylor Swift v. Spotify: Back Catalog Removed from Streaming Service* (Nov. 3, 2014) available at <https://www.theguardian.com/technology/2014/nov/03/taylor-swift-spotify-artists-discography-streaming-services>.

⁶² *Daniel Ek took “many many trips to Nashville” to get Taylor Swift Back*, CBS News (April 3, 2018) available at <https://www.cbsnews.com/news/spotify-ceo-daniel-ek-taylor-swift-ending-feud/> [there is either an extra quotation mark or a missing one]

Crucially, as the COVID-19 crisis has caused income from live performances to disappear and revenue from public communication to be critically reduced, performers are now being forced to consider leaving their occupations. *Musikcentrum* in Sweden has recently disclosed that one in three musicians is about to quit their profession.⁶³ Similar figures have also been released by the *UK Musicians Union*. Songwriters, too, also are in a vulnerable state (although beyond the scope of this study): The Ivors Academy recently launched their “#PaySongwriters” campaign to be support songwriters being paid a greater share of producer revenues and a per diem while on composing jobs because their songwriting royalties are insufficient.⁶⁴ One question for policymakers is whether creators in all categories are to become hobbyists out of necessity due to the streaming imbalance.

“We must adapt the legislation to current technology. Since the majority of listening takes place through streaming today, it is strange that we as studio musicians do not receive any compensation at all from streaming, when we do receive compensation from radio [in Europe].”
(Performer, Sweden)

In a typical recording artist agreement for a featured performer, the artist authorizes the fixation and assigns all the exclusive rights to a producer regarding distribution, reproduction and making available. The only rights that the artist does not assign are those requiring mandatory collective management. Collective management includes remuneration for communication to the public, broadcasting (for audiovisual works in certain countries), making available to the public in the digital markets subject to applicable national laws (in a very limited number of countries), remuneration for rental, and compensation for private copying. It is interesting to note that not all countries have the same remuneration rights recognized, but the exclusive rights transferred to producers are typically the same across jurisdictions, since they are recognized in the WIPO Performances and Phonograms Treaty (WPPT) (adopted in 1996) and, therefore, the countries that have ratified the treaty have them transposed in their national legislation.

Categories of performers and royalties from recordings

But not every performer is in the same situation. Performers of sound recordings can be divided into two primary categories: Featured and non-featured. Featured performers are associated by name with the exploitation of the sound recording concerned whether as an individual solo artist or as part of a group artist. Featured performers typically perform concert tours to support the marketing and sales of their recordings. Non-featured performers are the musicians and vocalists other than the featured artist who perform on the recording and typically do not necessarily tour with the featured performer.⁶⁵

The economics of performers can be best understood by categorizing them in certain groups depending on whether they are featured or non-featured, “signed” to a major or independent label or are self-distributed or “unsigned” as in the following tables.

⁶³ Jem Aswad, *Andrew Lloyd Webber, Giorgio Moroder, Sign Open Letter to Record Labels to ‘Pay Songwriters A Fair Share*, *Variety* (March 23, 2021) available at <https://variety.com/2021/music/news/andrew-lloyd-webber-georgio-moroder-pay-songwriters-open-letter-1234936589/>

⁶⁴ See, e.g., *Rebalancing the Song Economy*, Midia Research (April 2021) available at <https://www.midiaresearch.com/reports/rebalancing-the-song-economy> (“The music business will recover, but this enforced slowdown has had an important, unintended consequence: artists and songwriters have had to adjust to often dramatic falls in income – a light has been shone on music royalties.”).

⁶⁵ It is not correct to refer to these performers as “background” as they may include both soloists or horn sections.

Table 1. Types of performers and their relationship with royalty sources

Royalty Sources of Featured and Non-featured Performers by Category⁶⁶	Featured	Non-featured
Signed—Major Label	Term recording artist agreement (or “record deal”) ⁶⁷	Union collective bargaining agreement, grant of rights with residuals for exploitations
Signed—Indie Label	Term recording artist agreement	Split between union and non-union signatories with one-off buyout engagement with no residuals. May be self-contained
Unsigned	Direct distribution (e.g., Orchard/Tunecore)	One-off buyout engagement

A key distinction between featured and non-featured performers is the royalty payable on exploitations of the sound recordings concerned. While featured performers typically receive a royalty from the record company or, if they are unsigned independent artists, directly from the digital aggregator or distributor, non-featured performers typically render services on either a flat fee buyout or under a union collective bargaining agreement that covers the creation of the recording. Non-featured performers do not typically receive an artist royalty from a record company, nor do they from the digital music service through the record company.⁶⁸

“A songwriter, composer, producer and performer of her/his own music earns 50% of revenues from live performance, 30% for songwriting, and 20% from record sales, downloading & streaming, including exclusive rights for digital markets transferred to record labels” (Global artist #1 – Latin-electronic)

Featured performers generally grant their record company the exclusive right to exploit any recordings during and after the term specified in the contract. Featured performers also generally receive some monies from their record company related with the expected income from royalties, usually called an “advance” (defined as the “prepayment of royalties”). Non-featured performers do not participate in advances (and are not responsible for repayment) since they do not receive royalties from contracts with producers. The advance typically covers both recording costs, a personal advance to the featured performer, tour subsidy and other cost items. Advances are recouped prospectively from earned royalties otherwise payable to the featured performer from all sources that pass through the record company and sometimes from other sources. Neighboring rights payments received by the featured performer directly from a CMO are not applied in reduction of the advance and, because of their nature, should be never subject to recoupment.

⁶⁶ We have not addressed the “performing producer” who assists the featured artist in creating the recording concerned, sometimes being the same individual.

⁶⁷ Exclusive term recording artist agreements are the form of contract that is commonly referred to as a “record deal.” As the name implies, a term recording artist agreement is a grant by an artist of the exclusive right to the artist’s services for the recording of a minimum number of sound recordings, as well as the exclusive ownership and exploitation rights in the resulting performances in recordings the artist records during the term. The record label signing the artist also agrees to fund the production of these minimum commitment recordings and pay a royalty for certain types of exploitations of the recordings. Term recording artist agreements are complex and highly negotiated agreements that define the relationship of the artist and record label for years. While terms may be similar, each label drafts their own term recording artist agreements and sets their own precedents and contracts are also shaped by the bargaining power of the artist.

⁶⁸ Note that symphonic orchestras are often deemed “featured artists” for purposes of non-interactive royalties paid by SoundExchange.

“The situation of classical music performers depends considerably on the country they belong and to which label their ensemble or orchestra, if any, they are signed to. In the US, musicians in a symphonic orchestra are assimilated to feature artists and, therefore, participate in streaming royalties. In Europe, there are public subsidies for many symphonic orchestras. In some countries in Asia, temporary residencies are offered to main musicians and directors. But also, there is a variety of agreements depending on the orchestra. Bigger and more popular orchestras enjoy exclusive agreements with preferential placement in digital music markets” (Niche artist#3 – Classical)

Over time and as sales decline, a featured performer’s recordings become “catalog” (currently approximately 18 months from initial release for streaming). The bargaining power of featured performers tends to decrease over time, as their popularity erodes. Because featured performers are not paid directly by streaming services, they have little to no leverage over these payments.

Record labels and distributors typically deliver nearly identical repertoire of cleared recordings to each licensed streaming platform. Artists with historical unrecouped balances may find their streaming royalties are applied against recoupment under their artist agreements resulting in no current payable royalty. Because of low streaming royalties, recoupment takes even longer than usual. The rote application of terms in legacy recording artist agreements may result in artificially lower royalty rates for streaming⁶⁹ which may be lawful but cause legacy artists to be paid less on streaming than are current roster featured performers. Some labels (such as Beggars Banquet) have a practice of forgiving unrecouped balances after a time.⁷⁰ Record companies may choose, but are not required, to adopt a policy across the board that causes legacy rates to be increased to current royalty standards. These variables and terms highlight the complexity of mandates affecting private contracts.

In a sample of more than 150,000 recordings in digital music services in 2019 in Spain, 65% were found to be catalogue (1950-2012) and just 35% were new (2013-2019), a similar distribution to conventional -radio broadcasting- music radio. (AIE own survey, 2020)

Featured performers can be also be independent artists –sometimes also called “unsigned” featured performers– who may self-release their sound recordings through various means of distribution, including digital distribution. In fact, a substantial number of recordings available through on-demand streaming services are self-released by featured performers. Digital streaming services or digital aggregators pay royalties (but not advances) to these featured artists as a record company would, since independent artists are the sound recording owners.⁷¹

*“For [some] independent artists, streaming is now their primary source of income at 30%”.
(Jopling & Mulligan, 2019)*

⁶⁹ Streaming royalties may be lowered by the rote application of historical “new media” or “electronic transmission” rates that were adopted as downside protection for the record company after the introduction of the compact disc in the 1980s and 1990s.

⁷⁰ Unrecouped balances are carried on the producer’s books in historical currencies, i.e., if the advance in 1980 was \$100,000, the unrecouped balance is paid in 2021 dollars without adjustment for inflation, cost of money, etc. In some limited cases an unrecouped balance may be written off after a period of years based on record company policy. Beggars Group, for example, has a policy of writing off 25% of the then-unrecouped balance after 15 years and are industry leaders in this fairness-making practice. Testimony of Rupert Skellett Q350, DCMS Inquiry (Feb. 4, 2021) available at <https://committees.parliament.uk/oralevidence/1677/pdf/>

⁷¹ Artists without record labels generated \$643.1 million in 2018, up 35% from 2017. These independent artists represent the fastest-growing segment of the global recorded music business. They are also typically more streaming native than label artists (Jopling & Mulligan, 2019).

Non-featured performers may rely on unions to set their possible recording rates. Nonunion performers often negotiate one-time buyouts for their recordings. There are no direct negotiations between individual non-featured performers and streaming platforms.

Music exploitation models in the digital music marketplace and consumption trends

Currently, the digital music marketplace includes four basic types of exploitation models: downloading, streaming, podcasting and the so-called non-interactive streaming⁷². These configurations are not always exclusive, and the same digital music platform can use several of these at the same time.⁷³

On-demand streaming services allow consumers to choose when and where to consume music, either selecting an individual track, a playlist or letting the digital music service carry out the selection in an enterprise playlist according to data derived from the consumer's profile or marketing campaigns. Thus, streaming providers offer their users remote access to musical performances fixed on phonograms without the need to have physical copies of the corresponding recordings or download permanent copies. This is the case with Apple Music, Spotify, or Deezer, among many others. Note that although it is not necessary to download recordings or songs to stream them, these services usually include in their offer also the technical possibility of downloading songs on the consumers' device and listening to them offline, such as Apple Music, Spotify in its Premium mode, YouTube Music in Premium mode, or Deezer, for example.⁷⁴

Podcasting is another digital equivalent to music radio broadcasting, where a DJ hosts a program and chooses the music. The consumer decides when and where to listen to the program and has a set of limited options to rewind or fast-forward the listening experience.

The so-called non-interactive streaming is a catch-all denomination to include services where the consumer has a limited ability to select when to listen to the music or the music program. Specific services included in this last category are non-interactive webcasting, broadcast digital radio simulcasting, satellite radio and some background music services for business.

According to the available data from the recording industry (IFPI, 2020, 2021), streaming services were the leading category in terms of revenues with 56.1% share of the total global recorded music revenues -42% subscription audio streams and 14.1% ad-supported streams- in 2019 and even higher in 2020 with 62.1% share of the total global recorded music revenues -46% subscription and 16.2% ad-supported. Downloads accounted for 5.9% of this same total, and podcasts and non-interactive services were 1.3% of the total global recorded music revenues in 2019, while in 2020 downloads together with this other digital models only amounted to 5.8% market share. Streaming revenues increased by 22.9% in 2019 to US\$11.4 billion globally and a further 19.9% in 2020 to US\$13.4 billion. Paid -subscription-based- streaming grew 24.1% year on year in 2019 and a further 18.5% in 2020. On the contrary, downloading dropped 15.3% year-on-year in 2019 and further declined 17.3% in 2020. Income from physical sales represented 21.6% of the total music market in 2019 and just 19.5% in 2020.

These are consolidated trends from the last five years. Streaming services, especially subscription or paid streaming services, have already become the main offerings of online music (not including user-generated services) and predominant distribution outlets for the music industry. In 2015, the launch year of Apple Music, revenue from streaming services made up 20% of total recorded music market revenue, after growing 45.2% from the previous year. At that time (2015), revenues from sales, both physical and from digital downloads equivalent to physical

⁷² In a next section on techno-economic analysis, it will be explained why the idea of non-interactive music services leads to confusion and it would be better if avoided.

⁷³ Exploitations may include ad-supported or portable, nonportable, standalone, bundled subscription services by interactive streaming or limited downloads depending on the platform offering.

⁷⁴ For this reason, the situation of downloading for performers has considerable similarities with the issues on streaming presented in this report. Under this perspective, both would be "on demand" services for which non-featured performers are not remunerated.

property, already experienced falls, by -4.5% physical sales (constituted 39% of the global music market and -10.5% sales by downloads (which constituted another 20% of the total global market for recorded music). These two trends were accentuated in the following years, with revenue from music streaming having annual increases of 60.4% in 2016, 41.1% in 2017, and 34% in 2018. At the same time, revenue from sales by downloads experienced consecutive decreases of -20.5% in 2016, -20.5% in 2017, -21.2% in 2018, -15.3% in 2019, and -17.3% in 2020. Those from physical sales also experienced decreases, although less than the others, -7.6% in 2016, -5.4% in 2017, -10.1% in 2018, -5.3% in 2019, and -4.7% in 2020.

The evolution of music streaming appears to be a direct function of consumer preferences, as consumers increasingly opt into models based on access and use as opposed to the purchase or possession of physical copies of music or permanent downloads.⁷⁵

Going deeper into the question of the evolution of music consumption, there are different factors or forcing functions that explain the gradual transformation of the relationship between users and music, among which are: (i) in the digital context, users use multiple communication devices from which they can access music through increasing convenience and availability; (ii) in turn, the digitization of content allows its consumption and exchange in a flexible and dynamic way compared to the traditional analogue format; (iii) thanks to the increasing storage capacities and Internet access speed⁷⁶, digital music providers -and streaming services in particular- offer a consumer experience based on access to an extensive catalogue of music on a permanent basis that has quality characteristics similar to those that would be obtained from direct possession of the recordings; and (iv) the different strategies of music streaming platforms to attract users, such as the business models based on freemium-type schemes offered by Spotify or Deezer, the free trial period offered by Apple Music (which would also be a variant of the freemium model), the family plans offered by Apple Music, Spotify, Google and other platforms have contributed to popularize the consumption of streaming, which has become an easily accessible service, almost a commodity.

According to a study carried out by IFPI in collaboration with AudienceNet on a representative sample of the global online population, in 2019, the 89% of consumers listened to music through on-demand streaming, and 64% had listened to music via streaming audio for the past month. The main reasons consumers gave for enjoying streaming audio were “instant access to millions of songs” (62%), “listening to what I want when I want” (61%) and due to “being the most convenient way to listen to music” (47%).

Performers' royalties and intellectual property rights in the digital music marketplace

Download and interactive streaming revenues are usually paid as a percentage of service revenues under private contracts from a streaming platform to a record company or digital distributor that issues a license to the platform and then delivers existing catalog as well as new releases on an output basis. The licensor will receive a negotiated rate for all recordings delivered to the streaming service under the license. The licensor will later account and pay the licensor's featured performers under the terms of their artist agreement. The licensor will normally receive a higher royalty than they pay out to featured performers and the two rates may be accounted on different terms.

In the sole case of the United States, performers unions may receive additional -minor- payments from the record company. These are paid as contributions to pension funds or other trust funds that distribute monies to union members, both featured and non-featured performers.

⁷⁵ This is mostly happening in countries where access to the internet is available and technically and economically accessible.

⁷⁶ See footnote above.

