



February 16, 2022

Competition and Markets Authority
Victoria House
37-63 Southampton Row
London
WC1B 4AD

Re: Streaming and Music Market Study Public Comment

Gentlepersons:

I thank the Competition and Markets Authority for the opportunity to comment in this important investigation into the music streaming economy. Your investigation should take many twists and turns because streaming and the highly concentrated number of platforms and other firms controlling the sector has permeated the entire music community around the world, but particularly for Anglo-American repertoire.

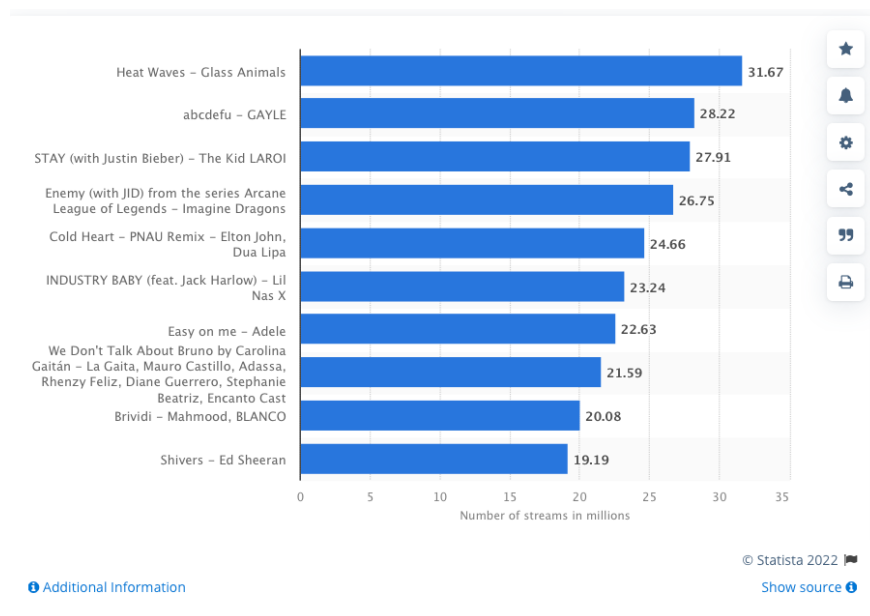


Figure 1 Most streamed weekly tracks on Spotify through 2/10/22¹

¹ Source: Statista, available at <https://www.statista.com/statistics/310166/spotify-most-streamed-tracks-worldwide/>

The CMA plays a unique role at a unique moment in the worldwide movement for justice of both featured artists and their nonfeatured session colleagues as well as songwriters who watch their incomes decimated by the streaming Leviathan—yet instead of protecting them from a Hobbsian existence, the Leviathan over-lawyers them, out-lobbies them and races them for the revolving door. The #BrokenRecord² and #FixStreaming campaigns in the UK are a prime example of these efforts; the Justice at Spotify campaign is a good example of these efforts in the U.S. that has found allies among outspoken members of the U.S. Congress.³

For example, songwriters watched powerlessly as Spotify hired away⁴ the Associate Register and General Counsel of the U.S. Copyright Office to be Spotify’s head of US government relations, but only after she completed drafting the regulations that govern Title I of the ironically titled “Music Modernization Act” that gave Spotify yet another safe harbor for copyright infringement. This incident was followed by another senior lawyer from the Copyright Office jumping ship to work against creator rights at the National Association of Broadcasters.⁵ If creators come to government with low expectations of trust, these incidents help you understand why.

The CMA will no doubt hear much about how “streaming has saved the music business” particularly from Spotify where the mantra has taken on pagan iconography after Spotify CEO Daniel Ek’s famous posed and promoted *Wired* magazine cover.⁶ Confirming that this is the “narrative,” Netflix curiously began development of this story line for a Spotify puff-piece miniseries out of the blue (which presumably will not include a Joe Rogan/Neil Young epilogue); a page straight out of the Edward Bernays playbook.⁷

² See Written evidence submitted by Mr. Tom Gray (#BrokenRecord Campaign), DCMS Committee Inquiry into the Streaming Economy available at <https://committees.parliament.uk/writtenevidence/10156/pdf/>; Stuart Dredge, #BrokenRecord Campaign Reveals Results of Streaming Survey, MusicAlly (Oct. 13, 2020) available at <https://musically.com/2020/10/13/brokenrecord-campaign-reveals-results-of-streaming-survey/>

