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Royalty Inequity: Why Music Streaming Services Should Switch to a Per-Subscriber Model

JOSEPH DIMONT*

Digital music streaming services, like Spotify, Apple Music, and Tidal, currently distribute royalties based on a per-stream model, known as service-centric licensing, while at the same time receive income through subscription fees and advertising revenue. This results in a cross-subsidization between low streaming users and high streaming users, streaming fraud, and a fundamental inequity between the number of subscribers an artist may attract to a service compared to how much they are compensated. Instead, streaming services should distribute royalties by taking each user's subscription fee and dividing it pro rata based on what the specific user is listening to—known as a subscriber-share model—or user-centric licensing. Many scholars have focused on creating a minimum royalty rate; however, this does little to solve the inherent inequity.

Either the music industry should self-regulate by switching to a subscriber-centric model, or the Copyright Royalty Board should make the switch for them. Under a subscriber-centric model, royalty distribution would more accurately reward artists for generating fans, not streams. Each month, the streaming service should take each subscription fee and apportion it out based on the percentages of artists that unique listeners choose to listen to during the subscription period. This change could come through the industry itself, litigation, or regulation, but will likely face resistance from the major record labels and the services themselves.

* J.D. Candidate 2018, University of California, Hastings College of the Law. I would like to thank Sharky Laguana for writing the blog post that inspired this Note; I hope I was able to add to the conversation in a meaningful way. I would also like to thank David Kostiner and Vivek Sridharan for their support in both sparking my interest in this issue and for answering my many questions. I would also like to thank Professor Ben Depoorter for his guidance and mentorship, even if this is not quite the paper he would have written.

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INTRODUCTION: THE RISE OF THE DIGITAL STREAMING SERVICE

Over the past decade, the rise of digital music streaming services has changed the way we listen to music as well as the shape of the music industry. With CD sales decreasing every year, more and more people are choosing to listen to music online, on their computers, or on their portable devices.¹ A recent study showed that the video-sharing website YouTube is the platform where the majority of teenagers listen to music.² The general trend shows a departure from owning CDs, or even digital

1. See Peter Kafka, *The Music Business Is Growing Again—Really Growing—and It's Because of Streaming*, RECODE (Sept. 20, 2017, 1:00 PM), <https://www.recode.net/2017/9/20/16339484/music-streaming-riaa-spotify-apple-music-youtube-2017-revenue-subscription>.

2. Frederic Lardinois, *Nielsen: More Teens Now Listen to Music Through YouTube than Any Other Source*, TECHCRUNCH (Aug. 14, 2012), <https://techcrunch.com/2012/08/14/youtube-is-for-music>.

downloads, and instead either subscribing to a streaming service or using “freemium” services where in exchange for not paying for the service, the user must listen to advertisements between songs and has limited features.³ As a result, more and more digital music streaming services are becoming available on the market.⁴ As of 2016, streaming amounted for 51.4% of music revenue in the United States.⁵

Currently there is a variety of different digital music streaming services, including: Spotify, Apple Music, Tidal, Deezer, Amazon Music, Google Play Music, and most recently, Pandora Premium. Spotify leads the pack in terms of subscribers, users, and controversies. Spotify was founded in Sweden in 2006 and, as of June 2017, has over 140 million users and over 60 million paying subscribers, a number that has more than doubled since 2015.⁶ It offers both a subscription service for \$9.99 per month (Spotify Premium) and a “freemium” service where advertising occurs between songs.⁷ Users of the service can listen to music from thousands of artists. Additionally, users can create playlists, share music with friends, follow their favorite artists, and download music to listen to offline on their mobile devices along with many other features.

Spotify, like many other streaming services, makes money through both advertising and a subscription fee.⁸ It is estimated that the subscription fee income accounts for roughly ninety percent of Spotify’s overall revenue.⁹ Other digital music streaming services, like Apple Music and Tidal, offer similar features and music selections, albeit each having its own unique selling features and exclusive content. Furthermore, each streaming service has negotiated its own licenses and

3. *Everyone Listens to Music, But How We Listen Is Changing*, NIELSEN (Jan. 22, 2015), <http://www.nielsen.com/us/en/insights/news/2015/everyone-listens-to-music-but-how-we-listen-is-changing.html>.

4. See Micah Singleton, *Pandora Premium: The Original Music Streaming Giant Is Ready for Prime Time*, VERGE (Mar. 13, 2017, 9:00 AM), <http://www.theverge.com/2017/3/13/14889122/pandora-premium-music-streaming-service-preview-interview>.

5. JOSHUA P. FRIEDLANDER, RIAA, NEWS AND NOTES ON 2016 RIAA SHIPMENT AND REVENUE STATISTICS (2017), <http://www.riaa.com/wp-content/uploads/2017/03/RIAA-2016-Year-End-News-Notes.pdf>.

6. Brooke Streatfield, *Rise of a Tech Giant: The History of Spotify*, TELEGRAPH (Dec. 8, 2015, 7:00 AM), <http://www.telegraph.co.uk/technology/technology-video/12033877/the-history-of-spotify.html>; Brian Benedik, *140 Million Strong*, SPOTIFY (June 15, 2017), <https://spotifyforbrands.com/us/2017/06/15/140-million-strong/>; Lizzie Plaugic, *Spotify Has More than 60 Million Subscribers Now*, VERGE (Jul. 31, 2017, 2:45 PM), <https://www.theverge.com/2017/7/31/16070982/spotify-60-million-subscribers-july-2017>.

7. Kathleen Wong, *How Does Spotify Make Money? Here’s the Business Model Behind the Streaming Service*, MIC (Mar. 10, 2016), <https://mic.com/articles/137400/how-does-spotify-make-money-here-s-the-business-model-behind-the-streaming-service#.pIygg9Ntq0>; Spotify also offers a student discount subscription and a family plan subscription.

8. *Id.*

9. Paul Resnikoff, *90% of Spotify’s Revenue Comes from 30% of Its Users*, DIGITAL MUSIC NEWS (May 30, 2016), <http://www.digitalmusicnews.com/2016/05/30/90-pct-spotify-revenue-30-pct-users/>.

royalty shares with the music industry. While the value of the music industry had been in decline after CD sales peaked in the late 1990s, music streaming services are giving record labels and artists new, and potentially lucrative, revenue streams.¹⁰ While the music industry is still half the size that it was pre-millennium, the future is bright as streaming services have generated the first uptick in revenue in over a decade.¹¹

A. PROBLEMS WITH ROYALTY DISTRIBUTION

While the rise of digital music streaming services has changed the landscape of music distribution, the law has not kept up at the same pace. This has led to issues and controversies surrounding royalties for use of the copyrighted musical works. Furthermore, the multiple rights that exist within one song complicate the matter. The issue of whether rights holders have been appropriately compensated for the use of their creation(s) has been discussed by many, with suggestions of statutory regimes to protect songwriters and performers.¹² However, these commentators tend to focus too heavily on the *value* of the royalty that artists receive and neglect another vital issue: the *method* by which royalties are tallied and distributed. Putting aside streaming services, or the aspects of the services, that generate income wholly through advertising, when analyzing royalty distribution for a subscriber-based service a simple flaw arises: royalties are paid per-stream, but users pay a flat subscription. This results in a cross-subsidization from the low-streaming user to the heavy-streaming user.

The development of listeners subscribing to *access* music, instead of *owning* music, has displaced traditional concepts of how artists and songwriters should be paid for their creations. Some in the industry have noticed that when royalties are paid out on a per-stream basis, such distribution does not necessarily reflect how many unique subscribers are listening to an artist.¹³ Seeing as digital music streaming services rely primarily on subscribers for revenue, some argue that royalty distribution should be based on which artists subscribers listen to, and not simply the number of times an artist is streamed overall.¹⁴ A digital

10. Kafka, *supra* note 1.

11. Cary Sherman, *2016: A Year of Progress for Music*, MEDIUM (Mar. 30, 2017), <https://medium.com/@RIAA/2016-a-year-of-progress-for-music-4e9b77022635>.

12. See, e.g., John Eric Seay, Comment, *Legislative Strategies for Enabling the Success of Online Music Purveyors*, 17 UCLA ENT. L. REV. 163 (2010); Stasha Loeza, Note, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes*, 31 BERKELEY TECH. L.J. 725 (2016); Jake H. Richardson V, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Services Can Save the Music Industry* (Nov. 5, 2014) <https://ssrn.com/abstract=2557709> (unpublished manuscript).

13. Sharky Laguana, *How to Make Streaming Royalties Fair(er)*, MEDIUM: CUEPOINT (Nov. 17, 2014), <https://medium.com/cuepoint/how-to-make-streaming-royalties-fair-er-8b38cd862f66#.z81v14psz>.