“The only royalties I receive from platforms such as Spotify come through AIE in Spain. I do not receive any other royalties from any other country” (Non-featured artist #1 – Latin percussionist)

Additionally, in some countries that have added a remuneration right to the exclusive right of making available to the public of performances fixed in phonograms in their legislation,⁷⁷ digital music services pay to performers’ CMOs a percentage of their revenues, which is distributed to both featured and non-featured performers. Non-featured artists receive revenues from the usage of recordings by digital music services only in those countries with this remuneration right.

A survey of the performers’ remuneration right in digital music services in Spain in 2019 displayed that it was distributed to more than 50,000 performers worldwide, with 89% of them non-featured performers. (AIE, 2020)

Podcasting royalties are presently controversial. According to record labels, they are a type of interactive service similar to streaming services and consequently subject to the same rules on transfer of exclusive rights. That is, subject to private contracts between featured artists and labels. According to a number of performers’ CMOs⁷⁸, podcasting is subject to the communication to the public and broadcasting right for non-interactive uses of phonograms, and should therefore be set by tariff and allocated under a statutory license to both record labels and performers – including featured and non-featured performers. The issue at stake is the definition of what is an interactive service, an issue examined in a next section.

Non-interactive streaming royalty rates for services such as webcasting, broadcast digital radio simulcasting or satellite radio, are usually set by tariff under national law. Under national laws emanating from international treaties, in some countries there are tribunals that set the rates; in others, there are voluntary negotiations between CMOs and relevant players -such as broadcasters or platforms- that determine the rate that can be appealed to a tribunal if negotiations fail. Some territories have “extended collective licensing” regimes where a representative set of owners (often through a CMO) negotiate rates with users which then apply to everyone, similar to a statutory license. These non-interactive streaming royalties are typically allocated for one half to the phonographic producers⁷⁹ and for the other to the featured performers and non-featured performers. Royalties are usually collected by a CMO and are paid out directly to participants in the recording. This means that non-interactive streaming royalties typically are paid outside of a term recording artist agreement and are not applied to recoupment of advances.

In the U.S., SoundExchange collects royalties from US statutory licensees -and indirectly from Pandora digital radio- and pays out 50% to the sound recording copyright owner, 45% to the featured performers and 2.5% to a trust fund for non-featured musicians and 2.5% to a trust fund for vocalists. (WIPO, 2020)

Term recording artist agreements

Performers who are parties to term recording artist agreements have specified royalty rates (or revenue shares) from exploitations of the recordings they create. These structures can be visualized through in Table 2.

⁷⁷ Mostly European countries, such as Croatia, Hungary, Slovenia and Spain. The impact of this right in the digital music marketplace is considered in more detail in a next section.

⁷⁸ A position confirmed by CMOs organizations such as SCAPR and FILAIE in direct exchanges with the authors of the study.

⁷⁹ In countries with common law principles these are known as the “sound recording copyright owner”, usually the record label or the independent artist.

Table 2. Types of royalty rates for “signed” featured performers

“Signed” Featured Performers Major or Indie Label		Reproduction and Distribution Rights (“Making available”)		
Configuration	Type	Royalty Source	Sales Channel	Non-Recoupable Neighbouring Rights
Physical in all configurations	Royalty Base Price Sales	Royalty rate in record deal	Label’s branch distribution operation	None
Permanent downloads	Revenue Share or Royalty Base Price	Royalty rate in record deal or specified revenue share	Label’s digital licensing operation	None
Interactive Streaming (see discussion below)	Revenue Share or Royalty Base Price	Royalty rate in record deal or specified revenue share	Label’s digital licensing operation	None, with limited exceptions
Synchronization (reuse of recording in film, TV, commercial)	Revenue Share	Specified revenue share in record deal (typically 50% of net receipts)	Label’s synchronization or special markets operation	None (but may be captured as communication to the public for broadcasting)

Unsigned featured performers fund the production of their recordings themselves⁸⁰ and rarely, if ever, receive an advance from distributors, especially digital distributors. Unsigned featured performers are responsible for paying non-featured performers, typically as a recording cost hopefully recovered from gross revenues from all exploitations.

In any of the cases above, non-featured performers are usually paid a one-time buyout fee for their recording services. Neighboring rights payments are largely the only “downstream” revenues payable to non-featured artists.

Table 3. Types of royalty rates for “unsigned” featured performers

“Unsigned” Featured Performers		Reproduction and Distribution Rights (“Making available”)		
Configuration	Type	Royalty Source	Sales Channel	Non-Recoupable Neighbouring Rights
Physical in all configurations	Gross revenue less distribution fee	Distribution agreement	Distributor (such as Tunecore)	None
Permanent downloads	Gross revenue less distribution fee	Distribution agreement	Distributor (such as Tunecore)	None
Interactive Streaming (see discussion below)	Gross revenue less distribution fee	Distribution agreement	Distributor (such as Tunecore)	None, with limited exceptions
Synchronization (reuse of recording in film, TV, commercial)	Gross revenue less distribution fee	Varies	Varies	None (but may be captured as communication to the public for broadcasting)

The corollary for “unsigned” featured performers demonstrates the lack of payments to non-featured performers.

⁸⁰ Some exceptions would include financial support for recordings by government agencies such as Canada’s FACTOR (Foundation for Assisting Canadian Talent on Recordings) <https://www.factor.ca>.

Table 4. Types of royalty rates for non-featured performers

Non-featured Performers		Reproduction and Distribution Rights (“Communication to the public and Making available”)		
Configuration	Type	Royalty Source	Sales Channel	Non-Recoupable Neighbouring Rights
Physical in all configurations	One-time buyout fee	Performers' CMOs	Physical distributor	Only if Communication to the public is applicable when using the recording
Permanent downloads	None	Performers' CMOs	Digital distributor	Only if Communication to the public is applicable when using the recording
Interactive Streaming (see discussion above)	None	Performers' CMOs	Varies	None, with very limited exceptions
Synchronization (reuse of recording in film, TV, commercial)	None	Performers' CMOs	Varies	None (but may be captured as communication to the public for broadcasting in few countries)

ECONOMIC MODELS IN THE DIGITAL MUSIC MARKETPLACE

The business model of digital music services

Streaming providers have primarily and initially opted for the massive recruitment of consumers, typically in some version of a free mode with advertising as a business model or introductory discounts, and hence, they have carried out different strategies to convert free users to paying consumers. Some labels may require certain levels of free-to-paid subscriber conversion under license agreements with streaming services.

In this context, the next business objective of streaming platforms is to capture and maintain the consumer's attention for as long as possible, with the goal of both increasing the possibility of using the consumer as an asset for advertisers in the advertising-based business model and also learning enough about them so as to retain customers who will convert to the subscription payment model. For the latter, the strategy followed by practically all internet service providers, not just the music related ones, is to build personalized offers based on user tastes, preferences and behaviors. All this supported by business smart systems capable of analyzing the data generated by the consumers themselves in their interaction with the platform and extracting information by creating consumer profiles, later used to customize the service offer. As an example, Spotify began to develop these capabilities as a core part of its platform as early as 2011 (Spotify Engineering, 2016).

It must also be said that a primary business motivation of digital music services is to gain access to the public financial markets. It is the public sale of stock or debt⁸¹ to finance the company's loss-making activities that ultimately seems to be the big payday for streaming services. Unlike the performers who provide the music to these platforms, streaming services arguably have very

⁸¹ Glenn Peoples, *Spotify Takes on \$1.3 B in debt*, Billboard (Feb. 24, 2021) available at <https://assets.billboard.com/articles/business/streaming/9531101/spotify-debt-exchangeable-notes>

little connection to “making a profit”⁸² and every connection to the public markets to tell the company’s growth story.⁸³

A common technical architecture for different digital music services

To meet these business requirements, any digital music platform has two main elements from a technical point of view: the consumer interface, which allows the consumer to access and play music in its different modes; and the supporting infrastructure, which is made up of the computing, storage and communication equipment that are in practice responsible for administering, managing and sending the music that the consumer listens to.

Within this framework, the consumer application, which is the operations center where the consumer experience is built, offers the visual interface and the different functionalities for accessing music. In particular, it offers personalized content proposals for the consumer (based on their previous listening, on a recommendation system based on intelligent algorithms and on the selection of music in playlists made by musical experts or third party steering agreements), as well as the possibility of searching for specific musical themes.

For its part, the supporting infrastructure is organized to satisfy and guarantee the operation of the digital music platform following these basic requirements. In practical terms, the system organization adopted responds to distributed architecture, so that the elements of the system are found in different geographical locations. This architecture makes it possible to balance efforts to provide the music access service and obtain a quality of service as homogeneous as possible regardless of location, being completely transparent for the consumer.

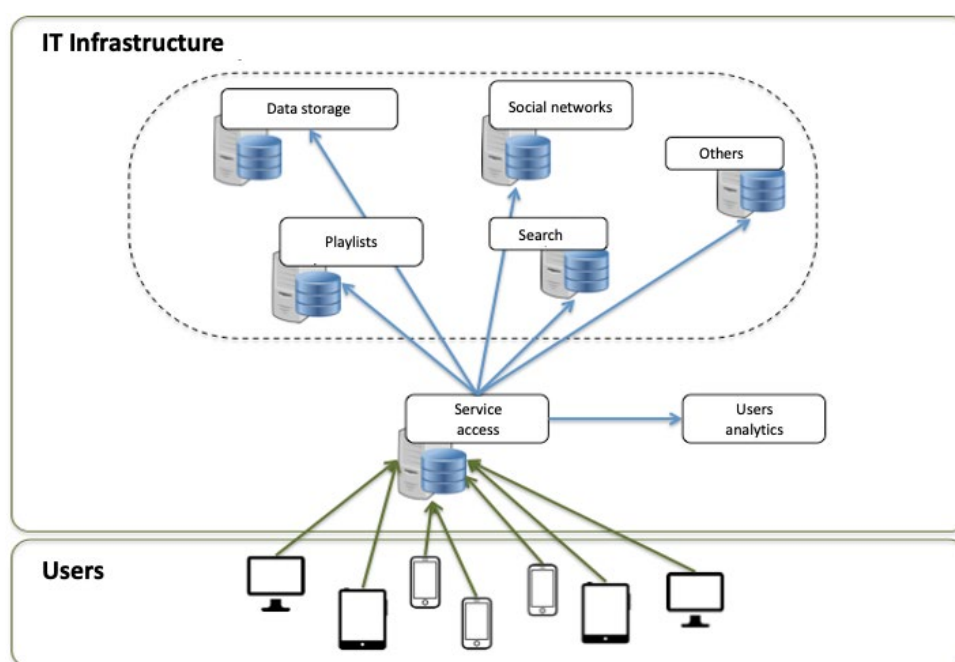


Figure 2. Supporting infrastructure of a digital music platform. Source: adapted from Gustavsson (2012) and Apple Music (n.d.)

The supporting infrastructure includes: the access to the system that offers the communication point between the client's application and the set of equipment that make up the support infrastructure and where functions such as authentication, load balancing, distribution of requests, etc., are found; the service management, responsible for the different functionalities offered by the platform, such as browsing and searching for content, playlists, or sharing songs and playlists;

⁸² Ben Eisen, *No Profit? No Problem! Loss Making Companies Flood the IPO Market*, Wall Street Journal (March 16, 2018) available at <https://www.wsj.com/articles/spotify-and-dropbox-to-join-a-growing-club-profitless-public-companies-1521204676>.

⁸³ See, e.g., Robert Spector, *Get Big Fast* (2009) ch. 12 *Get Profitable Eventually* at p. 235

the content storage, i.e., the physical repository in which the licensed content is stored and available for use; these servers are in turn connected to a higher hierarchical level server that coordinates content requests and offers alternative routes to them if a server is not able to satisfy the client's request; and the consumer behavior analysis, that is the module that uses data obtained from reproduction, consumption pattern and interaction, among others, to configure the different customization schemes.

The principles of operation and the technical architecture are translated in a set of musical services, using different forms of packaging, selection and reproduction of musical themes. Typically, within the digital music platform, the consumer can choose between multiple ways to access the music offer, such as thematic radio by musical genre, time of day, artist; ad-hoc playlists prepared by the platform with the collaboration of musical experts and adapted to the identified tastes and preferences of the user; hit lists; contact playlists on the platform and social networks.

In addition, the consumer can configure her own musical selection through searches or while listening to musical selections and from here create her own selection of music that she can play and share with other consumers. In reality, these different possibilities of listening to music entail a variety of suggestions or recommendations adapted to the consumer's tastes, together with suggestions or recommendations from the platform itself. But, all of them use a common technical infrastructure, precisely designed to provide multiple possibilities for distinct music services.

In summary, the digital music service is configured as a showcase for access to music provided by the platform, based on the tastes and interests identified by the system, ad-hoc proposals and / or user choices, trying to achieve the highest degree of alignment (customization) possible with the real preferences of each consumer. Together with the customization capacity, digital music platforms conduct promotions of certain musical styles, artists, or themes that allow the platform to become an access point to discover new content with which to maintain the user's interest and build loyalty. In many cases, in addition to algorithms, it uses dedicated teams of music experts who curate playlists to capture user interest and gauge the popularity of particular styles and artists, possibly in connection with promotional deals with record labels. In fact, it is common for these selections to be sponsored to popularize a certain genre or achieve greater impact in the launch of a new song or artist.

Interactivity vs. personalization: combination of digital music services in the same platform offer

As explained, a central issue for this study is the evaluation of the degree and type of interaction of the consumer with the musical content that a digital platform hosts. The issue at stake is whether interactivity is a relevant component in the differences in remuneration rights for artists across digital music services or whether the degree of interactivity is just a technical feature that, in fact, changes over time, is adapted to the preferred business model of the digital music platform and is combined across services in the practical offer of a digital music platform. If the latter holds true, then basing remuneration schemes on evolving and -many times combined- technicalities would be an error that, in turn, would contribute to manipulate the possible payment results and avoid the chances of a fair share to performers. Setting up an equitable remuneration system, independently of the right at stake and its obscure relationship with interactivity, would be a considerable improvement.

Conventionally, the different modes of exploitation of online music are distinguished by the degree of interactivity that users have on the musical content that is hosted on the corresponding platform. Thus, the interactivity with the musical content on the digital platform ranges from the situation corresponding to an online channel or program that links musical themes regardless of the user's tastes and preferences - in a similar way to the situation corresponding to a conventional broadcasting radio service, for example-, up to the maximum degree of interactivity that would occur when the user intentionally chooses a specific musical theme to listen to at a certain time and place - in a similar way to the situation corresponding to the acquisition of a musical recording that the user consumes on a device she owns.

A typical consumer interaction with a digital music platform essentially consists of a communication process through which a form of guided access is offered to the music stored on the platform. Guided recommendations are based on consumer's pre-existing audio library, the preferences, knowledge and specific indications of the consumer, as well as prescriptions of the platform itself, either prepared by it, or by other users of this same platform and by third parties hired or used for this purpose.

From the platform side, the consumer's preferences are used to build a consumer profile in order to adapt the music offer –and the corresponding business model- to the consumer's tastes at each moment and situation, as well as to use their profile to be able to prescribe music that the platform considers may be of interest to the consumer, including promotions from other clients, such as record companies or specific artists.

In fact, the ultimate goal of any music platform - like many other digital platforms today - is to get access to consumers -subscribers- and retain them, and the key to this lies in the personalization of its services.

Therefore, platforms seek to know the consumer in such a way that ideally it would be possible to adapt the music with total precision, at each moment and situation of the day, to the consumer's preferences. To achieve this result and offer recommendations tailored to the tastes of each consumer and better musical selections, the leading digital music platforms have considerably invested in music experts and intelligent data analysis systems and offer a set of modes of exploitation of online music that coexist on the same commercial proposal to the consumer. For this, they use a system of musical recommendations, based both on algorithms of the platform itself and on recommendations made by DJs or music specialists, and which is also dependent on the platform's commercial agreements with third parties, such as record companies, on which they depend for the catalog of available musical themes.