³ Justice at Spotify Campaign, Union of Musicians and Allied Workers available at <https://www.unionofmusicians.org/justice-at-spotify>

⁴ Brian Baxter, *Spotify Snags Copyright Office Legal Chief as Policy Head*, Bloomberg Law (Aug. 12, 2021) available at <https://news.bloomberglaw.com/employee-benefits/spotify-snags-copyright-office-legal-chief-as-public-policy-head>

⁵ *Chauvet Joins NAB in Policy Position*, Radio World (Aug. 30, 2021) available at <https://www.radioworld.com/news-and-business/people-news/chauvet-joins-nab-in-policy-position>

⁶ David Rown, *Daniel Ek: Europe’s Greatest Digital Influencer Tops Wired 100*, *Wired* (May 16, 2014) available at <https://www.wired.co.uk/article/wired-100-daniel-ek>

⁷ Christian Castle, *The Curious Timing of “Spotify Untold” the Corporate Bio Book*, MusicTechPolicy (June 20, 2021) available at <https://musictechpolicy.com/2021/06/20/the-curious-timing-of-spotify-untold-the-corporate-bio-book/>

These memes will probably also come from other of the “Big Tech” companies that make up the cohort of “digital music services” including Google. While Spotify has been repeatedly sued and paid millions in compensation⁸ for fast and loose music licensing practices, Spotify is not the only problem.⁹ I would ask the CMA to keep in mind that there likely is no corporation in commercial history that has done more to use its market power to systematically undermine copyright and artist compensation than Google¹⁰ which I summarized in an op-ed for Morning Consult concerning the *Google v. Oracle* industrial-strength fair use case in the US.¹¹

Dominance is not Genius

In my view, music’s “streaming recovery” is in significant part built on a fallacy to the extent it relies on transferring the value of music into stock market gains unrealized by creators. As I will describe below, the net result of Big Tech’s vast market power expressed through streaming prices and royalty terms is that all but a few creators are further beaten down by a combination of low streaming rates, skewed royalty terms, and a headlock on live performances from publicly reported stream counts that are largely used as a way for talent buyers to exclude artists who do not embrace streaming for distribution.

⁸ Ali Nawaz Khan, *Could Spotify Face \$100 million plus lawsuits over its comedy album faux pas*, Music Business Worldwide (Dec. 7, 2021) available at <https://www.musicbusinessworldwide.com/podcast/could-spotify-face-100-million-plus-lawsuits-over-its-comedy-album-faux-pas3/>; Ferrick v. Spotify Class Action Settlement Portal, <https://spotifypublishingsettlement.com>; Daniel Kreps, *Wixen’s \$1.6 Billion Lawsuit Against Spotify*, Rolling Stone (Jan. 3, 2018) available at <https://www.rollingstone.com/music/music-news/wixens-1-6-billion-spotify-lawsuit-what-you-need-to-know-202532/>.

⁹ A side effect of Spotify’s promotion of Anglo-American cultural dominance around the world is the company’s struggle to “find”, i.e., to account and pay song royalties for other than English repertoire even when the Hispanic-language artists including Nicky Jam and ChocQuibTown perform live at a Spotify awards party in Cancun. See *Spotify Can’t Find Songwriters Performing at Spotify High Roller Party in Cancun*, MusicTechPolicy (Jan. 25, 2019) available at <https://musictechpolicy.com/2019/01/25/spotify-cant-find-songwriters-performing-at-spotify-high-roller-party-in-cancun/>

¹⁰ Google has used its unprecedented online footprint to dictate the terms of the market for creative works. By tying together a set of limited exceptions and exclusions within the U.S. Copyright Act and analogous laws in other countries, and then advocating for the radical expansion of those exceptions, Google has amplified its own market power to the great detriment of artists, songwriters and copyright owners. Thus, where copyright exceptions were intended to be utilized for the cultural and economic good of both creators and the public, Google has throttled it into a business model. For a discussion, see amicus brief of Helienne Lindvall, David Lowery and Blake Morgan, *Google v. Oracle*, U.S. Supreme Court available at https://www.supremecourt.gov/DocketPDF/18/18-956/133298/20200218155210566_18-956%20bsac%20Helienne%20Lindvall%20et%20al--PDFa.pdf