14. *Id.*

streaming service receives more income from an artist that is able to attract multiple fans to subscribe. Therefore, a question remains as to why it would pay artists based on the number of streams—a figure that does not necessarily reflect the number of unique subscribers. It is this disconnect between streaming, subscribing, and royalty sharing that results in independent (“indie”) artists and record labels, songwriters, consumers, and the digital streaming services themselves losing valuable revenue. Indeed, valuing a copyrighted work on the number of times it gets played rather than the number of people that play it is an anomaly in copyright licensing. Stephen King does not get paid every time someone reads *It* and Stephen Spielberg does not get paid every time someone watches *ET* on DVD, yet Kanye West gets paid every time someone listens to “Stronger” on Spotify. Digital music streaming currently rewards the copyright holder not for mass appeal, but for repeatability.

The digital music streaming industry is becoming one of the largest platforms of music distribution and could disrupt the entire concept of music ownership as we know it. Therefore, a need exists for some type of regulation to protect musicians, songwriters, and any other copyright holders in an industry where a few key players receive a disproportionate amount of the income. In fact, many artists and songwriters openly admit that they *have* to engage with digital streaming services to compete in the market for music.¹⁵

To begin to solve the problem, one must first understand what royalties streaming services must pay and why they use a service-centric licensing system. Part I focuses on the different licenses required to operate a music streaming service. Part II explains how the current royalty distribution system works and provides examples of how the current system results in inequitable outcomes. Part III proposes the new subscriber-centric model and explains the benefits of that system. Finally, Part IV explores the various hurdles to implementing the subscriber-centric model and suggests how it might be done.

I. STREAMING SERVICES’ LICENSING REQUIREMENTS

In the United States, musical works are protected by federal copyright law.¹⁶ In fact, a musical work is protected by two distinct rights: one in the composition (the notes and lyrics), sometimes referred to as the publishing, and another in the sound recording itself, sometimes referred to as the master.¹⁷ There is a difference in the scope of the

15. Zach Schonfeld, *What Do Indie Musicians Really Think About Music Streaming?*, NEWSWEEK (July 23, 2015, 8:49 AM), <http://www.newsweek.com/ten-indie-musicians-weigh-music-streaming-debate-355298>.

16. 17 U.S.C § 102(a) (2012).

17. See U.S. COPYRIGHT OFF., COPYRIGHT REGISTRATION OF MUSICAL COMPOSITIONS AND SOUND

exclusive rights given to the owner of a composition versus the owner of a sound recording. Traditionally, the owner of the composition had the exclusive right of public performance, whereas the owner of a sound recording did not.¹⁸ There are also compulsory licensing schemes—especially involving the composition—to facilitate the reproduction and distribution of music.¹⁹ The main benefit of the compulsory scheme is that it is compulsory and contains statutory minimum and maximum rates, whereas the sound recording requires negotiation. As will become apparent, the differences in rights between the composition and sound recording have shaped the structure of the music industry and have made licensing for the digital streaming age both difficult and expensive.

A. THE COMPOSITION

1. Mechanical Licenses

Mechanical licenses for compositions are set by the Copyright Royalty judges that sit on the Copyright Royalty Board (“CRB”) in Washington, D.C.²⁰ While the CRB prefers that the interested parties negotiate between themselves to come to a settlement, if a license cannot be reached, the board will set a royalty rate after a hearing.²¹ Once the rate has been set, every five years the CRB will meet again to determine whether the rate should be adjusted.²²

One of the first issues that digital music streaming services had to resolve was whether a stream of a song was considered either a reproduction, which would require a mechanical license for the composition, or only a public performance, which would require its own license.²³ Publishers argued that interactive transmissions, like Spotify, required a mechanical license as well as a public performance license.²⁴ In making this argument, publishers pointed to a provision of the Digital Performance Right in Sound Recording Act of 1995 concerning mechanical royalties, which states “[t]he provisions of [] section [115] concerning digital phonorecord deliveries shall not apply to any exempt transmissions or retransmissions under section 114(d)(1).”²⁵ The

RECORDINGS (2012).

18. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 346 (9th ed. 2015).

19. See *id.* at 228–29.

20. BRIAN T. YEH, CONG. RES. SERV., COPYRIGHT LICENSING IN MUSIC DISTRIBUTION, REPRODUCTION, AND PUBLIC PERFORMANCE 4 (2015), <https://fas.org/sgp/crs/misc/RL33631.pdf>.

21. *Id.*

22. *Id.*

23. AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 755 (4th ed. 2010).

24. *Id.*

25. 17 U.S.C. § 115(c)(3)(K) (2012).

publishers argued that because interactive services were not exempt under § 114(d)(1), a mechanical royalty was required.²⁶

In the digital streaming context, after years of petitioning the U.S. Copyright Office, the Record Industry Association of America (“RIAA”) and the National Music Publishers Association (“NMPA”),²⁷ came to an agreement to provide mechanical licenses for reproduction rights for digital streaming services.²⁸ The statutory rate for services that conduct limited downloads and on-demand streams is now organized by the Harry Fox Agency (“HFA”)—a licensing non-profit that was previously owned by the NMPA. In brief, the formula for mechanical licensing in a streaming service involves calculating a payable royalty pool devised by the better of three options and dividing the pool based on the number of streams.²⁹ This rate is currently in front of the CRB once more in 2017 and with the aim to be settled by the end of the year.³⁰

Despite this system, Spotify ran into trouble when it failed to pay mechanical licenses for its catalogue due to an issue regarding matching songs to their copyright holders based on data from the HFA. In 2015, David Lowery—a law professor, and lead singer of the band Cracker—hit Spotify with a class action lawsuit for the failure to pay royalties.³¹ Shortly afterward, in early 2016, Spotify was hit by another class action suit led by the singer-songwriter Melissa Ferrick.³² These two suits were eventually combined into one class action seeking \$200 million in damages.³³

This occurred simultaneously while the NMPA and Spotify were engaged in settlement negotiations over unpaid royalties.³⁴ In 2016, the NMPA successfully negotiated a settlement.³⁵ Although the exact size of

26. KOHN & KOHN, *supra* note 23, at 756.

27. Both organizations are made up of the major record labels and publishers respectively.

28. KOHN, *supra* note 23, at 759.

29. For a more detailed analysis, see *Rate Charts*, HARRY FOX AGENCY (Oct. 26, 2017), https://www.harryfox.com/find_out/rate_charts.html.

30. Ed Christman, *4,000 Songwriters Sign NMPA Petition as Copyright Royalty Rate Hearings Heat Up*, BILLBOARD (Mar. 9, 2017, 5:48 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/7718025/4000-songwriters-sign-nmpa-petition-as-copyright>.

31. Ed Christman, *Spotify Hit with \$150 Million Class Action over Unpaid Royalties*, BILLBOARD (Dec. 29, 2015), <http://www.billboard.com/articles/business/6828092/spotify-class-action-royalties-david-lowery-cracker-150-million> [hereinafter Christman, *Spotify Hit with \$150 Million*]; Ed Christman, *Spotify Hit with Second Lawsuit over Copyright Infringement*, BILLBOARD (Jan. 9, 2016), <http://www.billboard.com/articles/business/6836439/spotify-hit-with-second-copyright-infringement-lawsuit-melissa-merrick-david-lowery> [hereinafter Christman, *Spotify Hit with Second Lawsuit*].

32. Christman, *Spotify Hit with \$150 Million*, *supra* note 31; Christman, *Spotify Hit with Second Lawsuit*, *supra* note 31.

33. Andrew Flanagan, *David Lowery and Melissa Ferrick’s Lawsuits Against Spotify Get Combined*, BILLBOARD (May 24, 2016), <http://www.billboard.com/articles/business/7385072/david-lowery-melissa-ferrick-spotify-lawsuits-combined>.