For instance, in Apple Music, within the same digital music platform, there is a range of services in terms of interactivity and personalization, from the radio channel Beats1 Live, the least interactive, rather similar to conventional radio broadcasting, up to the playlists by artists, musical genres, etc. suggested by the Apple Music service, where the consumer can choose the order or allow randomization, stop listening, advance to the next song or go back to the previous song, add the song to playlists. It is also possible to listen to specific songs, such as those suggested by the Explore list in "Hits of the moment".

The research conducted for this study shows that main digital music platforms combine consumption modes considered not fully interactive, that is, they require a limited degree of interaction by the consumer, together with modes of full interactivity, in which the consumer decisively intervenes to reproduce a certain musical theme.

This overlapping of operating modalities is a common practice in the online music business, since providers seek at all times to capture the attention of as many consumers as possible and offer them a musical experience that keeps them connected to the service or platform.⁸⁴ Given the diversity of tastes, preferences and situations of potential consumers, the combination of modes of exploitation is a logical response from the provider to the different market segments that it intends to attract for the consumption of its digital music services.

The commercialization of online music services using different combinations of operating modalities is a dynamic decision by the provider, since it can evolve -it has already evolved and it is evolving- over time depending on the business results obtained by the digital music platform.

⁸⁴ DCMS Inquiry, Question 598 addressed to Apple Music: "[W]e all have a similar catalogue. If you are looking to find specific music that you love, all of our services have very similar things so we have to look for other ways to differentiate ourselves."

Thus, it is common for online music providers to try to promote some modalities over others based on their interests and business strategy, including their commercial relationships with third parties such as record companies, recommendation platforms or social networks, and that this distribution of modalities changes over time and the geographical area where the specific online music platform has customers.

As a main example, Apple Music uses a recommendation system that guides the consumer through the platform's proposals to facilitate their music consumption. Given the rapid technological evolution, and the interest of the provider itself to get as close as possible to the tastes and preferences of users, and thus keep them satisfied and connected to its platform (which affects the ability to generate income) these intelligent systems are more and more powerful and precise. This is complemented by a range of other services. For instance, Apple Music also uses recommendations made by expert DJs, radio channels (Beats 1 Live for example), and / or related to commercial agreements with third parties, who can use the platform to publicize and make their music popular, such as options related to new launches or the category of Hits of the Moment, for example.

Understanding the inadequacies of making available transactions⁸⁵

The business model for interactive streaming that has evolved since the adoption of the Internet Treaties in 1996 combines rights collected by producers and independent artists compensated under the making available right with the “lean back” enterprise playlist model that is easily analogized to broadcast radio. While consumers may always be able to use interactive functionality in addition to music discovery enterprise playlists, a large number of users simultaneously⁸⁶ take advantage of “music discovery” or “lean back” playlists.

Because streaming transaction agreements typically sweep all rights under one royalty payment, it is difficult to separately value these functionalities (e.g., one agreement might cover non-interactive Internet radio as a direct license outside of any statutory framework as well as interactive streaming subject to customary direct licenses). Accordingly, responsible copyright policy should recognize that principles of equitable remuneration should take into account both simple interactivity and complex algorithmic enterprise playlists.⁸⁷

⁸⁵ We do not wish to be drawn into an argument about whether interactive streaming constitutes a license or a sale under typical term recording artist agreements. When we refer to “licensing” we literally mean the agreement between the phonogram owner, often the producer, and the music user. How that transaction is interpreted under an artist agreement is outside the scope of this inquiry. See, e.g., Stuart Dredge, *Independents Day at the UK's Music Streaming Inquiry*, MusicAlly (Feb. 5, 2021) available at <https://musically.com/2021/02/05/independents-day-uk-music-streaming-inquiry/>

⁸⁶ Spotify, *Amplifying Artist Input In Your Personalized Recommendations* (Nov. 2, 2020) available at <https://newsroom.spotify.com/2020-11-02/amplifying-artist-input-in-your-personalized-recommendations/> (“Spotify drives 16 billion artist discoveries every month, meaning 16 billion times a month, fans listen to an artist they have never heard before on Spotify.”)

⁸⁷ While there may be some concern about multiple equitable remuneration payments, the payments correspond to entirely separate functionality so users are not being asked to pay twice for the same functionality.

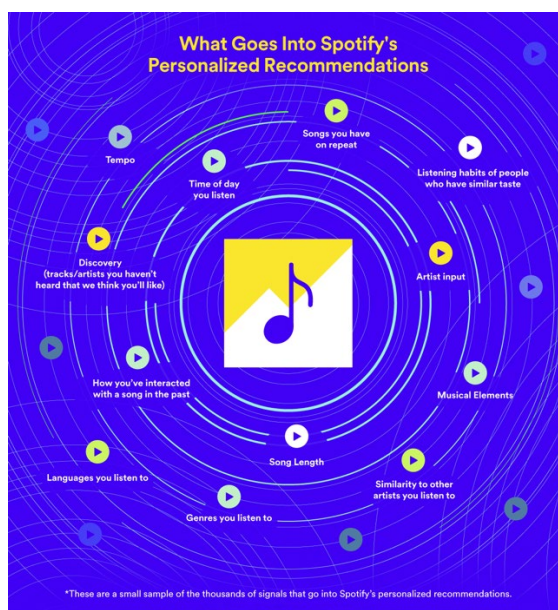


Figure 3. Spotify's Enterprise Playlist Methodology (Source: Spotify press release 11/2/20)

Streaming remuneration should not alter the fundamental exclusive right of performers and producers to authorize exploitation of subject phonograms.⁸⁸ Consistent with existing international law,⁸⁹ one might argue that Member States could determine that non strictly interactive streaming implicates a use of a phonogram as a communication to the public, attracting equitable remuneration payments.⁹⁰ The streaming platform taking the decision to use phonograms should pay the remuneration for such non strictly streaming as a communication to the public as may be established by Member States in national law.⁹¹ The hybrid nature of interactive streaming along

⁸⁸ Articles 10 and 14 WPPT. See also Chapter II, Directive 2001/29/EC of the European Parliament and of The Council (May 22, 2001).

⁸⁹ "When a phonogram which has been published for commercial purposes is used directly for broadcasting **or communication to the public**, Contracting States have three possibilities. These are to assure the payment by the user of an equitable remuneration (i) to the performers or (ii) to the producer of the phonogram or (iii) to both. In any case, the payment is a single one to be shared if necessary. Further, the provision is optional in the sense that member countries may exclude it in whole or in part (see below Article 16). Each country must therefore make its own choice of the path to follow between the various claims, decide to accept or reject the Article, and, if the former, provide for its practical application. The Article is the result of a compromise between the many interests involved and the national legal systems. The participants in the Rome Conference chose this system of setting out the principle and allowing for reserve, rather than that of leaving it all to national laws." WIPO, *Guide to the Rome Convention* (1981) at Par. 12.2-12.3 available at https://www.wipo.int/edocs/pubdocs/en/copyright/617/wipo_pub_617.pdf.

⁹⁰ Note that references in Article 12 of the Rome Convention and Article 15 of the WPPT are to "broadcasting or for any communication to the public".

⁹¹ Art. 12, Rome Convention (1961) ("If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting **or for any communication to the public**, a single equitable remuneration shall be paid by the user **to the performers**, or to the producers of the phonograms, **or to both**. **Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.**"); , Art. 15 WPPT ("(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting **or for any communication to the public.**(2) **Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer** or by the producer of a phonogram or by both. **Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram**, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. (4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

with enterprise playlists need not be interpreted as requiring Member States to choose between the two rights as one could argue that each can coexist with the other.⁹²

Moreover, given the global dominance of a reduced number of digital music platforms -such as Amazon, Apple, Google, Tencent, Spotify and others- in the streaming market in each country where they operate, streaming remuneration would allow Member States to create new revenue for local performers in large part paid for by these dominant multinational corporations doing business in their countries. While we have not addressed an appropriate royalty rate, Member States concerned with streaming remuneration placing too great a burden on their local streaming services or startups could adjust based on usage, subscribers, market share, revenues or other metric that would right-size the payment so that a local provider does not pay the same aggregate royalty as a multinational platform benefitting from larger economies of scale and scope.⁹³

"I appreciate the information I do receive, but I don't understand the breakdown of where the money is coming from. I do think there should be more transparency." (Niche artist #2 – Classical)

The unknown impact of recommendation engines in music value creation and royalties

The operation of the digital music streaming platforms -and part of their success- relies on persistent recommendation model, so that the platform, based on what it knows about the consumer, offers a wide range of possibilities to engage her at all times. The recommendation system is based on the preferences and history of music listened to and the consumption pattern of the consumer (and similar consumers) together with proposals from the platform prepared ad-hoc by a specialized team and / or related to commercial agreements with third parties, like record companies that generate playlists and content to guide users to a certain genre of music, artist or playlist (Ugwu, 2016).

Various streaming companies have invested in smart music recommendations. For example, in 2014 Spotify acquired the music data provider The Echo Nest, as part of a bid to develop the best music intelligence platform on the planet, according to founder Daniel Ek. Beats Music (which is part of Apple Music) has hired music experts to differentiate itself from its competitors and offer "a human touch" in compiling and selecting its playlists. Apple also bought Semetric in 2015, one of whose best-known brands is Musicmetric, which provides data related to downloads, streaming and social networks to provide itself with greater analytical capacity and, therefore, of recommendation (Dredge, 2015).

The impact of recommendation tools on the distribution of income in streaming business models is an area still to be fully assessed. Typically, when we choose a playlist whose title corresponds to the desire of the moment; or else, after the album we wanted to listen to, the service continues to another track decided by an algorithm as a function of our profile but also on other occasions following commercial interests. This automatic or human-managed editorialization of services, the composition of playlists, the algorithms that decide the next title obviously play a major role in the creation of value and the possible royalties attached to it.⁹⁴

⁹² This document is agnostic regarding the possible implementation of such a remuneration. I could be an extension of the communication to the public right (as artists in the UK have suggested, see for instance <https://www.theguardian.com/music/2021/apr/20/paul-mccartney-kate-bush-law-change-music-streaming-payment>), it could be collective remuneration from the making available right (as countries such as Spain are already doing) or it could be new remuneration right (based or not in existing legislation).

⁹³ "[E]ach State must review the arguments, weigh the importance of each and eventually choose, from the bundle of solutions the Convention offers, that which seems fairest and best suited to its own economic situation." *WIPO Guide to the Rome Convention* at 12. 28.

⁹⁴ For instance, being added to Spotify's "Today's Top Hits", increased streams by almost 20 million (Aguar and Waldfogel, 2018). In fact, the vast majority of successful playlists on Spotify are proprietary (98 out of the top 100 lists).

The recommended listening portion (generated automatically by algorithms) is estimated very differently depending on the interlocutor: between 10% to 20% depending on the online music platforms and up to 80% according to some labels. (Centre National de la Musique, 2021)

According to Mariuzzo & Ormosi (2020) using data from the UK, the overall effect of the above factors is that major label recorded music has a greater share of the most popular playlists, which really drive streams, than they do in the less popular playlists. If the total share of independent labels in the total UK recorded music market is around 30%, the percentage of independent music in the top 100 playlist in Spotify (that drive most of the listening streams and that are basically curated by Spotify) is just 19%. As expressed by Antal, Fletcher and Ormosi (2021), this lack of access is likely to have a direct impact on revenues for independent labels and their artists today, and also an indirect impact on the sustainability of this important segment of the market in the future.

According to available studies (Centre National de la Musique, 2021) fears have been expressed by some representatives of rights holders as to the potential orientation of eavesdropping via recommendation algorithms whose functioning is judged opaque. The quantitative analysis of the distribution of value between recommended and autonomous listening is complex and requires a common and shared definition which, today, is lacking.

Worst, creation of platforms' own playlists and own tracks might distort the fairness of remuneration to labels and independent performers. For particular rights-holders in categories such as relaxing / piano / chill / jazz, the competition from tracks created by platforms themselves using their knowledge of user profiles and their influence on playlist might seem particularly unfair.⁹⁵

ARTISTS' ROYALTIES CALCULATION IN STREAMING SERVICES

Big pool / pro-rata / market-centric model

This study addresses the core royalty accounting models of Spotify, Apple Music, Amazon Music and Google Play/YouTube, among others. Of these, Spotify and Apple Music are the two dominant on-demand streaming services from a competition point of view.⁹⁶ In particular, the study focuses on the royalty rates payable to featured performers and non-featured performers based on a "revenue share" calculation. These royalty rates are found under the "Streaming" row of each of the "Signed" Featured Performers Major or Indie Label chart and the "Unsigned" Featured Performers chart explained in the previous section. This is the so-called "big pool", "pro-rata" or "market-centric" model.

⁹⁵ Several cases of these practices have been reported. See for instance <https://www.musicbusinessworldwide.com/spotify-is-creating-its-own-recordings-and-putting-them-on-playlists/> or <https://variety.com/2020/digital/global/tidal-jay-z-beyonce-data-fraud-investigation-in-norway-1234631663/>

⁹⁶ Spotify has been the dominant streaming service for quite some time and currently is bigger than its two next largest competitors, Amazon and Apple. Billboard Magazine in the U.S. reported that Spotify's Chief Economist Will Page said in 2014 "While explaining how streaming 'is no longer an outlier in the business,' Page noted Spotify has launched in 32 of the 37 countries where streaming is the primary digital source of revenue. Page also point out that Spotify is half of the \$1.5 billion global subscription streaming market. In the U.S. market, Spotify made up approximately 90% of last year's growth in subscription revenue, according to Page." Glenn Peoples, Spotify was 10% of U.S. Label Revenue in First Quarter Says Will Page, Billboard (May 13, 2015) available at <https://www.billboard.com/articles/business/6561447/spotify-ten-percent-label-revenue-first-quarter-2015-will-page>.

Share of music streaming subscribers worldwide in 2019

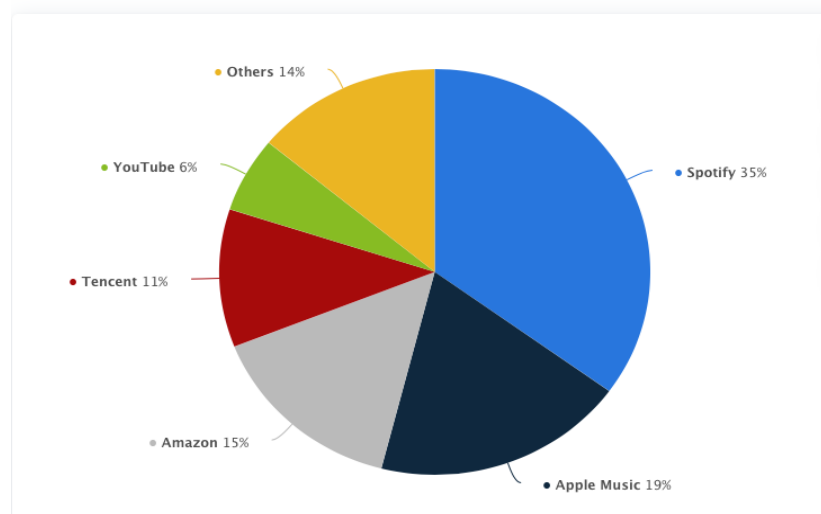


Figure 4. Share of music streaming subscribers worldwide in 2019 by company. Source: Statista, available at <https://www.statista.com/statistics/653926/music-streaming-service-subscriber-share/>

"The information is opaque and unintelligible. I miss that there is transparency in the agreements reached by the platforms with the management entities and with the record companies or aggregators themselves. Transparency is also necessary between artists and record companies, since sometimes they do not pay the corresponding royalties correctly."
(Ainara LeGardon – rock/experimental songwriter/artist)

As of early 2021, all major streaming services use some version of the “big pool” model for payments to artists. As a result, major-label superstars derive the bulk of the revenue from streaming platforms, therefor directing most of the revenue to the most popular artists regardless of whether a particular fan actually listened to those artists. “Big pool” is used by the major streaming services in each country where they operate. The “big pool” model may have a profound effect on niche artists and local repertoire given the worldwide dominance of Anglo-American based streaming platforms.