¹¹ Christian L. Castle, *The Supreme Court Should See Through Google’s Industrial Strength Fair Use Charade*, Morning Consult (Aug. 28, 2020) available at <https://morningconsult.com/opinions/the-supreme-court-should-see-through-googles-industrial-strength-fair-use-charade/>

Streaming is an answer to our problems the same way that the arsonist turned firefighter destroys our homes only for us to bear the cost to rebuild with no insurance while the arsonist takes credit for saving our lives. Artists and songwriters have this antisocial behavior imposed on them and are now told to appreciate the arsonist's lifesaving efforts by her many lawyers and lobbyists protecting firebugs with legislative safe harbors because "disruption" is a thing.

I would argue these phenomena are real and come about solely because of the power of Spotify over their target market and its verticals (including radio, or what Daniel Ek calls "the audio opportunity"¹²) and the market power of Alphabet Inc. with Google search and YouTube video for the most part (which further extends to all human and machine online activity).¹³

Climate-hostile streaming¹⁴ is not a medium of choice for artists or songwriters; there was no choice about it.¹⁵ It's not ubiquitous because artists and songwriters *want* to trade off higher

¹² Spotify Earnings Call Transcript, Feb. 2, 2022 available at <https://news.alphastreet.com/spotify-technology-spot-q4-2021-earnings-call-transcript/> ("Audiobooks in our view is a subset of the overall **audio opportunity**....") emphasis added.

¹³ For example, when YouTube rolled out its subscription service, it reportedly warned independent artists and labels that if they refused YouTube's licensing terms, their music would be blocked on YouTube's free service, and YouTube would keep any advertising revenue. See Ben Sisario, *Independent Music Labels Are in a Battle with YouTube*, N.Y. Times (May 24, 2014) <https://www.nytimes.com/2014/05/24/business/media/independent-music-labels-are-in-a-battle-with-youtube.html>. See also Zoë Keating, *What Should I Do About YouTube?* available at <https://zoekeating.tumblr.com/post/108898194009/what-should-i-do-about-youtube> ("My Google Youtube rep contacted me the other day. They were nice and took time to explain everything clearly to me, but the message was firm: I have to decide. I need to sign on to the new Youtube music services agreement or I will have my [ad supported] Youtube channel blocked."); Kevin Erickson, *Zoë Keating's YouTube Dilemma*, Future of Music Blog (Jan. 29, 2015) available at <https://futureofmusic.org/blog/2015/01/29/zoë-keatings-youtube-dilemma-what-you-need-know> ("The terms offered [to Zoë Keating] by YouTube aren't particularly surprising. That's because they seem to be essentially the same as the terms offered to independent labels, which spurred outcry from indie trade groups including WIN (World Independent Network) and inspired protests outside Google offices.").

¹⁴ Sharon George and Deirdre McKay, *How Streaming Music Could Be Harming the Planet*, BBC Future (Feb. 18, 2019) available at <https://www.bbc.com/future/article/20190207-why-streaming-music-may-be-bad-for-climate-change>; Nicola Jones, *How to stop data centres from gobbling up the world's electricity*, Nature (Sept. 12, 2018) available at <https://www.nature.com/articles/d41586-018-06610-y>; Andrew Winston, George Favaloro, Tim Healy, *Energy Strategy for the C-Suite*, Harvard Business Review (Jan.-Feb. 2017) at 138 available at <https://hbr.org/2017/01/energy-strategy-for-the-c-suite>; Greenpeace, *How Dirty is Your Data?* (May 24, 2011) available at <https://www.greenpeace.org/international/publication/7196/how-dirty-is-your-data/>