34. *Id.*

35. Paul Resnikoff, *Exclusive: Spotify, Major Songwriters Preparing a Massive Out-of-Court*

the settlement is confidential, a purportedly leaked copy of the settlement indicated a penalty of \$5 million,³⁶ and a total pool of \$25 million in back paid royalties.³⁷ Furthermore, the settlement indicated that Spotify was obligated to calculate and report its streaming data and to distribute royalties based on the percentage a publisher has of the total streams.³⁸ However, some independent writers were upset that, while Spotify may have appeased the major publishers, smaller songwriters were not enjoying the spoils.³⁹

2. Public Performances

Besides the mechanical license, digital music streaming services are also required to pay for the public performances of compositions.⁴⁰ Every time a song is played in public—whether it is on the radio, in the grocery store, at a restaurant, or in an elevator—someone should be paying for the public performance rights.⁴¹ This includes streaming the song in public.⁴²

Instead of every restaurant owner having to get a license from every single songwriter, the writers and publishers organized themselves into performing rights societies (“PROs”) to offer blanket licenses to all of the songs under their banner.⁴³ The three largest PROs in the United States are the American Society of Composers, Authors and Publishers (“ASCAP”), Broadcast Music, Incorporated (“BMI”), and SESAC.⁴⁴ They operate by collecting the money from blanket licenses and then distributing royalties based on which songs have been played the most.⁴⁵ Traditionally this was done by radio monitoring and television cue sheets, but now the data is generally more nuanced, albeit slightly burdensome.⁴⁶ If the PRO and the licensee cannot agree on a rate for the

Settlement, DIGITAL MUSIC NEWS (Mar. 7, 2016), <http://www.digitalmusicnews.com/2016/03/07/spotify-major-songwriters-preparing-massive-out-of-court-settlement/>.

36. Paul Resnikoff, *Exclusive: This Is the Contract Songwriters Are Signing with Spotify*, DIGITAL MUSIC NEWS (Apr. 27, 2016), <http://www.digitalmusicnews.com/2016/04/27/exclusive-spotify-establishing-direct-publisher-contracts-to-solve-mechanicals-issues/>.

37. *Id.*

38. *Id.*

39. See Daniel Siegal, *Rocker Says Spotify Tricking Possible Class in \$150M IP Row*, LAW360 (Apr. 19, 2016), https://www.law360.com/articles/786018/rocker-says-spotify-tricking-possible-class-in-150m-ip-row?article_related_content=1.

40. See KOHN & KOHN, *supra* note 23, at 1270.

41. KOHN & KOHN, *supra* note 23, at 1267.

42. KOHN & KOHN, *supra* note 23, at 1267.

43. PASSMAN, *supra* note 18, at 241–42.

44. PASSMAN, *supra* note 18, at 241–42; SESAC was formerly known as the Society of European Stage Authors and Composers.

45. PASSMAN, *supra* note 18, at 243.

46. PASSMAN, *supra* note 18, at 243; see ASCAP Announces U.S. Licensing Agreement with Spotify, ASCAP (July 14, 2011), https://www.ascap.com/press/2011/0714_LicensingAgreement-Spotify.aspx.

license, they must take the dispute to federal rate court.⁴⁷ In setting the fee, “[t]he rate court is responsible for establishing the fair market value of the music rights, in other words, the price that a willing buyer and a willing seller would agree to in an arm’s length transaction.”⁴⁸

Unhappy with the rate that digital streaming services had received, one of the major publishers, Sony/ATV, tried to partially withdraw its “digital rights” from BMI to negotiate a better deal.⁴⁹ Pandora, at the time an entirely non-interactive service, took Sony to court claiming that to do so was illegal under consent decrees that both ASCAP and BMI are subject to due to antitrust controversies in the mid-twentieth century.⁵⁰ The district court agreed with Pandora, and the Second Circuit affirmed.⁵¹ The PROs and publishers then went directly to the Department of Justice to petition a change to the consent decrees to allow partial withdrawal.⁵² Unfortunately for the record labels, after years of review, the Department did not change its current interpretation and continued to prohibit partial withdrawal.⁵³ Though the PROs are still contesting the decision, to date, it has not been overturned on appeal.⁵⁴

B. THE SOUND RECORDING

As discussed earlier, mechanical licenses for interactive services are determined using a complicated formula. While this benefits publishers and writers, the record labels, who were no longer selling millions of CDs every year, still faced a problem in the U.S. where copyright law did not protect public performances of sound recordings. Back when the public still purchased a high number of CDs, cassettes, and vinyl, the lack of a performance right in a sound recording was not as much of an issue because artists and labels were making money from selling physical copies that they owned. However, in the streaming age, the master is not physically copied as many times (nor digitally downloaded), meaning that artists and labels were, and still are, at risk of losing considerable revenue. Furthermore, copyright owners were worried about the potential for perfect reproduction of digital transmissions, as opposed to

47. *E.g.*, *United States v. Broad. Music, Inc.*, 426 F.3d 91, 95 (2d Cir. 2005).

48. *Id.* (internal quotations and citation omitted).

49. Ryan Faughnder, *Sony/ATV Threatens to Withdraw from ASCAP and BMI*, L.A. TIMES (July 11, 2014, 12:28 PM), <http://www.latimes.com/entertainment/envelope/cotown/la-sony-atv-ascap-bmi-20140711-story.html>.

50. *Id.*

51. *See generally In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 345 (S.D.N.Y. 2014), *aff'd*, 785 F.3d 73 (2d Cir. 2015).

52. U.S. DEP’T OF JUSTICE, STATEMENT OF THE DEPARTMENT OF JUSTICE ON THE CLOSING OF THE ANTITRUST DIVISION’S REVIEW OF THE ASCAP AND BMI CONSENT DECREES (2016).

53. *Id.*

54. *ASCAP and BMI Join Forces to Fight the Department of Justice’s Interpretation of Their Consent Decrees*, ASCAP (Aug. 4, 2016), <https://www.ascap.com/press/2016/08-04-ascap-bmi-join-forces-to-fight-doj>.

recording traditional radio. As a result, legislation was passed to relieve those fears and a limited public performance right in the digital performance of a sound recording was born.⁵⁵

In 1995, the Digital Performance Right in Sound Recordings Act (“DPRA”) was enacted to create three classes of digital streaming services with a different scope of rights for each.⁵⁶ The three categories are: (a) interactive services (for example, Spotify); (b) non-interactive subscription services; and (c) non-interactive non-subscription digital audio services (for example, Pandora Radio).⁵⁷ In 1998, the Digital Millennium Copyright Act (“DMCA”) expanded the definitions of interactive and non-interactive services, catching a few types of services that were operating outside of these definitions.⁵⁸ Furthermore, the DMCA set out a two-tier system between types of services that could obtain compulsory licenses for streaming music and those that could not.⁵⁹

An interactive service is defined as “one that enables a member of the public to receive a transmission of a program . . . on request[.]”⁶⁰ Digital music streaming services like Spotify, Apple Music, and Tidal, which allow the user to pick specific songs, all fall into the interactive services category. Non-interactive services, like Pandora Radio, allow users to pick an artist or genre, but the users do not select the individual songs. Users can skip some songs, but if they attempt to skip too many songs they are forced to listen to the last song. Unlike Pandora Radio, which pays compulsory royalties to the independent collection service SoundExchange, Spotify and other interactive services must negotiate with the rights holders of the sound recordings, i.e. the record labels and artists themselves.⁶¹ This has resulted in a service-centric licensing system, a pay-per-stream model, in which artists and labels license their sound recordings in exchange for a royalty every time the song is played. This system is fundamentally flawed.

II. THE ROYALTY DISTRIBUTION SYSTEM

A. SERVICE-CENTRIC LICENSING—THE PAY-PER-STREAM MODEL

While navigating the minefield of the copyright system and the necessary licenses required, digital music streaming services have made an error in how they distribute royalties. The disastrous flaw is that

55. See KOHN & KOHN, *supra* note 23, at 1468.

56. *Bonneville Int’l Corp. v. Peters*, 153 F. Supp. 2d 763, 767–68 (E.D. Pa. 2001). See generally U.S.C. 17 § 114.

57. *Id.*

58. Digital Millennium Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860 (1998).

59. PASSMAN, *supra* note 18, at 347.

60. 17 U.S.C § 114(j)(7) (2012).

61. *In re Pandora Media, Inc.*, 6 F. Supp. 3d 317, 332 (S.D.N.Y. 2014).

interactive digital music streaming services pay rights holders per-stream, but collect the majority of their revenue by subscription.⁶² In 2013, Spotify released the formula for how it calculates royalties.⁶³ An artist's royalty is calculated by taking the number of his or her Spotify streams divided by the total number of Spotify streams.⁶⁴ Then, seventy percent of the revenue is given to the rights holder (often a record label or publisher), based on the artist's own royalty rate.⁶⁵ In 2013, the average stream payout was between \$0.0084 (at the high end) to \$0.006 (at the low end) per stream.⁶⁶ Therefore, if an artist was earning an average of \$0.007 per stream, and was receiving 100% of the revenue, the artist would need roughly 166,000 streams to earn the monthly federal minimum wage in the United States.⁶⁷

It has been reported that fifty-five percent of Spotify's revenue goes to record labels, whereas Apple Music provides fifty-eight percent.⁶⁸ Similarly, a songwriter may have a publishing company that collects on your behalf and therefore, takes a commission themselves. Indeed, Apple reportedly pays 13.5–15% to songwriters and publishers, slightly more than Spotify.⁶⁹

On its face, this type of royalty distribution system is not especially new for the music industry. It almost makes sense that the more times a song is streamed, the more money the artist, or record label, should receive—like high CD sales or radio play. However, using a service like Spotify does not equate to buying a CD, because Spotify does not sell music, they sell *access* to music. Therefore, if every user is paying the same subscription fee each month, an inequity occurs between those that stream a lot of songs and those that stream fewer.