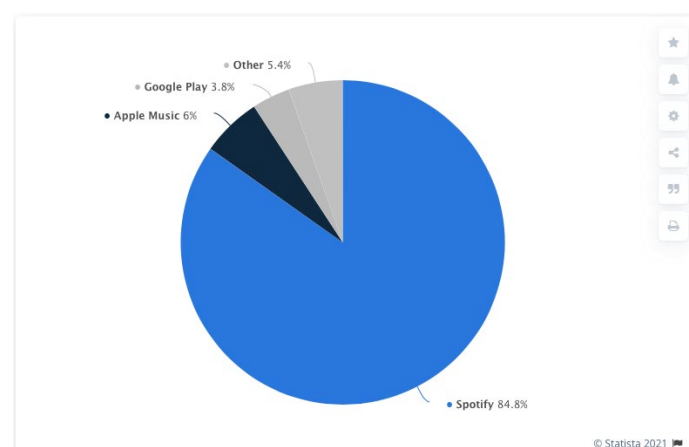


Figure 5 Leading Music Streaming Services in Mexico as of 3Q 2019, Statista 2021

The hallmark of streaming’s difficulty with featured performer royalties derives from two factors: First, the “big pool” revenue share method of royalty calculation, explained in detail below. This is the source of most of the complaints. In addition, a related core problem is the sustained refusal

by streaming services to exercise pricing power.⁹⁷ Relatively static pricing and a rapidly increasing number of available recordings and streams tends to cause royalties to decline over time in order to drive user growth that in turn drives platforms' market valuation and stock price, as also explained below.

Because the "big pool" puts all of the applicable revenue in a hotchpot divided based on number of plays—not all the service's revenue, but a negotiated contractual definition of revenue that is shared with rightsholders by the service—inevitably, a user will pay for music they do not listen to.

This feature is most observable in a subscription model where the consumer's monthly subscription fee goes into the defined revenue hotchpot for artist royalties. The typical subscriber pays a fixed fee and listens to a handful of artists relative to the tens of millions of tracks available on the platform. This can be either entirely interactive and without regard to "discovery" algorithms or enterprise playlists or guided by recommendations.

Even though the consumer only listened to certain artists, the subscription fee is divided with all the artists on the service who were played by other consumers. If our consumer were a classical music fan, she might never listen to the pop hits of the day. Yet in this common case, almost all of her subscription fee would go to artists she never listened to and might never listen to.⁹⁸ Because those artists typically lack the leverage to negotiate the downside protection of bigger labels, they may end up with less than they would if they received a share of their actual fans' subscription fees.

Hence there are two predictably inevitable harms from the "big pool" method: subscribers pay for music they do not listen to and whatever the payable royalty is will likely decline over time absent significant increases in the service revenue.

Per-stream rate calculations

The big pool formula in its most basic form is based on these calculations for each accounting period (Tn):

Monthly Service Revenue during T1 ÷ Total Streams in T1 = per-stream rate in T1⁹⁹

Per stream rate in T1 x Your Streams in T1 = Your Royalty at T1

And, algebraically, can also be expressed as this value for T1:

Monthly Service Revenue x [Your Streams ÷ Total Streams] = Your Royalty

⁹⁷ See generally DCMS Inquiry, Question 597. But see Chavi Mehta, *Spotify to raise prices on some plans across U.S. and UK*, Reuters (April 26, 2021) available at <https://www.nasdaq.com/articles/spotify-to-raises-prices-on-some-plans-across-u.s.-uk-2021-04-26>

⁹⁸ See, e.g., classical crossover cellist Zoë Keating "indicated that she earned \$753 from Spotify in September of 2020, which came from a little more than 200,000 streams of her music. This means that she earned about \$0.0037 per stream." Colin Cohen, *Zoë Keating Offers More Evidence That Spotify Royalties Are Declining*, Digital Music News (Dec. 6, 2019) available at <https://www.digitalmusicnews.com/2019/12/06/zoe-keating-spotify-royalties-declining/>

⁹⁹ Note that the per-stream rate is a necessary calculation in order to determine "Your Royalty" aggregated for all of Your Streams. This is particularly true for "Big Numerator" licensors. Jem Aswad, *Why It's Misleading to Say Apple Pays Twice As Much Per Stream as Spotify*, Variety (April 16, 2021) available at <https://variety.com/2021/digital/news/apple-music-pays-twice-stream-spotify-1234953590/#!> (Advocates for the status quo often discount the value of a per-stream rate in favor of "stream share": "Nobody looks at per-stream [metrics] anymore, **at least not internally [at the group level]**," one executive at a major music company tells Variety. "What we look at is overall subscription growth, the churn rate — with a low rate being the goal, because it means people are sticking around — and the conversion rate, which is how many people stay past the free trial or, in Spotify's case, switch from their ad-supported platform to a paid one." This is, of course, missing the trees for the forest and may not respond to the actual argument.)

Over time, consider that if the rate of increase in Monthly Service Revenue from one month (T1) to the next (T2) is less than the rate of increase in the Total Streams, the value of Your Royalty (sometimes called “stream share”) will always trend downwards over time (Tn). In fact, actual figures show that the streaming ARPU is declining. Spotify aggregated ARPU declined 2% from 2018 to 2019, and Ingham (2021) estimates an overall decline of 8% in the streaming ARPU from 2018 to 2019 of the global music industry.¹⁰⁰

This study speculates that this is why licensors have negotiated extensive downside protection in a handful of the larger catalog licenses for on-demand streaming services. This downside protection typically takes the form of various financial “floors.” Examples would be “greater of” formulas based on revenue share compared to per-subscriber and per-stream minimums, minimum numbers of adverts, as well as pre-payments of royalties. These prepayments are paid as advances to be recouped as minimum guarantees that essentially give the licensor the benefit of the present value of future royalty payments during the term of the license.

The minimum guarantee is recouped against earned royalties payable during the license term. If the minimum guarantee is recouped during the typical two-to-three-year term, royalties are then payable prospectively after the recoupment point. If the minimum guarantee is not recouped during the term, the unrecouped balance (sometimes called “breakage”) is often retained by the licensor for its own account. The service then negotiates what is essentially a new license with a new minimum guarantee and the process is repeated.

Even though royalties are effectively pre-paid by the minimum guarantee, the service still accounts to the licensor for usage during the term.¹⁰¹ This allows the licensor to account in turn to the licensor’s artists. The licensor then credits the artist’s royalty account with the corresponding payment as required by the artist’s recording or distribution agreement. If service has not recouped the minimum guarantee as to the entire licensor catalog, no payment will be due to the licensor by the service on that statement, but the licensor will still account to the artists whose recordings were streamed during that period.

“Your Royalty” in the formula above fluctuates from month to month depending on at least three functions: Monthly Service Revenue, Total Streams and Your Streams. Consider each of these functions:

Total Streams: Generally, the aggregate number of plays of 30 seconds or more of all the licensed recordings on the service. The Total Streams is an unbounded number that constantly increases at some rate which likely varies directly with the number of licensed recordings on the service. Total Streams tend to increase over time because of new recordings added to the service under output deals with rights holders.¹⁰² Once a recording has been “ingested” or made available on a service, it is rarely removed.

Your Streams: The aggregate number of plays of 30 seconds or more of sound recordings owned or distributed by the recipient of the royalty payment. While this number is also unbounded, it is unlikely to increase at a rate that is greater than either the increase in Total Streams or Monthly Service Revenue. Note that the larger the catalog, the more likely it is that “Your Streams” (or the licensor’s “stream share”) will be a larger number, particularly if the catalog owner is heavily marketing its artists, thus stimulating demand at the streaming service.¹⁰³

¹⁰⁰ Tim Ingham, *Why We Believe Streaming Subscription ARPU Fell by Around 8% Globally for the Record Industry Last Year*, Music Business Worldwide (March 24, 2021) available at <https://www.musicbusinessworldwide.com/why-we-believe-streaming-subscription-arpu-fell-by-around-8-globally-for-the-record-industry-last-year/>

¹⁰¹ Even though a per-stream rate is not a negotiated deal point (other than downside protection minima), it is necessary for the licensor to determine a per-stream rate in order to account to their artists.

¹⁰² See, e.g., Tim Ingham, *Over 60,000 Tracks Are Now Uploaded to Spotify Every Day*, Music Business Worldwide (Feb. 24, 2021) available at <https://www.musicbusinessworldwide.com/over-60000-tracks-are-now-uploaded-to-spotify-daily-thats-nearly-one-per-second/>

¹⁰³ Sometimes referred to as “Big Numerator” or “Low Numerator” producers or artists.

Monthly Service Revenue: This is not the gross revenue earned by the service, but is rather a negotiated amount that includes less than all earned revenue. It is then reduced by certain “off the top” costs that are negotiated. Any revenue earned by the service that is not defined as Monthly Service Revenue is excluded. This could include data-related fees or sales of user data, for example, playlist branding fees, or other revenues. Monthly Service Revenue definitely excludes all monies related to the trading of the company’s shares or the company’s valuation. The applicable gross monies earned by the service are reduced by approximately 50% to be included in the Monthly Service Revenue, meaning the service retains approximately 50% of that revenue for its own account and to pay music publishers or performance rights societies. The revenue categories commonly included are cash payments or non-cash consideration for advertising payments and subscription fees from users but can also include “non-display” uses such as e-commerce and referral fees or bounties, a share of traffic or tariff charges, or revenue derived from the sale of data about users (including behavioral data).

Note that the big pool calculation results in a *notional* per-stream rate for the accounting period concerned. While licenses between sound recording owners and streaming services are never based on a fixed per-stream rate as a negotiated deal point, it is necessary to determine at least a notional per-stream rate in order to calculate “Your Royalty” as noted in the formula above. It is also helpful to break down royalty payments by a service on at least a notional average per-stream payment in order to compare and rank services based on royalty payouts.

Deriving a per-stream rate requires making some assumptions. The Trichordist artist rights website famously derives the “Streaming Price Bible”¹⁰⁴ based on the annual earnings of an actual, but anonymous, independent label. Some artists such as Zoë Keating publish their royalty earnings. The study has used these sources and its own survey to compile the tables on per-stream rates and their evolution over time. The information is completed with an Annex with additional information on per-stream rates from specific artists.

Table 5. Total average artist per stream rates (2017-2020)

Total average per stream rates	2017	2018	2019	2020
Xbox			\$0.02730	
Napster / Rhapsody			\$0.01682	\$0.01900
Tidal			\$0.01284	\$0.01250
Apple Music	\$0.00640		\$0.00783	\$0.00735
Google Play Music			\$0.00611	\$0.00676
Deezer		\$0.00560	\$0.00624	\$0.00640
Amazon			\$0.00740	\$0.00402
Spotify		\$0.00540	\$0.00370	\$0.00307
Pandora Premium		\$0.00110	\$0.00134	\$0.00133
YouTube	\$0.00060		\$0.00074	\$0.00069

Source: Own calculations from publicly available Internet information (Sanchez, 2018; The Trichordist, 2020) and own survey

Table 6. Average no. of streams to make 1\$ (2017-2020)

No of streams to make 1\$	2017	2018	2019	2020
Xbox			36.63	
Napster / Rhapsody			59.45	52.63
Tidal			77.88	80.00
Apple Music	156.25		127.71	136.05
Google Play Music			163.67	147.93
Deezer		178.57	160.26	156.25
Amazon			135.14	248.76
Spotify		185.19	270.27	325.73
Pandora Premium		909.09	746.27	751.88
YouTube	1666.67		1351.35	1449.28

Source: Own calculations from publicly available Internet information (Sanchez, 2018; The Trichordist, 2020) and own survey

¹⁰⁴ 2019-2020 Streaming Price Bible, The Trichordist (Mar. 5, 2020) available at <https://thetrichordist.com/2020/03/05/2019-2020-streaming-price-bible-youtube-is-still-the-1-problem-to-solve/>. Note that Spotify royalty rates are averaged between free and subscription by The Trichordist.

The table also displays how the biggest digital music platforms have decreased the notional per stream rates during the last years. For instance, Spotify has moved down from \$0.00540 per stream in 2018, to \$0.00370 in 2019 and \$0.00307 in 2020. This is a reduction of 43% in the two year period. Apple Music has also decreased their per stream rates 6% in the period 2019 – 2020 and Amazon has the highest decline in 2019 – 2020 with a decrease of 46%.

Streaming royalties' calculations

As displayed in the tables, the streaming royalty is typically very low on a per-stream basis. Even so, it is important to note that this is the gross payment to the label but does not typically include any payment to songwriters or music publishers who are paid in addition to and separately from the sound recording royalty.

“The change [in digital music markets] should be that major labels pay a higher percentage to the artists, producers and songwriters”. (Independent artist#4, 2021)

As stated, the label then shares this royalty with their artist. How this royalty is shared by the label with their artists is of some controversy, but it is typically no lower than a 70/30 split between label and artist and is often higher, but not greater than 50/50. Deep catalog artists may have less favorable arrangements depending on how their contract is interpreted.

Independents are typically paid 100% of the streaming royalty as they act as their own label and own their own sound recordings.

Table 7. Artist scenarios of payout in current digital music services

Artists scenarios	From net present value of consumer data profiles	From consumer revenue (reduced from off the top costs) ¹⁰⁵	From total per stream rate (paid to label or digital aggregator)
Featured independent artist + songwriter	20.31%	57.28%	81.83%
Featured Independent artists	17.79%	50.17%	71.67%
Featured artist + songwriter	4.87%	13.74%	19.63%
Featured artist	2.35%	6.63%	9.47%
Non-featured artist¹⁰⁶	0%	0%	0%

Source: Own calculations from publicly available Internet information (Digital Media Association, 2020) and own survey

Table 6 above summarizes the different possible situations, combining featured and non-featured artists with their relationship with record companies -signed or independent artists- and their possible roles beyond merely performing, such as songwriter, creative producer or record label.

Estimations of value and comparisons with other digital markets

Companies in the digital music marketplace seek to capture valuation. Share price valuation implies growth and a belief in future growth. In Spotify's case, the company is still largely loss making and has been from its inception, an indirect evidence of the relevance of valuation vs. profits. In fact, personal data, as in other digital markets, is the key factor of production in streaming services and is extracted from fans driven to the platform in large part by the efforts of performers. Therefore, an approximation to the value of personal information for companies in the digital music marketplace will shed light on how much of this value is shared with performers.

Following Feijóo, Gómez-Barroso and Voigt (2014), net present value of personal data, the most stable approach to user valuation, can be derived starting from the present value of revenue per

¹⁰⁵ Up to 50% of gross consumer revenue.

¹⁰⁶ While this is true for most countries there are some minor exceptions. If it is a case of non-interactive streaming (such as webcasting or simulcasting), non-featured performers would receive a 2.50% in some countries (calculated from consumer revenue). Also, in very few countries that use collective management for making available to the public in streaming services, non-featured performers would receive a 2.50% in average (calculated from consumer revenue). Finally, in the US non-featured performers would receive 0.60% (calculated from consumer revenue) if their tariffs are union set.

data record -average revenue per user- and a multiplier that depends on assumptions on the useful lifetime of a personal data record and the existing interest rates. For instance, using standard assumptions¹⁰⁷, a typical multiplier will range from 1.88 to 3.64, with an average of 2.82. This means that the average revenue per user (ARPU) should be multiplied by this figure to include future returns and obtain a more reliable economic value, not just a performance or productivity figure.

Using official figures from Spotify, yearly ARPU has remained relatively constant at 25.56 € in 2017, 25.41 € in 2018 and 24.96 € in 2019, the latest available figure. In Spotify's case, growth is often measured as subscriber growth and subscriber growth implies competing on price because Spotify offers more or less the same product as its competitors (as discussed elsewhere in the text). Competing on price implies keeping retail prices down in a race to the bottom on subscription price and to the top on share price and user valuation. To this regard, and using the above multiplier, the net present value of each user would be respectively 71.99 €, 71.55 € and 70.29 € in 2017, 2018 and 2019. These figures are not far from the market valuation per monthly active user (MAU) that was placed at 84.15 € and 86.35 € at the end of 2018 and 2019, respectively.