62. Resnikoff, *supra* note 9.

63. Gabriela Tully Claymore, *Spotify Explains Royalty Payments*, STEREOGUM (Dec. 3, 2013, 4:55 PM), <http://www.stereogum.com/1587932/spotify-explains-royalty-payments/news/>. This formula is no longer available on the Spotify website and has been replaced by <https://artists.spotify.com>.

64. *Id.*

65. *Id.*

66. *Id.*; Lizzie Plaugic, *Spotify's Year in Music Shows Just How Little We Pay Artists for Their Music*, VERGE (Dec. 7, 2015, 11:28 AM), <http://www.theverge.com/2015/12/7/9861372/spotify-year-in-review-artist-payment-royalties>.

67. Based off the \$7.25/hour federal minimum wage, working 160 hours a month. This is also assuming that the artist completely owns the master and the composition, and has no record label or other distribution service taking a percentage.

68. James Cook, *Spotify Still Has Hurdles to Clear Before It Goes Public Next Year*, BUSINESS INSIDER (Aug. 24, 2016, 11:38 AM), <http://www.businessinsider.com/spotify-negotiate-new-deals-labels-before-ipo-2017-2016-8>; Tim Ingham, *Apple Music Is a Terrible Disaster. Apple Music Is a Storming Success.*, MUSIC BUS. WORLDWIDE (Aug. 6, 2015), <https://www.musicbusinessworldwide.com/apple-music-is-a-terrible-disaster-apple-music-is-a-storming-success>.

69. Tim Ingham, *Spotify Is Out of Contract with All Three Major Labels—and Wants to Pay Them Less*, MUSIC BUS. WORLDWIDE (Aug. 22, 2016), <https://www.musicbusinessworldwide.com/spotify-contract-three-major-labels-wants-pay-less>.

B. DISPROPORTIONATE ROYALTIES

In a service-centric license system, the artists with the largest number of streams get the largest share of the royalties. The flaw is that when a consumer pays \$9.99 a month for access to a premium service, the price remains the same regardless of how many songs the consumer streams. If the subscription fee equated to the number of streams it is worth, each user would get roughly 800 to 1000 streams per month, maybe more.⁷⁰ However, if a user listens to more than 1000 songs each month, she is not charged a higher subscription fee. Likewise, if a user only streams 100 songs a month, that user is not reimbursed for “unused” streams. As such, what results is a cross-subsidization from low usage subscribers to high usage subscribers.

By way of example, say only two people—Person A and Person B—subscribe to Spotify, each paying \$10.00 a month.⁷¹ After Spotify takes 30% (or \$6.00 of the \$20.00), to cover overhead, this leaves a pool of \$14.00 in royalties. In one month, Person A listens to nothing but Drake and streams “Hotline Bling” 900 times. Conversely, Person B listens to his favorite local hard rock band, Down and Outlaws, but only streams their song “Lay Me Down” 100 times. Under the current distribution model, Drake receives \$12.60—or 90% of the royalty pool—whereas Down and Outlaws receive only \$1.40. It is important to remember that Person B, who only listened to Down and Outlaws, generated an equal share of the overall revenue for Spotify. Moreover, technically Person B was less of a burden on Spotify’s service because he streamed fewer songs.

Another example is a small case study of the cellist Zoë Keating. According to her 2013 sales figures, Keating made \$1,764.18 from 403,035 streams on Spotify (roughly \$0.0044 per stream).⁷² However, we know nothing about how many unique users listened to her songs. If we assume that an album is made of ten tracks, then Keating received 40,304 “album plays.”⁷³ It would take about 8,000 fans, listening to a

70. Assuming that there is around a \$0.007 per stream payout. Interestingly, that number is a little lower than the 1500 streams that Billboard and the Recording Industry Association of America equate to the sale of an album. Billboard Staff, *Billboard 200 Makeover: Album Chart to Incorporate Streams & Track Sales*, BILLBOARD (Nov. 19, 2014), <http://www.billboard.com/articles/columns/chart-beat/6320099/billboard-200-makeover-streams-digital-tracks>.

71. See Laguana, *supra* note 13.

72. See Zoë Keating—2013 Online Sales & Streaming Revenue, <https://docs.google.com/spreadsheets/d/1dv74s4RL8FggnkyRlkVdF8eolDzxzDTUHvAkHLooYbE/edit#gid=0> (last visited Jan. 20, 2018); see also Stuart Dredge, *Streaming Music Payments: How Much Do Artists Really Receive?*, THE GUARDIAN (Aug. 19, 2013, 6:03 AM), <https://www.theguardian.com/technology/2013/aug/19/zoe-keating-spotify-streaming-royalties>.

73. David Greenwald, *Spotify’s Broken Math: Why the Streaming Model May Never Work for Artists*, OREGONLIVE (July 8, 2014, 12:15 PM), http://www.oregonlive.com/music/index.ssf/2014/07/spotify_broken_math_streaming_artists.html.

Keating album five times a year to generate the same number of plays.⁷⁴ If she sold her album for \$10 to that 775, even having a small number of “super” fans would generate roughly \$6000 more dollars in revenue than Spotify did for her. In fact, she earned \$8710.65 from the sale of 1325 albums off Amazon that year.⁷⁵

These examples, while perhaps simplistic or based on conservative assumptions, highlight genuine issues with the current royalty distribution model. First is the sharp departure from the traditional way of selling music and receiving compensation. Traditionally, an artist or label was paid for each CD sold and shipped, not the number of times the CD was played. Songwriters were paid the more times a song was played on the radio; however, radio has traditionally been a form of supplementing or promoting record sales, not a replacement. For Zoë Keating, the way her digital streaming royalties are calculated is likely significantly reducing her potential revenue. This is unnerving because Keating is adding value to the streaming service by attracting listeners.

Second, it becomes clear that the artists who are listened to by heavy users are cross-subsidized by artists who are listened to by light users. As the first example illustrates, Person A streamed 900 times, which, based on a royalty rate of \$0.007, should equal \$6.30. Instead, Drake received \$12.60, with the missing \$6.30 coming from Person B. But how much is the average Spotify user streaming? In 2013, Spotify’s chief sales, marketing, and international growth officer Jeff Levick stated that Spotify users average 110 minutes per day—roughly 1000 streams a month.⁷⁶ In 2014, a study reported that the average American listened to an average of 240 minutes of music per day, with 12 percent (28.80 minutes) comprised of streaming services.⁷⁷ These figures conflict with one another; as such, the actual average may be even more today. Moreover, it is quite possible that the majority of users stream less than 1,000 times per month. Therefore, it is likely that those that stream less than 1,000 songs per month are essentially compensating for those that stream more frequently. Furthermore, as younger generations enter a world where streaming music is more prevalent, what is going to happen when the average user is streaming far more than 1,000 songs per-month? This could be why, despite having so many subscribers, Spotify is still losing \$389 million a year and is expected to pay out over \$2 billion in royalties over the next two years.⁷⁸

74. *Id.*

75. Zoë Keating—2013 Online Sales & Streaming Revenue, *supra* note 72.

76. Tim Peterson, *Spotify’s New Mobile Service to Launch with Audio Ads Only*, ADAGE (Dec. 11, 2013), <http://adage.com/article/digital/spotify-s-mobile-service-launch-audio-ads/245638/>.

77. Colin Stutz, *The Average American Listens to Four Hours of Music Each Day*, SPIN (June 19, 2014), <https://www.spin.com/2014/06/average-american-listening-habits-four-hours-audio-day/>.

78. Jem Aswad, *Spotify Passes 140 Million Users, Promises to Pay Labels \$2 Billion as Losses Widen*, VARIETY (June 15, 2017, 6:19 AM), <http://variety.com/2017/biz/news/spotify-passes-140->

Ultimately, the focus for an artist is not to attract as many subscribers as possible to a service, but to generate as many streams as possible. Obviously, the more subscribers listen to an artist is likely to generate more streams; however, one heavy user can generate the same revenue for an artist as two casual users. Such a reward structure begs the question as to whether copyright should be used in a way to protect creations that have high replay value over mass appeal. The answer to that question may be found by looking at instances of bands and individuals “gaming” the system in the hope for a larger slice of the royalty pie.

C. CLICK FRAUD

Due to service-centric licensing, click-fraud in digital music streaming services has become a real problem. For example, realizing what matters is the number of streams, American funk band Vulfpeck came up with a plan to game the system.⁷⁹ In March 2014, they released a ten-track album called *Sleepify*.⁸⁰ The catch was that *Sleepify* did not actually contain any music.⁸¹ The album consisted of ten tracks, roughly 31 or 32 seconds long, of complete silence.⁸² They asked their fans to stream the album while they were asleep, and promised to use the revenue to fund a tour.⁸³ Assuming they had 100 fans streaming the album for seven hours while they slept, Vulfpeck would be able to generate just under \$600 a night.⁸⁴ Unfortunately for the band, Spotify removed the album in April with a statement that the album violated Spotify’s terms of service.⁸⁵ Indeed, Spotify’s terms and conditions at the time prohibited “artificially increasing play count[s]” or otherwise manipulating the service.⁸⁶ Nonetheless, the fact that Vulfpeck could have potentially received \$18,000 from 3.72 million plays is a testament to how lucratively the pay-per-stream model can be exploited if the scheme goes unnoticed.

million-users-promises-to-pay-labels-2-billion-as-losses-widen-1202467102/.

79. Tim Jonze, *How to Make Money from Spotify by Streaming Silence*, GUARDIAN (Mar. 19, 2014, 7:08 AM), <https://www.theguardian.com/music/musicblog/2014/mar/19/spotify-streaming-silence-vulfpeck-make-money>.

80. *Id.*

81. *Id.*

82. *Id.* It takes a user to listen to a track for about thirty seconds for Spotify to register it as a complete stream.

83. *Id.*

84. *Id.*

85. Harley Brown, *Spotify Removes Vulfpeck’s ‘Sleepify’*, BILLBOARD (Apr. 26, 2014, 7:17 PM), <http://www.billboard.com/biz/articles/news/legal-and-management/6070030/spotify-removes-vulfpecks-sleepify>.

86. *Spotify Terms & Conditions of Use*, SPOTIFY, <https://www.spotify.com/us/legal/end-user-agreement/#s8> (last visited Jan. 20, 2018).

A little before the Sleepify stunt, in 2013, Peter Fillmore, an Australian security professional, generated his own fraudulent royalty stream.⁸⁷ He used Amazon servers to fabricate fake “listeners” to stream a track that he made by mixing public domain works together for twenty-four hours per day for a month.⁸⁸ Fillmore received over \$1000 and actually topped the charts of a now-bankrupt streaming service called Rdio.⁸⁹ It took six months for the services to realize they were being conned; moreover, the scam exposed a security issue in the streaming services that suggested there was no automated system for rooting out bots and other fabricated plays.⁹⁰ While Spotify claims to have both human and computer algorithm based protections, it was evidenced in 2016 that the scam can still be executed.⁹¹ In 2016, William Bedell did essentially the exact same thing by creating fake users to stream other people’s music.⁹² He generated \$32.26 a day in royalties with “minimal effort[,]” noting that “the barriers to entry are clearly minimal.”⁹³ Click-fraud, it appears, is just as much of a problem on streaming services as it is on the rest of the internet.

Lastly, and somewhat surreally, the pay-per-stream model can be used as a form of fan activism. In September 2016, after learning about his \$2.4 million tax bill, fans of Nelly took to social media to show support by asking his supporters to stream his 2002 single “Hot in Herre” to help him pay the IRS.⁹⁴ Requiring an estimated 300 million streams and with Nelly having over 6 million monthly listeners on Spotify, the suggestion was not unreasonable.⁹⁵ Though it is unlikely that Nelly was able to generate enough to pay his taxes, it feels odd that his fans were able to manipulate his royalty revenue without spending more money for their subscriptions than other users.

As evidenced, the pay-per-stream model has the potential to manipulate revenue as instigated by artists, scammers, or even fans. Such instances may add to the fact that Spotify has yet to make a profit.⁹⁶

87. Kelly Fiveash, *Aussie Bloke Hacks Way to top of Music Charts with MIDI-Based Tunes*, REGISTER (Nov. 5, 2013, 8:27 AM), http://www.theregister.co.uk/2013/11/05/peter_fillmore_hacks_into_online_charts/.

88. *Id.*

89. *Id.*

90. *Id.*

91. See William Bedell, *I Built a Botnet That Could Destroy Spotify with Fake Listens*, MOTHERBOARD (Oct. 16, 2015, 6:00 AM), https://motherboard.vice.com/en_us/article/gv5xbx/i-built-a-botnet-that-could-destroy-spotify-with-fake-listens.

92. *Id.*

93. *Id.*

94. John Lynch, *Nelly Fans Are Streaming His Music En Masse to Help Pay Off His \$2.4 Million Tax Debt*, BUS. INSIDER (Sept. 13, 2016, 5:18 PM), <http://www.businessinsider.com/nelly-fans-streaming-tax-debt-2016-9>.

95. *Id.*

96. Tim Ingham, *Spotify Revenues Topped \$2bn Last Year as Losses Hit \$194m*, MUSIC BUSINESS WORLDWIDE (May 23, 2016), <https://www.musicbusinessworldwide.com/spotify-revenues-topped->

Furthermore, click-fraud drains the royalty pool that ultimately can be used by other artists. Also, subscribers may be outraged that they could essentially give money to an artist that they have never even heard of to help pay for a tax bill.

D. SILENCE FROM THE MAJORS

With the potential for click-fraud and other forms of royalty manipulation, one would expect major record labels to demand that streaming services remedy the situation. However, in 2015, a leaked contract between Sony Music Entertainment and Spotify may answer why the major labels (“majors”)—Sony, Universal, and Warner—had been so quiet regarding royalties in general. The contract, executed in 2011, required that Sony, in exchange for a license to its entire catalogue, receive millions of dollars in advances each year, accompanied by a most favored nations clause to keep it in line with any other deal Spotify made with another label in the future.⁹⁷ This advance was taken off the top of Spotify’s gross revenue, before Spotify paid itself or distributed royalties.⁹⁸ Additionally, Sony was allowed to pull in “a revenue share fee that was equal to 60 percent of Spotify’s monthly gross revenue multiplied by Sony Music’s percentage of overall streams.”⁹⁹ Moreover, Sony had the option to use a usage-based minimum and subscriber minimum royalty rate.¹⁰⁰ The usage-based minimum involved a \$0.00225 royalty per song streamed, and the subscriber minimum was the percentage of Sony streams multiplied by the number of subscribers times \$6.00.¹⁰¹ Sony could always opt for the revenue share if the stream rates were lower.¹⁰²

The contract was illuminating for many reasons. First, assuming the other two majors—Universal Music Group (“UMG”) and Warner Music Group (“Warner”)—both have their own contracts with Spotify, it suggests that tens or hundreds of millions of dollars are essentially being removed from the royalty pool to begin with. If the big labels already know they are getting a payday—regardless of how their songs are streamed—there is little incentive for them to care about how Spotify distributes the rest of the pie. Additionally, it insulates them from

2bn-last-year-as-losses-hit-194m/.

97. Micah Singleton, *This Was Sony Music’s Contract with Spotify*, VERGE (May 19, 2015, 10:05 AM), <http://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract>.

98. *Id.*

99. Paul Resnikoff, *F*&K It: Here’s the Entire Spotify/Sony Music Contract . . .*, DIGITAL MUSIC NEWS (May 22, 2015), <https://www.digitalmusicnews.com/2015/05/22/fk-it-heres-the-entire-spotifysony-music-contract/> (citing SONY MUSIC ENTERTAINMENT/SPOTIFY USA INC., DIGITAL AUDIO/VIDEO DISTRIBUTION AGREEMENT (Jan. 18, 2011)).

100. *Id.*

101. Singleton, *supra* note 97.

102. Singleton, *supra* note 97.

instances of click-fraud whittling away the per-stream royalty rate. One should also remember that because each major label has at least one hugely popular artist on its roster, they are almost guaranteed to take home a large portion of the royalty pool anyway.