The authors of the study think that net present value is a fairer representation of the returns from data-intensive companies such as those in the digital music marketplace and, therefore, should be the base for actual assessment of the value than can be shared with other stakeholders, such as performers. For a comparison between performers' share of value and revenue in digital music platforms, Table 6 above includes a first column with the pay-out for performers in different situation if this net present value is considered, and not merely the ARPU as it is usually displayed. According to this perspective, even in the best of cases for Spotify, performers would get about 20% of the total value created from a single user, while the remaining 80% would stay in the platform.

In addition, COVID-19 has nearly destroyed the live music business that sustained the artists who previously tolerated low streaming royalties. Far from being harmed by COVID-19, the pandemic has been rocket fuel for Spotify's growth which adds to the unfairness of the big pool royalty system. As the comparison to "FAANG" stocks demonstrates, Spotify's growth in valuation has outpaced other big tech companies.

¹⁰⁷ According to the same paper, after three to seven years the data from personal profiles loses its usefulness to extract economic value -in this study we have used five years as an average between both values. Also, there is an influence of the interest rate, with benchmark values at 5% and 10% -in this study we have used the lower value in line with current low values for interest rates.

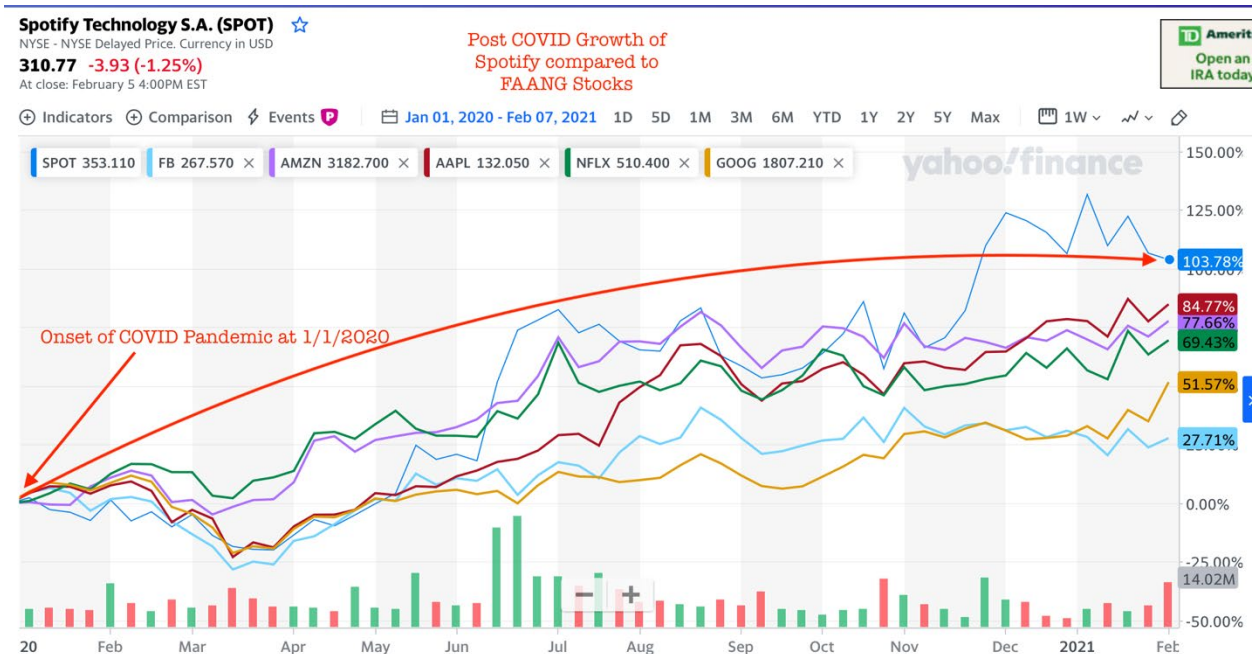


Figure 6. Spotify Valuation Growth Compared to Google, Facebook, Amazon, Apple and Live Nation 1/1/20 to 02/07/21

Lack of information and reporting transparency and reliability

In addition to the issues on per stream rates and the differences in how to share value for digital music platforms and for performers, there are issues on lack of information and transparency in the supplied accounting data.

Q: Do you receive enough information (transparent, clear and understandable) about the amount of money you get paid from digital music platforms? What do you think is missing?

A: "No. What's missing is a clear understanding of who to talk to when there is a question" (Doug Emery, 2021)

A: "Direct contact with the platform. Clarity in total volume. There is no API of any store that tells you directly the number of streams, how do we know if the aggregator or label figures are true?" (Non-featured artist#2, 2021)

A: "Never. It's impossible to gauge what I actually receive per play or per 100 or 1000 plays. It's not transparent at all" (Scanner, 2021)

A: "The format of the reports of the different platforms should be unified and they should be obliged to send a report to each artist. That way we could compare the amounts reported by the platforms. We have no way of knowing if the reported executions and amounts are correct!". (Keko Yunge, 2021)

According to available studies (Centre National de la Musique, 2021) on digital music services, some data is simply not available, such as the identification of the singing language. Others lack reliability, such as the identification of production countries using ISRC codes.

Also information on royalties per stream is missing. For instance, during the DCMS Inquiry, the head of institutional relationships at YouTube refused to provide per stream rates with the argument of YouTube being based on advertising model¹⁰⁸.

Micropayments

The direct micropayment model has been used for some years in digital streaming services such as Tencent's QQ Music¹⁰⁹ and in fan-club type subscription services such as Patreon and OnlyFans. During 2021, SoundCloud (Singleton, 2021) has also announced its intention to adopt a direct payment model to artists. This "virtual gift" model could also be considered a form of "user-centric" in the sense of user deciding which artists to pay. It must be noted that platforms often take a share of micropayments as a processing fee. In Tencent's case, these fees accounted for more than 70% of Tencent Music's revenue.¹¹⁰

PROSPECTIVE SCENARIOS AND ALTERNATIVE MODELS

New legislation for streaming remuneration in the digital music marketplace

Digital music markets are not perfect-functioning markets, but rather riddled by market failures. In the past, they have required –and currently still require– attention from public policy makers and regulators.

Q: What do you think should change in the digital music market so that artists and performers receive for compensation for their music's consumption?

A: "Equitable remuneration should apply to streaming because streaming is not only replacing the dominant sales model but also replacing the dominant broadcasting model". (Tom Gray, 2021)

A: "A clearer picture so that even consumers can understand why artists are not being paid so much as they think, and for companies like Spotify to consider paying higher returns to artists and also session musicians who have performed on recordings but receive next to nothing" (Scanner, 2021)

A: "Streaming platforms need to support the artists who are releasing music and sustaining their business model. There doesn't seem to exist the correct balance between what is earned by the service and its profit, and what is provided to its suppliers". (Independent artist#3, 2021)

A: "Neighboring rights [in the digital music marketplace] should be worldwide and allowed for all performers". (JKEscorcia, 2021)

Concerns that have been mentioned in the literature¹¹¹ as general competition issues are: (i) commission fees charged for subscriptions that are made through Android or iOS devices, and

¹⁰⁸ See a summary of YouTube declarations at Music Week, available at <https://www.musicweek.com/digital/read/dcms-inquiry-youtube-defends-its-record-on-royalties-and-says-it-can-be-no-1-for-streaming-revenue/082582>

Also EU adopted Directive 2019/790 with specific provisions (Article 19) devoted at guaranteeing and improvement regarding information and contracts.

¹⁰⁹ See, e.g., financial reporter Jim Cramer on micropayments: "Tencent Music is a major part of the micropayment ecosystem because they let you give virtual gifts," Cramer said. "If you want to tip your favorite blogger with a song, you do it through Tencent Music. In the latest quarter we have numbers for, 9.5 million users spent money on virtual gifts, and these purchases accounted for more than 70 percent of Tencent Music's revenue" Mad Money (Dec. 13, 2018), available at <https://www.cnbc.com/2018/12/13/cramer-tencent-music-would-be-a-buy-if-it-wasnt-for-us-china-trade.html>

¹¹⁰ Id. See also, *SEC Form F-1 Registration Statement, Tencent Music Entertainment Group* (Oct. 2, 2018) at 129 available at <https://sec.report/Document/0001193125-18-290581/d624633df1.htm>

¹¹¹ See for instance a summary at Antal, Fletcher & Ormosi (2021)

restrictions imposed to prevent services from circumventing those fees; (ii) the video streaming activity of YouTube effectively competing with specialist music streaming services, but without proper licenses for the music it streams, nor paying fees similar to those paid by other streaming services¹¹²; (iii) transparency and lack of auditability of revenues and payments; (iv) whether payments made by the platforms to third parties such as performers -the object of this study- are fair; and (v) whether streaming platforms are able to compete unfairly against traditional audio or television broadcasters.

Concerns specific of streaming platforms are fundamentally: (vi) the big pool / pro-rata / market centric allocation method for remuneration payments (already discussed above); and (vii) the role of playlist in driving streams in particular directions (also discussed above).

As a main example, the European Union, Directive 2019/790 is supposed to solve the problem of remuneration by including the principle of adequate and proportionate remuneration for authors and artists in the digital music marketplace. In particular, within Ch. 3 devoted to “Fair remuneration in exploitation contracts of authors and performers”, art. 18 reads:

Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

And art. 20 also adds:

Contract adjustment mechanism

1. Member States shall ensure that, in the absence of an applicable collective bargaining agreement providing for a mechanism comparable to that set out in this Article, authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.

“Playlist inclusion process [in streaming services] should be based on listening merits and not any payola from interested parties” (Non-featured artist#2, 2021)

However, as of this writing the actual status of the implementation by the EU Member States does not seem to change the panorama much. EU Member States can implement and adopt this Directive in their national legislations up to July 2021 so that status may change.

User-centric approach

The “user centric” model seeks to compensate featured performers on a per-user basis for interactive streaming in order to eliminate the “market centric” allocation of revenue across all streams. As of this writing, none of the proposed user-centric models compensate non-featured performers at all. With respect to featured performers, “user-centric” offers some benefits such as protecting users from paying for music they do not listen to. In order for a service to completely change from a “market centric” to a “user centric” model, the service would have to renegotiate each of their licenses, and the licensor (often a producer) would necessarily have to agree to the change. Because the “market centric” distribution is at the core of the license, it seems unlikely that the producers would agree to the change if it made them worse off.

¹¹² An issue also considered in EU Directive 2018/790 in its Article 17.

Repost, now owned by SoundCloud, allows independent artists to distribute music and collect revenue from major streaming services like Spotify, Apple Music, and TikTok, along with offering promotional tools, for \$30 a year, a plan that lets acts keep 100% of their SoundCloud revenue, and 80% of revenue from other platforms. (Singleton, 2021)

A simple example will illustrate the difference between the pro-rata model and the user-centric model. Suppose a consumer listens to one single song during a particular month. In the user-centric model the amount of her monthly subscription -discounted from off the top charges- will be paid to the owner of that recording. However, in the “market centric” model, this one stream will be pooled against the total number of streams on the service during the accounting period, generating an income typically less than one half cent of a euro or dollar. The “market centric” model pays many orders of magnitude less than the user-centric model in this example. However, note that the difference between the two models blurs when the number of plays per user per month increases and when it is averaged across artists.

The logic of the two models is very different: the user-centric tracks the user's consumption and matches revenue from the user to the titles he listens to; the market centric is paid into a hotchpot distributed among rights holders, according to the overall audience of the titles by market.

“User-centric payment is the intuitively correct way to distribute income because revenue share fails to reward based upon having built a loyal audience. In fact, it rewards the opposite and is unhealthy for culture. 1 in 5 listeners are distributing 80% of revenues. This means the musical taste of 4 of 5 members of our society is actively defunded. Revenue share also takes away the moral rights of the consumer. Presently their subscriptions can go to funding material they may dislike or even find politically and morally wrong”. (Tom Gray, 2021)

Mathematically, both of these systems have a logical impact on the value of every play. Generally, in market centric, each play tends to have the same value, while in the user-centric model, the value of a stream depends on the number of tracks the subscriber has played. In user-centric, the lower the volume of titles played, the more the value of the plays increase on a per-stream basis as to a particular subscriber. If the subscriber plays only one title in the month, as in the example above, this one title could be paid her full subscription fee. If the consumer plays two, the royalties will be divided by half and so on; if this is a heavy user, listening to several hundred tracks or more per month, the marginal value of each additional play would decrease accordingly. The actual royalty paid to the artist will still be subject to the artist's existing artist agreement with the label or directly -through a digital aggregator- if she is an independent artist.

A study from the Centre National de la Musique in France, that took place in 2020 using data from Spotify, Deezer and Sacem (Centre National de la Musique, 2021), concluded that an eventual switch to an user-centric model would make it possible to make the distribution of income consistent with the respective weight of the different types of music consumers. In particular, the study found that the move to a user-centric model could promote a redistribution of income for the benefit of artists, titles and aesthetics to smaller audiences. This redistribution would favor rock and pop to the detriment of rap and hip hop¹¹³. However, it would have a limited impact beyond the 10,000th most listened to artist, since it would be at most a few euros per year on average over the year per artist. In addition, the switch to user-centric model could encourage a strengthening of the back catalog market share (current policy being released prior to 18 months).

¹¹³ According to the study the shift to a user-centric model would have the effect of greatly reducing the royalties received by the Top 10 artists (-17.2%), stabilizing the middle of the ranking with a small increase in royalties received and allowing the artists the least listened to (> 10,000th rank) to benefit from an increase in their royalties (+ 5.2%). In terms of musical genres, classical music (+ 24%), hard rock (+ 22%), blues (+ 18%), pop rock (+ 17%), disco (+ 17%) and jazz (+ 10%) would benefit from significant increases in percentage, while rap (-21%), hip hop (-19%) and, to a lesser degree, afro beat (-9%) and new age (-7%) would see their royalties drop. Back catalogue would see a modest increase in royalties (+3.2%).

"It is extremely important to understand that a shift in reporting methodology [to user-centric model] will not increase the amount of money artists are paid in the aggregate. It will just shift money from some artists to other artists" (Sony Music, 2021)

According to that same study, the development of the user-centric model would be the responsibility of the platforms. It is anticipated that the royalty accounting for user-centric would be much more complex than the current market-centric model, plus the services have years of operational costs amortized in the current system. These operational costs may be too expensive to be absorbed by smaller platforms and could be passed on throughout the value chain potentially resulting in lower royalties. The beneficiaries (distributors, producers, collective management organizations) could also bear the costs of verifying the reports submitted by the platforms, that is, the operational costs linked to the weightings carried out at user level for the user-centric model calculations. This seems unlikely.

"I think artists should be payed more for each stream and that fans should pay if they listen to me and not pay bigger artists if they don't listen to them". (Niche artist#5 – postclassical)

However, Berlin-based SoundCloud¹¹⁴ recently announced its own user-centric alternative with "fan powered" royalties which allows certain independent artists to opt into the program.¹¹⁵ SoundCloud is an example of a platform making performer payments into a competitive advantage against its competitors. The independent label association IMPALA has also proposed a number of different versions of the basic user-centric model¹¹⁶ which are more nuanced than the basic model used in the French study. It must be said that none of the user-centric models currently on offer expressly compensate non-featured performers, including the SoundCloud version which is actually being implemented as of April 1, 2021. In any case, none of these models will provide remuneration to non-featured performers.

The online music services indicate that, under the assumption that the data exchange interfaces with the right holders remain unchanged, user-centric model will require additional expenditures to implement it. Deezer has already incurred technical costs, mainly development costs insured by 4 half-time engineers over a period of 6 months. Spotify estimates that switching to user-centric model would incur an increase in operating costs of 2% to 3%. Other platforms, whose market start is less than those of these two companies, have not yet estimated the possible costs or the capacity to consider such changes due to their systems. (Centre National de la Musique, 2021)

Another relevant effect of the user-centric model is the fight against fraud. This model may reduce the impact of one of the existing click fraud schemes which consists in artificially increasing the plays of targeted titles and artists, for example by "click farms". With the establishment of the user-centric model, fraud could evolve towards the targeting of low-intensity or inactive users or even the hacking of sub-accounts within bundles. The fight against fraud is one of the main challenges of music streaming -continuous vigilance of platforms to detect fraudulent listening is essential and greater transparency is still necessary.