Second, the minimum usage rate of \$0.00225 suggests that the royalty rate could be significantly lower than the \$0.0084 to \$0.006 rate that Spotify claimed to pay artists. At the very least, it suggests that this number could fluctuate. Indeed, one artist reported they received \$0.004891 per stream.¹⁰³ Additionally, the contract was completely silent regarding how Sony would distribute the royalties to their artists. We can only assume that Sony distributes income to artists based on their individual contracts; however, singer songwriter Taylor Swift, who at one point famously removed her music from Spotify in protest of the amount of royalties she was receiving,¹⁰⁴ is signed to RCA, a label owned by Sony Music. Granted, while the agreement from 2011 may not reflect contemporary arrangements, it still highlights the general apathy from the majors regarding the pay-per-stream model, because it likely does not really apply to them. Indeed, in early 2017, Universal Music announced a new contract with Spotify in which it agreed to a slight reduction in the royalty rate and that some content would be exclusive to subscribers for a limited time.¹⁰⁵ This deal was closely followed by another contract with Sony in July 2017 with Warner following suit in August of the same year.¹⁰⁶ Moreover, in September 2017, Apple Music signed a new deal with Warner that included a reduction in the royalty rate, on par with the Spotify deal.¹⁰⁷

Additionally, even some coalitions of independent labels are negotiating their own deals.¹⁰⁸ In April 2017, digital rights agency Merlin

103. Paul Resnikoff, *My Band Has 1,000,000 Spotify Streams. Want to See Our Royalties?*, DIGITAL MUSIC NEWS (May 26, 2016), <http://www.digitalmusicnews.com/2016/05/26/band-1-million-spotify-streams-royalties>.

104. Pamela Engel, *Taylor Swift Explains Why She Left Spotify*, BUS. INSIDER (Nov. 13, 2014, 12:16 PM), <http://www.businessinsider.com/taylor-swift-explains-why-she-left-spotify-2014-11> (she has since put her music back in Spotify suggesting that she has more control over how her music is distributed than other Sony artists).

105. Nick Statt & Micah Singleton, *Spotify Will Restrict Some Albums to Its Paid Tier*, VERGE (Mar. 16, 2017, 3:43 PM), <http://www.theverge.com/2017/3/16/14950492/spotify-premium-free-tier-restricting-album-releases-ipo>; Micah Singleton, *Spotify Premium Users Will Get Some Albums Two Weeks Before Free Users*, VERGE (Apr. 4, 2017, 10:31 AM), <http://www.theverge.com/2017/4/4/15177004/spotify-premium-two-week-exclusive-albums-licensing-universal-music-group>.

106. Hannah Karp, *Spotify Reaches Deal with Sony Music: Sources*, BILLBOARD (July 11, 2017), <http://www.billboard.com/articles/business/7864354/spotify-licensing-deal-sony-music>; Peter Kafka, *Spotify Just Signed the Last Big Music Label Deal It Needs to Go Public*, RECODE (Aug. 24, 2017, 3:58 PM), <https://www.recode.net/2017/8/24/16199514/spotify-warner-music-label-deal-ipo>.

107. Lucas Shaw & Alex Webb, *Apple Reaches Music Deal with Warner, Eyes Sony Pact*, BLOOMBERG TECH. (Sept. 6, 2017, 4:03 PM), <https://www.bloomberg.com/news/articles/2017-09-06/apple-is-said-to-reach-music-deal-with-warner-sony-pact-next>.

108. *Id.*; Ingrid Lunden, *Spotify Strikes New Deal with Indy Giant Merlin 'Competitive' with Big*

announced that it had cut a deal with Spotify on behalf of a group of independent record labels.¹⁰⁹ In a negotiating landscape where clearly the biggest and loudest voices are heard, it comes as no surprise that even independent labels are uniting to get deals on par with the majors. The compromise is that more parties are resigning themselves to a broken royalty distribution model.

Ultimately, the majors are working on an aggregate, not individual rate. The big three, or their subsidiaries, all have artists on their roster that consistently appear on the top streamed lists of the digital music streaming services. Therefore, every month, each one of the majors receives a significant percentage of the royalty pool from its top artists and takes its own cut. It has been reported that the majors take home seventy-three percent of the royalty pool in some countries.¹¹⁰ Unlike Zoë Keating, for example, who likely owns her own sound recordings, the majors have little incentive to care about *individual* artists on their rosters, so long as *overall* they are bringing in revenue.¹¹¹ Furthermore, the streaming service cares a lot more about the major labels because if the majors pull their catalogues, a huge portion of the service's music would disappear as opposed to niche independent labels. Additionally, although the company is not yet public, reports indicate that all three of the majors have an ownership interest in Spotify.¹¹² Merlin has gone on the record to state that it has an equity interest in Spotify.¹¹³ Therefore, it is unlikely for the industry to see any change come from the major labels, or the organizations that represent them, leaving it up to the independent artists and songwriters to enact change.

Labels, TECHCRUNCH (Apr. 20, 2017), <https://techcrunch.com/2017/04/20/spotify-strikes-new-deal-with-indy-giant-merlin-competitive-with-big-3-labels>.

109. Lunden, *supra* note 108.

110. Tim Ingham, *Major Labels Keep 73% of Spotify Premium Payouts—Report*, MUSIC BUS. WORLDWIDE (Feb. 3, 2015), <http://www.musicbusinessworldwide.com/artists-get-7-of-streaming-cash-labels-take-46>.

111. Or at least care more about the Taylor Swifts and the Kanye Wests of the world.

112. See Heliene Lindvall, *Behind the Music: The Real Reason Why the Major Labels Love Spotify*, GUARDIAN (Aug. 17, 2009, 10:03 AM), <https://www.theguardian.com/music/musicblog/2009/aug/17/major-labels-spotify>.

113. See Statt & Singleton, *supra* note 105; see also Tim Ingham, *Sony: We Will Also Pay Artists Profits from the Sale of Our Spotify Stake*, MUSIC BUS. WORLDWIDE (Feb. 4, 2016), <http://www.musicbusinessworldwide.com/sony-we-will-also-pay-artists-profits-from-the-sale-of-our-spotify-stake>; Kenny Gates, *'Independents Have No Less Opportunity on Streaming Services than the Majors.'* [PIAS] (Dec. 20, 2016), <http://www.pias.com/blog/independents-have-no-less-opportunity-on-streaming-services-than-the-majors-2> (interview with Merlin CEO Charles Caldas).

III. FIXING THE PROBLEM

A. STATUTORY ROYALTY RATE: AN IMPERFECT SOLUTION

Creating a statutory compulsory minimum royalty rate is a common trope of scholarly writing regarding this topic.¹¹⁴ One of the major benefits of a compulsory minimum rate is that it creates a baseline from which to negotiate so that artists and labels have some leverage.¹¹⁵ One writer has suggested that the CRB should require a minimum royalty rate based on their annual net revenue adjusted to the number of subscribers.¹¹⁶ Then, to protect the streaming services from content holders having too much bargaining power, a punitive tax would be imposed on content holders in a way that would facilitate reasonable license rates.¹¹⁷

While these ideas are admirable and may increase royalties paid out to artists and writers, they are complicated and still fundamentally flawed. A minimum compulsory royalty rate does nothing to combat issues like click-fraud or to remedy cross-subsidization. What many fail to recognize is the fundamental problem with the consumer paying a subscription, and the digital streaming service paying a royalty based on streams. Trying to apply old applications of copyright licensing, like compulsory rates—which worked in the age of CD sales and digital downloads—onto a subscription based streaming service is like trying to fit a square peg into a round hole. While a compulsory license may expand the pie of royalties available to artists, it does nothing about ensuring a fair slice. Because users are buying subscriptions to access music, royalty distribution should be based around what each individual listener is accessing, and should avoid equating streams to purchases.

B. USER-CENTRIC LICENSING—THE SUBSCRIBER SHARE SOLUTION

Given that the pay-per-stream model is open for abuse and fraud and does not reward creation that appeals to the most people, it is prudent for digital streaming services to change their distribution model so that it not only benefits consumers and artists, but also reflects how music used to be purchased. A few in the industry advocate a simpler, and perhaps more elegant, solution. The concept is to move away from a pay-per-stream model to a pay-per-subscriber, or subscriber-share model.¹¹⁸

114. See generally Seay, *supra* note 12; Loeza, *supra* note 12; Richardson, *supra* note 12.

115. Richardson, *supra* note 12, at 32.

116. Richardson, *supra* note 12, at 32–33.

117. Richardson, *supra* note 12, at 33.

118. Laguana, *supra* note 13 (also known as subscriber-centric licensing and both terms are used henceforth).

A subscriber-share model works by distributing royalties based on the listening habits of each unique subscriber each month.¹¹⁹ Thus, if, from the previous example, Person A listens to nothing but Drake on Spotify, Drake gets approximately \$7; however, if Person A listens to a thousand different artists, each only once, then each artist receives \$0.007, similar to the share each artist would receive under a pay-per-stream model.¹²⁰ Similarly, in regards to mechanical royalties, the royalty pool should not be allocated based on the number of streams, but by how many unique subscribers streamed that song. The general premise assumes that artists should be rewarded by the number of fans they have listening to their music, not the number of times their songs are streamed.