In summary, the user-centric model is often presented as fairer for subscribers because it brings the distribution of income from their subscription closer to the reality of listening: their subscription pays the artists they listen to and only those. It is also described as fairer for artists, authors,

¹¹⁴ SoundCloud is reportedly available in 190 countries, SoundCloud Statistics and Facts (2021) <https://expandedramblings.com/index.php/soundcloud-statistics/>

¹¹⁵ SoundCloud, Fan Powered Royalties (March 2, 2021) available at <https://community.soundcloud.com/fanpoweredroyalties>

¹¹⁶ Independent Music Companies Association, *It's Time to Challenge the Flow* (March 23, 2021) available at <https://impalamusic.org/wp-content/uploads/2021/03/IMPALA-streaming-ten-point-plan-March-2021.pdf> (IMPALA proposals include Pro Rata Temporis, Artist Growth Model, Active Engagement Model and the User Choice Model.)

composers and performers, since it avoids concentrating the distributed income on works and artists listened to by intensive users; with it, each listening effectively remunerates the rights holders. Conversely, user-centric has been presented by others as an unfair system that can penalize artists whose audiences are the most engaged and who listen to them the most. In any case, it is unlikely that user-centric will change dramatically the royalties received by artists, but it is likely that significant transaction costs would be incurred in its implementation, unlike streaming remuneration. It must also be said that if non-featured performers were not being compensated already, there is nothing in user-centric that would create a new revenue stream for them. These complications of user-centric enhances the appeal of streaming remuneration in fulfilling the policy goals of equitable remuneration generally.

The sustained interest in user-centric highlights the dissatisfaction of artists with the status quo and the sense that something is being put over on them. It is hard to explain why fans are paying for music they don't listen to. Streaming remuneration could help to quiet these concerns.

Safe harbor provisions

Existing safe harbor provisions for Internet providers also impact on the commoditization and perceived value decrease of music. The paying services like Apple and Spotify ultimately have to “compete with free” including YouTube and Twitter’s manipulation of the safe harbors. This is particularly the case of video or social network services that rely partly on content created and or uploaded by consumers, such as YouTube, Youku and others.

As the EU Parliament debate over the new Copyright Directive demonstrated, safe harbor laws are massively abused resulting in “value gap” problems that distort the market.¹¹⁷

The record company positions

We do not wish to set up a straw man argument, but based on recent public statements of record company associations, there is some apprehension about either changing the market-centric model or establishing additional remuneration for streaming. It is easy to understand their concerns because global recorded music revenues have grown six consecutive years to a total of \$21.6 billion in 2020,¹¹⁸ a substantial growth rate even in the pandemic. This streaming-fueled success has not trickled down to performers, especially non-featured performers. The more global revenues surge, the harder it is for performers to understand why the imbalance is fair—because it is not. It is also difficult to accept a sustained effort to block fair payments to performers when the record companies have not put their own house in order on performer royalties. While the objections to fairness-making efforts for performers speak to rights being “stripped away”, if anyone has had their rights stripped away it is the performers, especially non-featured performers. And in the words of the song, nothing from nothing leaves nothing.¹¹⁹

Having said that, the opposition of some record companies must be taken into account because streaming remuneration should not come at the cost of a creeping compulsory license that undermines private contracts or valuable rights. But it can be argued that streaming platforms should recognize the enterprise value that performers confer on them which is one reason why the streaming remuneration payment should be paid by the platforms through CMOs (and not applied against unrecouped balances). It also should not be applied in reduction of payments to record companies that ultimately reduce payments to featured performers.

¹¹⁷ See generally Frances Moore, *The Value Gap—The Missing Beat at the Heart of Our Industry* (2016) available at <https://www.ifpicr.cz/the-value-gap/>

The issue is addressed in Article 17 of the EU Directive 2019/790.

¹¹⁸ IFPI Global Music Report 2021, *State of the Industry* (2021) at 7.

¹¹⁹ Billy Preston and Bruce Fisher, *Nothing from Nothing* (1974)

THE ROLE OF PERFORMERS' CMOs IN THE DIGITAL MUSIC MARKETPLACE

Rights and CMOs role in the digital music marketplace

CMOs have currently and in general a very limited role in performers' rights in the digital music marketplace. The general functions of a performers' CMO consist of (i) collecting remuneration rights, (ii) identifying the performers involved and (iii) distributing of the collected money. For CMOs to be able to conduct these functions they need a legal support to claim the mandatory collective management rights.

As mentioned, existing regulation considers two types of rights applicable to artists in the digital music marketplace: (i) communication to the public and broadcasting and (ii) making available of phonograms.

"At present, most Internet Service Providers (ISPs) keep around 30% of their subscribers' monthly payments. Of the remaining 70%, CMOs [related to songwriting rights] currently get around 16% and the recording label gets around 54 percent. That isn't sustainable. Some new thinking is needed." (Björn Ulvaeus – CISAC President / ABBA)

The right regarding communication to the public and broadcasting was included in 1961 Rome Convention (art. 12) and in the WPPT (art. 15), where a remuneration right to artists and producers is acknowledged. Both treaties allow Member States to make reservations to these provisions limiting or not granting the right of remuneration for communication to the public and broadcasting. Several Member States deposited a declaration limiting these provisions including the US, China, Australia, and India.

The right of making available of phonograms

The right of making available of performances fixed in phonograms appears in the WPPT (art. 10) and it is defined as an exclusive right for artists in the digital music marketplace. This means that the artist decides whom is to be authorized to use the recording of her performance -the phonogram- in general including in the digital music markets. In practice, artists systematically transfer the making available right to producers under term recording artist agreements or other arrangements. Producers in turn negotiate licenses with digital platforms for exploitations of the recordings.

However, there is a limited number of countries where there is a remuneration right collectively managed for making available with different extents of regulation and implementation approaches. To the authors' knowledge, Spain and Serbia are the only countries in the world that have legislated this right (similar to the rental right configured also in the WPPT (art. 9)) so that artists retain an unwaivable equitable remuneration that survives transfer to the producer (and the Spanish CMO AIE collectively manages this right). An Annex compiles existing models in the EU regarding the making available right for performers. Damian Green, MP, of the DCMS Committee raised the equitable remuneration right in Spain as an example of a possible solution for low performer payouts for streaming during testimony of Amazon, Apple and Spotify executives at the DCMS Inquiry. Notably, Spotify's representative did not reject the idea of expanding the collective management of the making available right:

Damian Green, MP: I have one last question, probably for Horacio [Gutierrez of Spotify]. One of our witnesses was the Spanish collecting society and in Spain equitable remuneration is paid out by the streaming services rather than the record companies. How does that model influence how you operate in Spain and what are the economic consequences of it?

Horacio Gutierrez [Spotify]: It basically created an incremental path. We already as a general matter pay, as you know, 70% of all our revenue to rights holders. In Spain they

chose to create this additional right on top of it and labels have been reluctant to make it whole for that price. That means we have had to carry the burden of that, which has further increased our losses for our service in Spain. We have not degraded the service in any way. We continue to offer in the same way and we look for other ways of trying to make up the margin that we lost as well as the margin pressures that we are normally subject to, given the general cost structure of music streaming.

It has not really affected the way that we operate in Spain but it has made it harder for us to have a path to profitability and margin expansion. [Spotify acknowledged in other testimony that Spotify intentionally kept prices low as a business strategy.]¹²⁰

There are also other countries with related formulas: extended collective management (Hungary), included in the communication to the public remuneration (Croatia, Slovenia, Slovakia), exclusive right to collective management (Portugal, although it was previously mandatory and now this management is voluntary). In a WIPO study on the impact of the digital environment on copyright legislation adopted up to 2016 (Rostama, 2017), 51 Member States from 94 surveyed had enacted provisions to adapt the right of communication and/or making available to the public to the digital environment.

In addition, streaming remuneration likely should be considered consideration for a communication to the public right. That right is implicated by the various types of playlists created by interactive streaming services and which services acknowledge are a substitute for broadcast radio during questioning at the DCMS Inquiry. This is not the first-time policy makers have discussed this connection.

In the US, new legislation says that streaming payouts for publishers and songwriters will rise from 10.5% to 15.1% by 2022. At the time of writing this report, the decision is on appeal although the National Music Publishers' Association remains confident that the rate increase will be upheld.

In fact, a group of experts convened by WIPO in 2017 (WIPO, 2017) discussed the merit of this right in the digital music marketplace. They concluded that many content sharing platforms and social networks were making works available to the public, generating significant profits which they failed to share fairly with rightsholders. The experts then stressed that the problem of the value gap would have to be addressed through (i) transformation of the role of intermediaries; (ii) transparency of contracts between platforms and authors; and (iii) establishing collaboration and trust between rightsholders and operators.

Although regulating a different kind of fixations, as a relevant antecedent, the Beijing Treaty on Audiovisual Performances (WIPO, 2012) also acknowledges both the right of making available of fixed performances and the right of broadcasting and communication to the public. Both rights are enjoyed by performers as exclusive rights of authorization. However, article 12 paragraph 3 states that "Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 [making available] and 11 [broadcasting and communication to the public]". Even if in this case is an "à la carte" protection for broadcasting, is still a signal for the possibility of implementing similar legislative solutions.

¹²⁰ UK Parliament, Digital, Culture, Media and Sport Committee, *Oral Evidence: Economics of Music Streaming* (Q599) (Feb. 23, 2021), See also discussion above of whether Spotify is driven by profit or stock market valuation so that "difficulty in making a profit" is not Spotify's main business concern.

CMO performer line-up databases

CMOs can help keep lower the transaction costs of streaming remuneration payments by leveraging their existing performer line-up databases. However, CMOs¹²¹ capacity to distribute internationally the -existing, new- digital music right would require increased transparency and governance.

International distribution of royalties for performers' rights is made possible by using CMO databases, which include many of the performer line-ups of recordings since the beginning of recorded music. For instance, the International Performers Database (IPD) allows to register individual performers and to assign a unique identifier for the purpose of identifying individual performers in sound recordings and audio-visual works. The IPD also contains information about the mandates a performer has given to CMOs on a territory, period and use type basis. The International Performer Number (IPN) is the unique identifier assigned to a performer registered in the IPD.¹²² In addition, some main CMOs use shared databases to enable the exchange of performers-related information necessary to run distributions locally.¹²³ As another example, SoundExchange, uses their ISRC database.¹²⁴

“Artists need protection of our auditing rights and transparency. For too long the major rights-holders have been able to keep large sums of income without distributing to artists because they are protected by NDAs and those incomes do not appear to relate to streams (digital breakage, etc.). The present system promotes inaccuracy with CMOs receiving broken data (ISRC not matching ISWC for example). This again benefits major-rights holders because unattributable income is distributed pro-rata. This is completely unacceptable. [...]. The industry is an embarrassment in many ways”. (Tom Gray, 2021)

CMOs are likely best positioned to account for revenue to performers independently of record labels and certainly revenues paid on a non-recoupment basis outside of term recording artist agreements.

Lack and limitations of international reciprocal agreements

The international administration of remuneration rights, both in the legacy and digital music marketplaces sometimes have limitations from CMOs such as qualifications for performers to be entitled to their share of equitable remuneration.¹²⁵ A fairer environment would need, at international level, that any repertoire usage be paid to the performers without qualifications, regardless of the country of production, artist's nationality or any other criteria.

¹²¹ According to authors' research there are 62 worldwide performers' CMOs

¹²² As of early 2021, about 830,000 unique performers are registered in the system, see www.scapr.org

¹²³ The most extended system is VRDB, run also by SCAPR, an organization belonging to CMOs. As of early 2021, 9 million unique sound recordings and audio-visual works were registered in the database.

¹²⁴ SoundExchange ISRC Database includes 32 million recordings, see <https://isrc.soundexchange.com/#!/search>

¹²⁵ See, e.g., PPL Distribution Rules available at <https://www.ppluk.com/tools-resources/member-policies-and-distribution-rules/> .

SUMMARY OF PROPOSALS

The following grid summarizes the proposals in this study including a pro and con analysis for each:

Proposal	Pro	Con	Further comments
Status Quo—continue market-centric model unchanged with voluntary experiments in fairness-making royalty methods (SoundCloud and Apple, for instance)	No disruption to streaming ecosystem, locks in market-centric royalty model, allows market forces to drive change (e.g., SoundCloud fan powered royalties and Apple messaging pro-artist royalty rates)	Favors major labels and their featured performers, non-featured performers paid zero, does not respond to grassroots campaigns by featured and non-featured performers; burdens local repertoire and local culture (see concerns about streaming music raised by Heritage Canada and Canadian Parliament in current consideration of Bill C-10 ¹²⁶)	Do not change and allow market forces to impact royalty rates through grassroots protests against streaming royalties like #BrokenRecord and #IRespectMusic campaigns and potentially litigation
Streaming Remuneration to Performers Paid By Platforms Through CMOs	Does not require additional transaction cost as matching and payment information already exists at CMOs; does not require renegotiation of licensing agreements or disrupt current licensing practices; platforms are already paying similar royalties in certain territories; recognizes value transfer from all performers to platforms; helps to preserve local culture by compensating both featured and non-featured performers	Platforms may seek to offset streaming remuneration payments against catalog license revenues; platforms may seek to expand compulsory licenses; additional operating cost for platforms;	Flexible solution that Member States may elect to implement. Benefits both featured and non-featured performers. Mandate may exclude deduction from existing licenses and may make payments non-waivable.
Voluntary change in label streaming rate policy and (for instance) Beggars Group-style forgiveness of unrecouped balances	Fairness making move so that producer unilaterally updates all legacy contracts to current rates. Simple to pay more than contract requires, can be implemented quickly, low transaction costs. Forgiveness of	Does not change the underlying payments to featured performers, does not compensate non-featured performers. Might be arbitrary and subject to sudden changes.	Labels should consider before legislation requires a change in response to grassroots protests (see DCMS Inquiry). Non-featured performers are not benefited. Compatible with other models.

¹²⁶ House of Commons of Canada, House Govt. Bill C-10 (43rd Parl, 2nd Sess., Nov. 3, 2020) available at <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=e&Mode=1&billId=10926636&View=1>

Proposal	Pro	Con	Further comments
	unrecouped balance occurs after a fixed period of time. (Beggars model forgives 25% after 15 years).		
Mandate review of royalty statements and systems by independent accountants or “special masters”	Biggest point of failure in royalty reporting is at the platform, so review of systems by independent accountants and experts would increase transparency and help to reduce third party fraud. Expert review would be in addition to SSAE 16 type review. At a minimum, public accounting firms should be required to publicly disclose systems reviews undertaken as part of audited financials.	Biggest negative would be cost, but in the long run would potentially reduce the cost and increase the efficiency of individual audits. Might be accomplished through disclosure and rebalancing of duties of public accounting firms.	Member States may consider legislating transparency. Non-featured performers are not benefited. Compatible with other models.
Adjust corporate governance at streaming companies to make them more responsive to shareholders (such as eliminating dual class stock in publicly traded companies)	Allows shareholders a meaningful voice in corporate governance denied by “supervoting” shares such as Spotify’s 10:1 insider shares, allows fans or users an opportunity to be heard by board of directors	Does not by itself change underlying payment issues for either featured or non-featured performers	Member States may consider as a general matter depending on existing corporate governance laws and exchange rules. Non-featured performers may not be benefited. Compatible with other models.
Voluntary User Centric Share of Revenue Royalty methods	Likely to allow users to have transparency as to where their money goes; perceived greater fairness for featured performers	Costly to implement due to transaction costs of renegotiating all licenses. May just reallocate revenue without increasing the pie; does not recognize the value transfer from performers to platforms in market valuation and share price. Does not compensate non-featured performers.	Allow platforms to experiment with different models. Non-featured performers are not benefited under models tried to date.
Fan-to-performer Direct Digital Gifts	Does not require changing licensing agreements for services and producers; payments to performers can be made directly outside of recording or distribution agreements; if broadly	Excludes producers from compensation scheme; requires performers to sign up to accept payment; some services take a cut some do (like Tencent) and some (like Apple) do not take a cut if true	Allow platforms to experiment with different models. Non-featured performers could be benefited. Member States may consider legislation to curtail platforms taking a cut of digital gifts.