Moving to a subscriber-share model would have profound effects across the music industry. First, independent bands and labels may see an increase in their streaming royalty revenue each month. By way of example, the hard rock band Down and Outlaws, with approximately 55,000 streams on Spotify overall, should have received roughly \$385 under the current model.¹²¹ According to their artist page on Spotify, they also have 2621 monthly listeners.¹²² If they could convince 2000 of their listeners to subscribe and listen to them only 10% of the time they use Spotify, they could make about \$1400, earning almost 400% more than their total royalties in one month. Artists whose music falls into a very specific genre—like Down and Outlaws—can benefit greatly from this model as their fans may be less likely to stray outside the niche.

Furthermore, according to her current statistics, Zoë Keating has 45,685 unique monthly listeners and 21,322 followers.¹²³ If we assume that in 2013 half of those listeners subscribed to the service, this would mean that, in part, Keating helped generate \$360,000 in revenue for Spotify and \$840,000 for the royalty pool. Based on these numbers, Keating's royalty of \$1764.18 would reflect 0.0021% of the total of the royalty pool that her listeners generated that year. That number is accurate if she was listened to equally with 476 other artists by each subscriber; however, it would take 100 Keating super fans under a subscriber-share model, listening to Keating fifty percent of the time for five months, to generate the same amount that she earned for the entirety of 2013.

To highlight the point, Brendan Moore, a typical user of the now defunct service Rdio, published his listening data for a year. He paid

119. Laguana, *supra* note 13.

120. This figure is based on a ten dollar subscription where the service takes thirty percent.

121. As of April 15, 2017. *Down and Outlaws*, SPOTIFY, <https://play.spotify.com/artist/3sWobZ6jJoLpiAOQVYg8C6> (last visited Jan. 20, 2018).

122. *Id.*

123. Zoë Keating, SPOTIFY, <https://play.spotify.com/artist/6OHXnLZCeWUwtdDsBdqOdr> (last visited Jan. 20, 2018).

\$119.88 over the year and had a total of 2936 plays, averaging 245 a month.¹²⁴ Rdio had an average per-stream royalty rate of \$0.00521, meaning that he generated a total of \$15.30 in royalties.¹²⁵ If Rdio had used a subscriber-share model, each artist that he listened to would have received a significant boost in their royalties.¹²⁶ Even artists like Coldplay and Stevie Wonder, who generate millions of streams, would still have received more money from Moore.¹²⁷ However, under the model Rdio used, the rest of his subscription fee was used to pay artists he did not stream.¹²⁸

A subscriber-share model will decrease click-fraud and other scams involving the generation of false streams. Under a subscriber-share, if a scammer created artificial streams of a song by using a “fake listener” bot, the bot would be capped by the subscription fee. To scam the subscriber-share model, one would need to create numerous bots, each with its own subscription account—a redundant endeavor.

Finally, under the subscriber-share model, artists would be rewarded for having a large and passionate fan base. For example, if an artist like Taylor Swift is not receiving a high royalty rate, she need only blame her own fan base for not streaming her enough, or her record label for not distributing her royalties correctly. In addition, artists would likely see an increase in royalties when they release full length albums as one might expect their fans to listen to them more exclusively Just as opposed to one hit in an eclectic playlist. Furthermore, should an artist like Nelly run into issues with the IRS, it would seem far more equitable for only his large fan base to help pay off his tax bill by streaming him exclusively, instead of relying on users who never listen to his music.

IV. HOW TO IMPLEMENT A SUBSCRIBER-SHARE MODEL WITH USER-CENTRIC LICENSING

A. NECESSARY DATA

The first hurdle to a subscriber-share model is making sure that the streaming service has each subscriber’s listening data. Although streaming data is hard for the public to come by, there are several indications that the subscriber-share model is feasible to implement. Based on royalty statements, Spotify is able to provide an artist with a detailed list of every time his or her song is streamed and in which

124. Brendan Moore, *Real Numbers from the Proposed Alternative Streaming Model*, MEDIUM (Nov. 19, 2014), <https://medium.com/@webmusicguy/real-numbers-from-the-proposed-alternative-streaming-model-202a9c085147>.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

country.¹²⁹ Spotify also uses subscribers' listening data to create a curated playlist each week.¹³⁰ It also uses unique listening data in advertising campaigns, such as pointing out how many times a user listens to an individual song.¹³¹ As such, it is likely that, from a purely technical standpoint, a service like Spotify has the data available to distribute royalties according to a subscriber-share model.

B. INDUSTRY INITIATIVE

The biggest hurdle will be shifting the industry from service-centric licensing to user-centric licensing. Ideally, the industry itself would adopt this form of licensing. Moving to user-centric licensing benefits everyone in the music industry including the streaming services themselves. Tidal, one of the newest streaming services, has already begun disrupting the industry by offering artists considerably higher royalty rates, reported to be on average \$0.012 per stream.¹³² However, as discussed previously, a higher royalty rate does not solve the problem of click-fraud or inequitable distribution, and may in fact exacerbate it. Interestingly, Tidal, along with Apple Music, only offers subscription services—no “freemium”—making them even better candidates for user-centric licensing.

Another report in April 2017, from MIDiA Research's Mark Mulligan, claimed that French music streaming service Deezer was considering user-centric licensing.¹³³ That report claimed that Deezer and record labels were considering using the user-centric model for some of its royalty distribution.¹³⁴ Unfortunately, since April, there has been no follow up verifying whether any deals have been struck.

That said, outside of newcomers disrupting the industry, it is unlikely that the services themselves or the major labels will want to change anything. With competition coming from left and right, and still without ever having turned a profit, sources indicate that Spotify is looking to get a better rate from the majors.¹³⁵ Furthermore, with new

129. Resnikoff, *supra* note 9.

130. *Introducing Discover Weekly: Your Ultimate Personalised Playlist*, SPOTIFY (July 20, 2015), <https://press.spotify.com/li/2015/07/20/introducing-discover-weekly-your-ultimate-personalised-playlist>.

131. Patrick Kulp, *Spotify Outs Its Listeners' Embarrassing Habits with Billboards*, MASHABLE (Nov. 29, 2016), <http://mashable.com/2016/11/29/spotify-outdoor-billboard-campaign/#RLrhulHsQ5qu>.

132. Ben Kaye, *So Far, TIDAL's Royalty Payouts Nearly Double Spotify's*, CONSEQUENCE OF SOUND (May 3, 2015, 8:00 PM), <http://consequenceofsound.net/2015/05/so-far-tidals-royalty-payouts-nearly-double-spotifys>.

133. Mark Mulligan, *Exclusive: Deezer Is Exploring User Centric Licensing*, MUSIC INDUSTRY BLOG (Apr. 19, 2017), <https://musicindustryblog.wordpress.com/2017/04/19/exclusive-deezer-is-exploring-user-centric-licensing>.

134. *Id.*

135. *See id.*

deals being struck with Sony, Universal, and Warner, it is unlikely we will see a change until those contracts expire. Therefore, it is unlikely that there will be any radical changes in these negotiations to move to a user-centric model despite the benefit to the streaming service.

C. LEGISLATIVE AND REGULATORY ACTION

Currently, with respect to mechanical royalties for the composition, the NMPA, the publishing companies, and songwriters are in front of the CRB again.¹³⁶ Since the rates were last set five years ago, songwriters have banded together once more to petition the CRB to set higher rates, especially with regard to streams on “freemium” services.¹³⁷ Indeed, they have an open petition for the tech industry to “[s]top litigating against songwriters and pay them a fair rate for their songs.”¹³⁸ Like compulsory minimum rates, a higher rate will unlikely solve many of the issues that result from per-stream based compensation. Because certain indie artists and labels are underrepresented in organizations like the NMPA and because major publishers are collecting mechanical revenue on an aggregate rate, there is little incentive for them to adopt a subscriber-share model.

The European Union, also in the process of copyright reform, has called out online and digital services to pay more to rights holders.¹³⁹ In his State of the Union address in 2016, European Commission President Jean-Claude Juncker declared that rights holders should be fairly paid for their work.¹⁴⁰ So far, draft reform proposals indicate that the digital services have the obligation to ensure they are paying licenses for the use of copyrighted works.¹⁴¹ On January 10, 2018, the CRB released their determination regarding Satellite Audio Radio Services, such as SiriusXM, requiring them to pay 15.5 percent of revenue for the next five years to the publishers.¹⁴² Yet as of early 2018, the CRB has yet to release

136. Lucas Shaw, *Songwriters Sing Blues over Diminished Streaming Royalties*, BLOOMBERG TECH. (Mar. 7, 2017, 2:00 AM), <https://www.bloomberg.com/news/articles/2017-03-07/songwriters-sing-blues-over-diminished-royalties-from-streaming>.