Proposal	Pro	Con	Further comments
	established, could include both featured and non-featured performers.	gift and not disguised in-app purchase	
Extended collective licensing of the exclusive right of making available on demand	Rebalance relations between stakeholders; guarantee a remuneration for all categories of performers through collective management	Limited protection for performers when opt-out is possible; needs conclusion of new licensing agreements; will affect the perimeter of licensing agreements concluded between labels and platforms	Would conflict with existing contracts, increasing litigation with uncertain results; non-retroactive application with limited effects
Compulsory collective management of the exclusive right of making available on demand	Rebalances relations between stakeholders; guarantees a remuneration for all categories of performers through collective management; protects all performers from unbalanced transfer of right	Needs conclusion of new licensing agreements; will affect the perimeter of licensing agreements concluded between labels and platforms; deprives featured performers of their direct capacity to negotiate with labels through individual contracts	Would conflict with existing contracts, increasing litigation with uncertain results; non-retroactive application with limited effects

CONCLUSIONS

Market Centric vs. User Centric

Performers are beginning to mistrust the market centric royalty allocation unless they are the beneficiaries of the hyperefficient market share distribution of royalties. For many artists, the extraordinarily low or no streaming payments are unsustainable and unacceptable, particularly compared to the billions of market capitalization of the streaming services. While services may run loss-making businesses, their executives would seem to prefer stock buy-backs to paying livable royalties. When artists and fans alike understand that fans pay for music they do not listen to, the market centric system seems to be a seriously questionable business practice. On top of all of these issues, non-featured performers simply are excluded from the payments.

Conversely, the user-centric allocation seems unlikely to accomplish the goal of increasing featured artist payments, much less non-featured performer payments that still amount to nothing in this model. Widely implementing the system—even one of the versions of user-centric proposed by IMPALA or SoundCloud’s “fan powered” royalties--seems unlikely to happen at all due to the entrenched interests, commercial disruption and high transaction costs involved. Yet one record executive who is credited with designing Spotify’s original market-centric deals said recently, “These models need to evolve.”¹²⁷

A fairer remuneration

What remains is that performers transfer value to streaming services beyond that which is compensated by market centric royalty payments. It seems that the policy goals and principles of equitable remuneration are best fulfilled by a streaming remuneration in the nature of a

¹²⁷ See Peoples.

communication to the public royalty that is outside of any recording agreement, is not waivable by the performer and it is collected and distributed by performers' CMOs.

Beyond remuneration, some other features of the digital music marketplace need also a thorough assessment to check whether the social value provided by music is being sustained. Recommendation algorithms based on artificial intelligence derived from fans are increasingly used by music platforms.¹²⁸ Subscribers should have the right to have these mechanisms and their consequences clarified. Likewise, it is vital that the musical work remains the heart of the system. Creation shaped by authors, composers and performers must not be lowered to the rank of "product", in competition with "content" such as background music per kilometer possibly produced by computers,¹²⁹ or even non-audio services. Highlighting diversity is an objective which must also apply to streaming platforms that have become essential players in music distribution.¹³⁰

Lack of -transparent- information that can be used to track payments is also a too-usual feature of digital music services. Some data are not available, and others lack reliability. Resolving this transparency typically must be done on audit, which few can afford. Artists look at their royalty statement and literally have no idea what it means. Labels receive statements that potentially cover millions of transactions in a single accounting period due to the per-listen reporting of the market-centric model.

Competition between digital music platforms will probably lead to some differentiation, since if not the commoditization of music could also destroy the value proposition of platforms.¹³¹ Currently we are witnessing the early steps in this direction with interactions with live performances, podcasting, and ideas extracted from legacy conventional broadcasting. The existential danger for performers in these new business models derived from increased competition lies in further eroding the remuneration for artists to truly unsustainable levels. Therefore, remuneration models and regulations independent of technology and business choice will contribute to create a stable, predictable and levelled playing field for artists.

All in all, the goals of authors, composers and performers seeking fair remuneration for their work, have not yet been achieved despite their efforts. Performers rightly have the feeling that they are doing all the work of creating the music, recording the music, promoting the recordings and driving fans to the platforms—yet everyone seems to be getting rich¹³² except the performers. This is

¹²⁸ See generally, Hannah Sparks, *Spotify Hypes Algorithm that Knows When You're Sad or Mad*, NY Post (Jan. 29, 2021) available at <https://nypost.com/2021/01/29/spotify-making-algorithm-that-knows-when-youre-sad-angry/>; Jonathan Vanian, *How A.I. is playing a bigger role in music streaming than you ever imagined*, Fortune (Oct. 1, 2020); Tim Ingham, *Spotify's Scientist: Artificial Intelligence Should Be Embraced, Not Feared by the Music Business*, Music Business Worldwide (Jan. 22, 2018) available at <https://www.musicbusinessworldwide.com/spotify-scientist-artificial-intelligence-should-be-embraced-not-feared-by-the-music-business/>; Bernard Marr, *The Amazing Ways Spotify Uses Big Data, AI and Machine Learning to Drive Business Success*, Forbes (Oct. 30, 2017) available at <https://www.forbes.com/sites/bernardmarr/2017/10/30/the-amazing-ways-spotify-uses-big-data-ai-and-machine-learning-to-drive-business-success/?sh=7f2792324bd2>

¹²⁹ See, e.g., Laura Kobylecky, *Making Fake Art: "1984", the New Rembrandt and the "Fake Artist"*, Music Tech Policy (Aug. 4, 2017) (Comparison of Orwell's "versificator" to computer generated "art".)

¹³⁰ Also, there is not any silver-bullet remuneration model that can be considered as shield against all types of fraud present on the platforms. The best model is the continuous vigilance of the platform to detect fraudulent behaviors and the increase of transparency on the methods used to recommend music tracks and the remuneration information attached.

¹³¹ See James DeLong, *Google the Destroyer* (2008) available at http://www.ideasinactiontv.com/tcs_daily/2008/01/google-the-destroyer.html ("In most circumstances, the commoditizer's goal is restrained by knowledge that enough money must be left in the system to support the creation of the complements....Google is in a different position. Its major complements already exist, and it need not worry in the short term about continuing the flow.... So, on the whole, Google can continue to do well even if leaves providers of its complements gasping like fish on a beach.")

¹³² See, e.g., Nick Ames and Will Unwin, *Spotify's Daniel Ek joins forces with Arsenal legends in bid to buy club*, The Guardian (April 26, 2021) available at <https://www.theguardian.com/football/2021/apr/26/spotify-daniel-ek-joins-forces-with-arsenal-legends-in-bid-to-buy-club-henry-bergkamp-vieira-kroenkes> ("Ek, a 38-year-old Swedish

why a streaming remuneration payment by the services to performers is such a compelling solution to the systemic imbalance, even if it requires enhancements in the level of performance of CMOs in the effective tool of international reciprocity.

Proposals have been made for fairer remuneration and they must be assessed and tested. The good news is that streaming as the new paradigm in the digital music marketplace is rich in opportunities to find a better balance for all the stakeholders in the music industry. It should be possible to find the legal means to arrive at it.

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billionaire, had [used Twitter](#) to express interest in a deal on Friday evening, writing: 'As a kid growing up, I've cheered for Arsenal as long as I can remember. If KSE would like to sell Arsenal I'd be happy to throw my hat into the ring.'")

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ANNEX – QUESTIONNAIRE FOR ARTISTS

Dear artist/performer, on behalf of the World Intellectual Property Organization (WIPO) we are conducting a “Study on artists in the digital marketplace: economic and legal considerations”, that will be presented to all Member States at the next Standing Committee on Copyright and Related Rights .

For this report we are collecting evidence from the artists’/performers’ perspective on the current status of the music digital market through the following survey.

All responses will be treated with confidentiality and anonymously included in the report, unless you give us explicit permission to mention your name.

1. Could you share with us your artistic name?

We need to know who is answering in order for us to make sense of the survey statistics. There will be no mention of your (artistic) name in our final report unless you give us permission at the end of the survey. We guarantee the confidentiality of your answers.

2. Could you provide us with an email address?

We will send you your answers after you complete the survey, so you can check and/or modify them.

You will also receive a copy of the report when finished.

3. How would you describe your activity in music? Out of all the recordings you have been part of, which is/are the most recognized?

Examples of music profiles (non-exclusive): solo artist, featured artist, session musician, producer, songwriter, arranger, composer, teacher...

4. Are you the main artist or are you a member of a band?

A. Main artist

B. Member of a group/band

5. What music genre(s)/style(s) would best fit your music career?

We are aware it is difficult to accurately describe your music. We can give you examples of some of the main genres/styles, as categorized by Allmusic: African, Asian, Caribbean, hip-hop, classical, electronic, jazz, blues, pop, rock, other.

6. Do you have any higher education or vocational training in music?

A. Yes, I have higher education or vocational training in music

B. No, I do not have higher education nor vocational training in music

7. In which continents and countries have you mainly worked in the last ten years?

Examples: Africa, Asia, Europe, South America, USA, Oceania // United Kingdom, Nigeria, Australia, Argentina, China...

8. How has streaming affected your income over the last five years?

A. Increase in income

B. Decrease in income

C. Income has remained constant

9. Among the following, what has contributed to your annual income during 2020?

Choose as many as you like

A. Live performances

- B. Records/recordings sales
- C. Work at a studio
- D. Grants, scholarships or financial support
- E. Composing or arranging
- F. Teaching private music lessons
- G. Teaching regular music lessons
- H. Other

10. Thank you, you have selected the following as your income sources.

Could you please let us know what percentage do each of the previous sources hold in regard to your music income in 2020? (total sum of 100%)

11. How has the pandemic affected your income over the last twelve months?

- A. Increase in income
- B. Decrease in income
- C. Income has remained constant

12. What percentage out of your annual income comes from music?

13. What has been a major influence on your music career in the last twelve months?

14. What has been a negative influence on your music career in the last twelve months?

15. Following these introductory questions regarding your music career, we will now ask you three questions about your intellectual property rights.

- A. Do you know if there are intellectual property rights applicable to you in the digital music market? If so, which ones?
- B. How do you collect intellectual property rights in the digital market?
- C. Who do you receive your payments from?

17. Thank you, next two questions about your relationship with other agents in the digital music market.

- A. What intellectual property rights have you transferred to producers or labels in your contract? Answer only if you have signed a contract with a label.
- B. In relation to the previous question, what percentage of sales are you receiving because of this agreement? Answer only if you have signed a contract with a label.

18. Next two questions about the collection of intellectual property rights in the digital music market.

- A. Do you know which countries and platforms do the intellectual property rights you are collecting come from? If so, please specify which relevant countries and platforms.
- B. Could you tell us the average annual income you receive for intellectual property rights? Please specify the numbers for each digital platform.

19. This is the last set of questions, regarding information that digital music platforms provide you with.

- A. Do you know how many digital platforms your music is played at? How many times are your songs played annually at those platforms? If possible, please specify the number of times your songs are played at each platform. For example, annual number of plays at Spotify, annual number of plays at Apple Music...

- B. Do you receive an income from Management Entities because of intellectual property rights in the digital music market? If so, which one(s)?
- C. If your answer to the previous question was a yes, how long does it take for you to receive payment once your music is played?
- D. Do you receive enough information (transparent, clear and understandable) about the amount of money you get paid from digital music platforms? What do you think is missing?
20. Do you think streaming platforms pay main artists fairly?
- A. Yes
- B. No
21. Do you think streaming platforms pay musicians and performers fairly?
- A. Yes
- B. No
22. What do you think should change in the digital music market so that artists and performers receive fair compensation for their music's consumption?
23. Finally, two questions regarding how you prefer us to treat your contribution to the report.
- A. Do you give us permission to include your artistic name in the report and associate it with your answers? Unless with your permission, your answers will be treated with confidentiality and presented anonymously.
- B. Do you give us permission to mention your artistic name in the report as one of the artists/performers that has taken the survey? Unless with your permission, there will be no mention of your name on the list of artists/performers that have taken the survey, included in the report.

Thank you for your contribution.

You will receive an email with your answers and our contact information, in case you have any enquires.

ANNEX – ARTISTS INTERVIEWED / SURVEYED

Table 8. Artists interviewed / surveyed for this report (N=38)

	Africa, Asia, LatAm	EU	Australia, Canada, UK, US
Global artists ¹³³	Global artista#2 - latin	Global artist#1 – electronic	Right Said Fred
Niche – pop, rock, electronic	Los Andes - rock	Allova Niche artist#4 – rock Rufus T. Firefly	Niche artist#2 – indie Scanner
Niche – classical, folk, jazz, instrumental, ...	Edith WeUtonga Guillermo Bazzola	Buika Cuarteto Casals Niche artist#1 – classical Niche artist#5 - postclassical Pipo Romero	Niche artist#3 - classical
National artists	Keko Yunge National artist#2 - pop	Chenoa David Otero National artist#1 – pop	Tom Gray
Non-featured international ¹³⁴	JKEscorcia Mauricio Clavería Non-featured artist#1 – percussionist Non-featured artist#4 - flautist	Non-featured artist#2 - session musician Non-featured artist#5 – organ / choir conductor	Doug Emery Non-featured artist#3 – background vocalist
Independent artists	Independent artist#4 – latin Independent artist#5 - dance	Ainara LeGardon Independent artist#3 – indie electronic Nude	Independent artist#1 Independent artist#2

¹³³ Defined as at least five top-10 positions in home country official charts (Billboard, UK's Official Charts, etc.) spanning at least five years, plus at least three other countries official charts.

¹³⁴ They play for global artists or global emerging artists

ANNEX – PER STREAM RATES FOR SELECTED ARTISTS

Table 9. The maths of artists' royalties' calculation

Cases	Rufus T. Firefly - Magnolia	Zoe Keating	Independent artist	Independent artist	Independent artist	Artist	Artist
Platform	Spotify	Spotify	Amazon Unlimited	Amazon Cloud	Pandora	Spotify	Napster
Collection year	2017	2019	2019	2019	2019	2019	2019
Time span (years / months)	3	1	1	1	1	1	1
Country of origin	Spain	US	US	US	US	US	US
Number of plays	8,000,000	206,011	112,353	103,792	15,783		
Total payout	20,000.00 €	\$753.00	\$1,351.77	\$414.31	\$41.15		
Total per stream rate	0.00250 €	\$0.00366	\$0.01203	\$0.00399	\$0.00261		
Distribution/aggregator company share	30%						
Total artist per stream rate	0.00175 €	\$0.00366	\$0.01203	\$0.00399	\$0.00261	\$0.00235	\$0.00850
Total artist yearly payout	4,667 €	\$753.00	\$1,351.77	\$414.31	\$41.15		

Source: Own calculations from publicly available Internet information (Sanchez, 2018; Escribano, 2020) and own survey

Table 10. (cont) The maths of artists' royalties' calculation

Cases	Olivia Rodrigo – Drivers License	Allova	Disintegration State	Sony	Sony	Sony	Artist
Platform	YouTube	Spotify	Several platforms	Spotify Premium	YouTube	QQ Music	Spotify
Collection year	2021	2020	2019 – 2020	2020	2020	2020	2020
Time span (years / months)	1	1	1.75	1	1	1	1
Country of origin	US	Spain	UK	UK	UK	China	LatAm
Number of plays	581,000,000	4,000	869,708	1000	5,479	13,333	2,750,000
Total payout							
Total per stream rate							
Distribution/aggregator company / share							30%
Artist royalties deal with record label				25%	25%	25%	
Total artist per stream rate	0.00058 €	0.00375 €	0.00023 €	0.00117 €	0.00021 €	0.00009 €	0.00305
Total artist yearly payout	341,501 €	15 €	200.52 €	1.17 €	1.17 €	1.17 €	8,399.5 €

Source: Own calculations from publicly available Internet information (Escribano, 2020; How would you fix music streaming? (2021); Jones, 2021; UK Parliament (2021) and own survey

Table 11. (cont) The maths of artists' royalties' calculation

Cases	Independent artist	Keko Yunge	Beggars Group	WMG / UMG	JKEscorcia	Independent artist	Independent artist
Platform	Spotify	Spotify	Several platforms	Several platforms	Spotify	Spotify	Apple, Spotify, Amazon, Deezer, Sound Mouse
Collection year	2020	2020	2020	2020	2020	2020	2020
Time span (years / months)	1	1	1	1	1	1	1
Country of origin	Colombia	Chile	UK	UK	US / Colombia	Asia	UK
Number of plays	1,000,000	800,000	1,000,000	1,000,000	100,000	500,000	50,000,000
Total payout							
Total per stream rate							
Distribution/aggregator company / share	30%						
Artist royalties deal with record label	Independent	Independent	25%	20%	Independent	Independent	Independent
Total artist per stream rate	0.00384 €	0.00433 €	0.00232 €	0.00116 €	0.00340 €	0.00340	0.00092
Total artist yearly payout	3,384 €	3,467 €	2,322 €	1,161 €	339.5 €	1,701 €	46,017 €

Source: Own calculations from publicly available Internet information (Dredge, 2021) and own survey

Table 12. (cont) The maths of artists' royalties' calculation

Cases	Independent artist
Platform	Spotify
Collection year	2020
Time span (years / months)	1
Country of origin	Europe
Number of plays	1,200,000
Total payout	
Total per stream rate	
Distribution/aggregator company / share	30%
Artist royalties deal with record label	Independent
Total artist per stream rate	0.00336 €
Total artist yearly payout	4,030 €

Source: Own calculations from publicly available Internet information and own survey

ANNEX – SOME ARTISTS WHO HAVE EXPRESSED THEIR CONCERN ON CURRENT SITUATION OF DIGITAL MUSIC MARKETS

156 artists in the UK (<https://www.theguardian.com/music/2021/apr/20/paul-mccartney-kate-bush-law-change-music-streaming-payment>)

Alejandro Sanz (<https://www.vix.com/es/btg/musica/9898/taylor-swift-y-9-estrellas-de-la-musica-contra-los-servicios-de-streaming-como-spotify>)

Amee Mann (<https://www.vix.com/es/btg/musica/9898/taylor-swift-y-9-estrellas-de-la-musica-contra-los-servicios-de-streaming-como-spotify>)

Beck (<http://industriamusical.es/mas-de-180-artistas-firman-peticion->)

Belako (https://www.elconfidencial.com/cultura/2020-08-25/spotify-youtube-apple-amazon-streaming-musica_2723263/)

Bono, singer of U2 (<http://industriamusical.es/mas-de-180-artistas-firman-peticion->)

British Academy of Songwriters, Composers and Authors (<https://www.genbeta.com/multimedia/musicos-contra-spotify-las-m>)

Cala Vento (https://www.elconfidencial.com/cultura/2020-08-25/spotify-youtube-apple-amazon-streaming-musica_2723263/)

David Byrne (<https://www.genbeta.com/multimedia/musicos-contra-spotify-las-m>)

Gwen Stefani (<http://industriamusical.es/mas-de-180-artistas-firman-peticion->)

Jay Z (<http://www.t13.cl/noticia/tendencias/espectaculos/10-exitosos-a>)

Jordi Barnard (<https://www.mehaceruido.com/2020/08/no-soy-tu-algoritmo-plataformas-de-streaming-vs-artistas-independientes/>)

Kevin Kadane (<http://www.elconfidencial.com/tecnologia/2015-09-24/la-miseria->)

La Habitación Roja (<http://www.lainformacion.com/arte-cultura-y-espectaculos/musica>)

Lady Gaga (<http://industriamusical.es/mas-de-180-artistas-firman-peticion->)

Lori Meyers (<http://www.lainformacion.com/arte-cultura-y-espectaculos/musica>)

M Clan (https://www.huffingtonpost.es/2017/01/29/entrevista-mclan_n_13129566.html)

Manitas Nerviosas (<https://www.mehaceruido.com/2020/08/no-soy-tu-algoritmo-plataformas-de-streaming-vs-artistas-independientes/>)

Marc Gili and Belly Hernández, from Dorian (https://www.lainformacion.com/arte-cultura-y-espectaculos/los-musicos-espanoles-se-cansan-de-spotify-es-un-parche-a-la-pirateria_XbwrmnisDBp0MlzS06Gh6/)

Metallica (<https://www.vix.com/es/btg/musica/9898/taylor-swift-y-9-estrellas-de-la-musica-contra-los-servicios-de-streaming-como-spotify>)

Molko, from Placebo (<https://www.genbeta.com/multimedia/musicos-contra-spotify-las-mayores-rajadas-contra-la-tarifa-plana>)

Mónica Vázquez from Klein (https://www.lainformacion.com/arte-cultura-y-espectaculos/los-musicos-espanoles-se-cansan-de-spotify-es-un-parche-a-la-pirateria-2_0vzmwrkvb9vpi1mnno5t7/)

Nadine Shah (<https://www.theguardian.com/commentisfree/2020/dec/03/music-streaming-major-labels-musicians-uk-government>)

Nigel Goldrich (<https://www.genbeta.com/multimedia/musicos-contra-spotify-las-mayores-rajadas-contra-la-tarifa-plana>)

Patrick Carney, drummer from Black Keys (<https://www.genbeta.com/multimedia/musicos-contra-spotify-las-mayores-rajadas-contra-la-tarifa-plana>)

¹ The information provided in this study is the sole responsibility of its authors. The study is not intended to reflect the views of the Member States or the WIPO Secretariat

Paul McCartney (<https://industriamusical.es/mas-de-180-artistas-firman-peticion-en-contradel-dmca/>)

Pink Floyd (<https://www.vix.com/es/btg/musica/9898/taylor-swift-y-9-estrellas-de-la-musica-contralos-servicios-de-streaming-como-spotify>)

Prince (<https://www.t13.cl/noticia/tendencias/espectaculos/10-exitosos-artistas-que-se-rebelaron-contraspotify>)

Rihanna (<https://www.vix.com/es/btg/musica/9898/taylor-swift-y-9-estrellas-de-la-musica-contralos-servicios-de-streaming-como-spotify>)

Rubén Pozo, from Pereza (<https://www.leonoticias.com/culturas/musica/queda-dinero-streaming-20201122094327-ntrc.html?ref=https%3A%2F%2Fwww.google.com%2F>)

Rufus T. Firefly (https://www.elconfidencial.com/cultura/2020-08-25/spotify-youtube-apple-amazon-streaming-musica_2723263/)

Seward (https://www.elconfidencial.com/cultura/2020-08-25/spotify-youtube-apple-amazon-streaming-musica_2723263/)

Swan Fyahboy (<http://industriamusical.es/hablamos-con-swan-fyahbwoy-sobre-aut>)

Tachenko (<http://www.lainformacion.com/arte-cultura-y-espectaculos/musica>)

Taylor Swift (<http://industriamusical.es/mas-de-180-artistas-firman-peticion->)

Thom Yorke, from Radiohead (<https://www.genbeta.com/multimedia/musicos-contraspotify-las-m>)

Vega (<https://www.leonoticias.com/culturas/musica/queda-dinero-streaming-20201122094327-ntrc.html?ref=https%3A%2F%2Fwww.google.com%2F>)

Zoe Keating (<http://industriamusical.es/zoe-keating-artista-spotify-ingresos>)

ANNEX – DIFFERENT LEGAL SYSTEMS REGARDING THE MAKING AVAILABLE RIGHT FOR PERFORMERS

In the EU, there are different legal systems established by certain national legislations concerning the right of making available to the public for implementing the Directive 2001/29/CE.

- Spain

i) The relevant Law

The Directive 2001/29 on the harmonization of certain aspects of copyright and related rights in the information society was implemented in the Spanish Law by means of the Law 23/2006 dated on July 7 and it resulted in a new wording of article 108 of the Consolidated Text of the Intellectual Property Law of Spain (hereinafter TRLPI), through sections 1, 2 and 3 as follows:

- Article 108.1 recognizes an exclusive right in favor of performers for making their fixed performances available to the public in the manner set out in article 20.2 i).
- Article 108.2 establishes an assumption of assignment of this exclusive right in favor of the phonogram producer or audiovisual producer when both the performer and the producer enter into a contract in this regard.
- Article 108.3 guarantees, when the performer has transferred this exclusive right to the producer, an unwaivable right to equitable remuneration. This remuneration lacks condition of exclusive right, i.e., it does not lie in authorizing or prohibiting. Performer is just granted with a credit right to obtain an equitable remuneration by those who carry out making available act (article 108.3). In addition, under article 108.6, this right shall be entrusted to collective management societies, i.e., it cannot be managed by right holders individually but on collective management basis.

Therefore, when performers sign individually or collectively a contract with a phonogram or audiovisual producer, regarding the production of phonograms and audiovisual recordings, it will be assumed (unless there is an agreement in a contrary sense), that the performer has assigned their making available right. This transfer does not affect the remuneration right subject to compulsory collective management.

This remuneration right shall be paid by those who carry out making available acts according to article 108.3 of the Spanish Law and is managed by the relevant collecting societies under article 108.6 of the Law.

Link to the Law:

<https://wipo.lex.wipo.int/es/text/577658>

ii) The collective management of the making available right in Spain

According to article 108.6 TRLPI, this right is subject to compulsory collective management. The relevant collecting management societies in charge of administering performers' right are AIE (regarding musical performers) and AISGE (regarding actors and dancers).

The CMOs have reached different agreements with internet service provider which make available both phonograms or audiovisual recording to the public.

<https://www.aie.es/wp-content/uploads/Memoria-2019.pdf>

<https://www.aie.es/wp-content/uploads/INFORME-DE-TRANSPARENCIA-Y-CCAA-2019-DEFINITIVO.pdf>

<https://www.aisge.es/media/uploads/informes%20y%20cuentas/Informe%20anual%20de%20transparencia%202019.pdf>

- Portugal

i) The relevant Law

Directive 2001/29 was implemented in the Portugal by means of the Law 50/2004 of Copyright and related Rights in the Information Society of August 24. This law amended, among others, the article 178 of the Code of Copyright and related Right enacted on September 17, 1995.

The article 178 of the Law foresees the different economic rights in favor of performers. A letter d) was introduced in the first section of the article with the aim of laying down the making available right of performers: d) A colocação à disposição do público, da sua prestação, por fio ou sem fio, por forma que seja acessível a qualquer pessoa, a partir do local e no momento por ela escolhido.

Thereby, the law implemented the making available right as an exclusive right granting the right to authorize or prohibit. However, a former section 4 was added to article 178 in order to lay down a compulsory collective management of this right: 4 – O direito previsto na alínea d) do n.º 1 só poderá ser exercido por uma entidade de gestão colectiva de direitos dos artistas, que se presumirá mandatada para gerir os direitos de todos os titulares, incluindo os que nela não se encontrem inscritos, assegurando-se que, sempre que estes direitos forem geridos por mais que uma entidade de gestão, o titular possa decidir junto de qual dessas entidades deve reclamar os seus direitos.

We can note that the stronger protection of the making available right in favor of performers derived from the mean of managing it. The Portuguese legislator took into account that the exclusive right only had an effective result provided that it is administrated in a collective way.

To sum up, the making available right held by performers was set up as an exclusive right subject to compulsory collective management.

However, said section 4 of article 178 was amended by Lei n.º 32/2015, dated 24 April in order to exclude the compulsory collective management of the exclusive right. Consequently, the wording remains as follows: - O direito previsto na alínea d) do n.º 1 pode ser exercido por uma entidade de gestão coletiva de direitos dos artistas, assegurando-se que, sempre que estes direitos forem geridos por mais que uma entidade de gestão, o titular possa decidir junto de qual dessas entidades deve reclamar os seus direitos.

Link to the Law:

<https://wipolex.wipo.int/es/text/451731>

ii) The collective management of the making available right in Portugal

GDA is the collective management organization administering the making available right, but it is not effective because requires the mandate from the performers who (most of them) will have transferred the right to the produces previously.

• Hungary

The current Law that entered into force on September 1, 1999, Act No. LXXVI of 1999 on Copyright, aimed at implementing the international obligations adopted by Hungary such as the 1996 WIPO Treaties. The making available right was foreseen in respect of all right holders.

The first section of Article 73 of the Act on Copyright established that the performer's consent shall be sought for making his performance available to the public by cable or any other device or in any other manner so that the members of the public can choose the place and time of the availability individually . Additionally, this right was established as an exclusive right.

However, this Law provided a tool of protection tending to promote the collective management of the right granted to performers to the detriment of an individual administration of these rights. Article 91 of the Copyright Act stipulates an "opt-out" system (or "extended collective administration") of collective management. The principles of this system are based on an assumption of collective management of intellectual property rights. Therefore, by virtue of the first section of the article 91, collective management societies administrate the intellectual property rights granted by the Copyright Act.

However, the second section of this article establishes that the provision of the first section shall not apply if a rightsholder covered by the society's collective administration of rights objects

beforehand in a written declaration to the authorization of the use of his works or performances of neighbouring rights within the framework of collective administration of rights. The organization performing collective administration of rights shall proceed according to such a declaration, if it is made more than three months before the end of the calendar year.

Link to the Law:

<https://www.wipo.int/edocs/lexdocs/laws/en/hu/hu035en.pdf>

iii) The collective management of the making available right in Hungary

The Hungarian collective management organization administering performers' rights is EJI. Nonetheless, according to EJI webpage, the enforcement of the making available right is a most difficult task as many of the music platforms claim to have already paid performers through various deals with record companies, despite such deals clearly being in contravention of the protection performers enjoy under Hungarian law. EJI now tries to enforce this most important right of performers by way of litigation.

https://www.eji.hu/cikk/further_useful_information

• France

i) The relevant Law and agreement

On October 2, 2015, the main stakeholders related to the music industry in France signed a memorandum of agreement in favor of the fair development of the online music. The Ministry of Culture organized the mediation among all parties: online music platforms, producers of recordings and live performances, authors and performers. The agreement established a series of commitments in order to achieve greater transparency regarding the income from online music and a more equitable distribution among the different stakeholders and to support the development of the legal music offering. The agreement also foresaw the establishment of a "Music Economy Observatory" and a proposal about a "Code of practice" for promoting Good contractual practices.

Although one of the main goals of the memorandum was the "Objective number 5 GUARANTEE FAIR REMUNERATION FOR ARTISTS", nowadays, the agreement has not reached its main goals and, consequently, performers continue lacking a fair remuneration from the users which make available to the public phonograms and audiovisual recordings.

Link to the Memorandum of the agreement:

<https://www.culture.gouv.fr/content/download/130930/file/memorandum-of-understanding-for-the-equitable-development-of-music-online.pdf?inLanguage=fr-FR>

Moreover, the French Law (Code de la Propriété Intellectuelle), does not establish a remuneration right for the making available right, it just states exclusive rights in article L212-3 (in fact there is not an specific reference to the making available right).

Link to the Law: <https://www.wipo.int/edocs/lexdocs/laws/fr/fr/fr465fr.pdf>

ii) The collective management of the making available right in France

Regarding the management of the making available right, there are collective management entities administering performers' rights: ADAM and SPEDIDAM. However, the failure of the 2015 agreement and the lack of a remuneration right involves the absence of a real equitable remuneration in favor of performers in the digital scope. As it can be seen in both webpages, CMOs are claiming an effective remuneration in relation to the making available act of exploitation through online platforms.

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