137. *Id.*

138. *Songwriters to Big Tech: Stop Fighting Us in CRB*, NMPA, <http://nmpa.org/songwriters-to-big-tech-stop-fighting-us-in-crb> (last visited Jan. 20, 2018).

139. Richard Smirke, *European Commission President Calls Out YouTube, Presents Copyright Reforms in State of the Union*, BILLBOARD (Sept. 14, 2016), <http://www.billboard.com/articles/business/7510296/european-commission-state-of-union-jean-claude-juncker-safe-harbor-youtube-copyright-reform>.

140. *Id.*

141. *Id.* (This appears to be an attack on “freemium” services).

142. See Ed Christman, *Copyright Royalty Board Raises Rate for SiriusXM, Lowers It for Music Choice*, BILLBOARD (Dec. 15, 2017), <https://www.billboard.com/articles/business/8070762/sirius-xm-copyright-royalty-board-crb-rate-increase>; *In re Determination of Royalty Rates and Terms for Transmission of Sound Recordings by Satellite Radio and “Preexisting” Subscription Services (SDARS III)*, Dkt. No. 16-CRB-0001 (2018-2022) (Jan. 10, 2018).

a determination regarding the on-demand services such as Spotify.¹⁴³ Nonetheless, this European development led to numerous organizations, including the NMPA, ASCAP, BMI, the RIAA, and SoundExchange, to write a letter to the U.S. government urging support of any new EU directive.¹⁴⁴ However, the proposals indicate no specifics, nor hint at any increase in license rates. That said, one interesting clause of the proposal, “Article 15 Contract mechanism,” reads:

Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.¹⁴⁵

This proposal suggests that there would be a mandatory most favored nations clause in all licensing contracts and the ability to renegotiate if a better offer is accepted by a subsequent service. Furthermore, such a rule would apply to all licensors, not just major labels and publishers. Potentially, if a label or artist can get a license based on a subscriber share under this EU directive, they may be able to force other services into offering an equal rate. This could start a chain reaction if artists are able to show that they receive better royalties based on a subscriber-share model.

In December 2017, a bi-partisan bill was introduced to Congress called the Music Modernization Act.¹⁴⁶ The primary aim of the bill is to allow companies to “obtain a compulsory license to make and distribute phonorecords of a nondramatic musical work, including by means of digital phonorecord delivery.”¹⁴⁷ Furthermore, the act requires the CRB to consider a “willing buy and willing seller” when determining rate, which suggests an increase in rates, or at least the opportunity for the rights holders and services to argue their cases.¹⁴⁸ However, as this Note already argues, mandatory licensees such as those proposed in the Music Modernization Act do not solve the issues of cross-subsidization.

143. Christman, *supra* note 124.

144. *U.S. Industry Bodies Urge Gov't to Support EU Digital Copyright Reforms*, BILLBOARD (Nov. 4, 2016), <http://www.billboard.com/articles/news/7565576/us-industry-bodies-govt-support-eu-digital-copyright>.

145. PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COPYRIGHT IN THE DIGITAL SINGLE MARKET (2016), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016PC0593&from=EN>.

146. Music Modernization Act of 2017, H.R. 4706, 115th Cong. (2017).

147. *Id.* at § 2(a)(1)(A).

148. *Id.* at § 2(c)(3)(D).

D. IMPACT LITIGATION

As previously mentioned, class action litigation has commenced to get back unpaid mechanical royalties for digital streaming services, namely Spotify. In May 2017, Spotify settled its longstanding class action with David Lowery for \$43.4 million.¹⁴⁹ At one point, it was feared that David Lowery's litigation would never end in settlement. Spotify's settlement with the NMPA and other large publishers had already disqualified thousands from joining Lowery's class action.¹⁵⁰ Indeed, it was reported that "[o]ver 96% of the music publishing community, as measured by NMPA Market Share, [had] opted-in to the Spotify settlement."¹⁵¹ Nonetheless, Lowery persisted and managed to get a settlement for the songs that was outside of the NMPA action.¹⁵²

However, almost as soon as the Lowery suit closed, another suit contesting that settlement arose. In September 2017, hundreds of artists objected to the settlement claiming that it was not enough.¹⁵³ This follows another two lawsuits from July, alleging essentially the same thing as Lowery: failure to license and pay mechanical royalties.¹⁵⁴ It appears that the issue of whether Spotify has paid the correct royalties is far from answered. For Spotify it appears that as soon as one litigation ends they are sued by someone else. In early 2018, Wixen Music Publishing filed against Spotify claiming \$1.6 billion in damages for unpaid royalties on behalf of artists such as Tom Petty, The Doors, Neil Young, Stevie Nicks and Weezer.¹⁵⁵

Unfortunately, none of the litigation proposes a user-centric royalty, but instead look for a copyright infringement payday. That said, provided digital streaming service providers have the correct license, there is nothing illegal about how they collect revenue and distribute sound recording royalties. It might take a savvy plaintiff to request a user-

149. Robert Levine, *Spotify Settles Class Action Lawsuits Filed by David Lowery and Melissa Ferrick with \$43.4 Million Fund*, BILLBOARD (May 26, 2017), <http://www.billboard.com/articles/business/7809561/spotify-settles-class-action-lawsuits-filed-by-david-lowery-and-melissa>.

150. Paul Resnikoff, *How Spotify Crushed a \$200 Million Songwriter Lawsuit . . .*, DIGITAL MUSIC NEWS (July 12, 2016), <http://www.digitalmusicnews.com/2016/07/12/spotify-crushing-david-lowery-lawsuit>.

151. *Id.* (quoting NMPA President David Isrealite).

152. Levine, *supra* note 149.

153. Eriq Gardner, *A Legal Campaign Against Spotify Intensifies Ahead of the Company's Plan to Go Public*, BILLBOARD (Sept. 13, 2017, 5:59 PM), <http://www.billboard.com/biz/articles/news/digital-and-mobile/7964875/legal-campaign-against-spotify-intensifies-ahead-of>.

154. *Id.*

155. See Legal Entertainment, *Little Chance Lawsuit Against Spotify Disrupts IPO*, FORBES (Jan. 4, 2018, 8:07 PM), <https://www.forbes.com/sites/legalentertainment/2018/01/04/little-chance-lawsuit-against-spotify-disrupts-its-ipo/#812044721cf4>; Complaint for Copyright Infringement & Demand for Jury Trial, *Wixen Music Publ'g, Inc., v. Spotify USA Inc.*, No. 2:17-cv-09288 (C.D. Cal. Dec. 29, 2017).

centric license as part of a settlement of an infringement suit to enact any change.

CONCLUSION

Music licensing has always been a complicated regime. However, the music industry itself, constantly adapting to the times, has not faced such a significant change in how it charges for music. The younger generations' apparent contentment with paying for access instead of ownership is shaking the foundation of what it means to "sell" music. The result is that content creators are looking for new ways to ensure compensation, while titans of the music industry are pushing to maintain their relevance and revenue.

Unfortunately, during this change in the music industry, the independent artist has been left out in the cold. Unable to bring in the number of plays—though not necessarily listeners—the independent artist is losing a game where the number of streams is what matters. Furthermore, the ability for some to rig the system using click-fraud techniques, while the major labels focus only on themselves, highlights other major issues. The pay-per-play model is simply inherently flawed and needs to go.

The fairer way is based on the individual subscribers, as they are the ones who bring in the revenue. While it is not a perfect solution, it does more accurately reflect listening habits, fan bases, and the relationship between those that pay the fees and the artists they follow. Unlike a mandatory minimum rate, the subscriber-share model is more resilient to click-fraud and will likely reduce royalty inequality. It may also make the streaming services profitable.

Implementation will be difficult. The CRB is unlikely to change their position, however in Europe there is the potential—through a mandatory most favored nations clause—to change the system. Furthermore, disruptions in the industry itself may remedy the issue, but for now it appears litigation that is very narrowly focused on recouping unpaid royalties is the only avenue for those that experience injustice.

Indeed, one might find the apparently endless self-interested litigation is the perfect reason for regulatory action. Currently, as evidenced by pay-per-stream model, copyright law finds itself in a position that rewards a very specific type of creation. Never has there been such an ability for the individual consumer to shape the revenue stream of a creator purely by consuming more of their work without any additional expense. Creations should be rewarded by either their mass appeal or their ability to command a higher price from the consumer. Mandating user-centric licensing is the chance for copyright law to reassert itself as an egalitarian wealth generator that values one thing: quality. It is, however, uncertain if or when that rebalance of values will occur.