¹⁵ While streaming accounts for approximately 85% of recorded music revenues, it must be said that many artists and many fans, given the choice, prefer physical carriers for both sonic and aesthetic reasons. Vinyl, for example, is enjoying a resurgence despite the market power of Spotify. See, e.g., Tina Benitez-Eves, *Vinyl Record Sales up 108.2% in First Half of 2021*, American Songwriter (July 16, 2021) ("For the past 15 years, vinyl record sales have seen consecutive growth, despite the continued uptick of digital consumption in the U.S. and drop in sales and

margin goods for lower margin goods,¹⁶ or trade the thousands of diverse record shops¹⁷ that streaming drove out of business for essentially four global outlets¹⁸ dominated by Anglo-American repertoire.¹⁹

backup in production due to the pandemic.”) available at <https://americansongwriter.com/vinyl-record-sales-up-108-2-in-first-half-of-2021/>; Sarah Whitten, *Music Fans Pushed Sales of Vinyl Albums Higher, Outpacing CDs, Even As Pandemic Sidelined Stadium Tours*, CNBC (July 14, 2021) (“Music consumption in the first half of the year has remained robust even without the sold-out stadium tours, according to a new report. While on-demand audio streaming is up 15%, consumers are also looking to own more tangible collectibles like vinyl albums, which continue to surpass CD sales. In the first six months of 2021, 19.2 million vinyl albums were sold, outpacing CD volume of 18.9 million, according to MRC Data, an analytics firm that specializes in collecting data from the entertainment and music industries.”) available at <https://www.msn.com/en-us/entertainment/news/music-fans-pushed-sales-of-vinyl-albums-higher-outpacing-cds-even-as-pandemic-sidelined-stadium-tours/ar-AAM6S31>; Ed Christman, *Audio Streams Up 15%, Vinyl Sales Double in First Half of 2021*, Billboard (July 15, 2021) (“Vinyl sales, which have grown for the past decade, more than doubled between January and June, up 108.2% to 19.2 million from 9.2 million in the first six months of last year. Even CD sales, which have been steadily and precipitously declining, posted a modest 2.2% gain, to 18.9 million units. The only serious loss was in digital sales: Album downloads fell 26.8%, to 12.92 million, while track sales dropped 20.3%, to 101.8 million. But physical sales rose so much that, for the first time in years, total album sales rose, by 12.6% to 51.26 million.”) available at <https://www.msn.com/en-us/music/news/audio-streams-up-15-vinyl-sales-double-in-first-half-of-2021/ar-AAM9Sk7>; Sam Willings, *Sainsbury’s Supermarket Will Stop Selling CDs, Sale of Vinyl Records Will Continue* (July 13, 2021) (“A spokesperson for the British Phonographic Industry (BPI) told the BBC that “The CD has proved exceptionally successful for nearly 40 years and remains a format of choice for many music fans who value sound quality, convenience and collectability.” They continued: “Although demand has been following a long-term trend as consumers increasingly transition to streaming, resilient demand is likely to continue for many years, enhanced by special editions and other collectable releases.”) available at <https://www.musictech.net/news/sainsburys-supermarket-will-stop-selling-cds-sale-of-vinyl-records-to-continue/>.

¹⁶ See, e.g., *The Trichordist Streaming Price Bible 2019-2020*, available at <https://thetrichordist.com/2020/03/05/2019-2020-streaming-price-bible-youtube-is-still-the-1-problem-to-solve/>

¹⁷ See, generally, Kate Nicholson, *Revealed: The surprising problem that may have hampered HMV’s success in the past*, Express (Oct. 11, 2019) available at <https://www.express.co.uk/finance/personalfinance/1189590/hmv-business-finance-birmingham-surprising-problem-past-success-spt> (lack of exclusive content in high street record shops); Lois Price, *Record Store Day: Remembering an era when buying and selling discs were labours of love*, The Independent (April 17, 2015) available at <https://www.independent.co.uk/arts-entertainment/music/features/record-store-day-remembering-an-era-when-buying-and-selling-discs-were-labours-of-love-10183001.html>

¹⁸ Not only do Spotify, Google, Amazon and Apple dominate the global market for the sale of recorded music, they are also intentionally encroaching on the broadcast radio market through their algorithmic “lay back” enterprise playlists that appear to be pay-for-play schemes for selection and rotation of music in large part. If these pay-for-play schemes were occurring on radio they would be called “payola,” a long-standing discredited practice to gain market share.

¹⁹ Spotify, *What the World Streamed Most in 2021: Most Streamed Artists Globally in 2021* (Dec. 1, 2021) available at <https://newsroom.spotify.com/2021-12-01/what-the-world-streamed-most-in-2021/> (“1. Bad Bunny; 2. Taylor Swift; 3. BTS; 4. Drake; 5. Justin Bieber”).

Global streaming music subscription market, Q2 2021

Global streaming music subscription market, Q2 2021, global

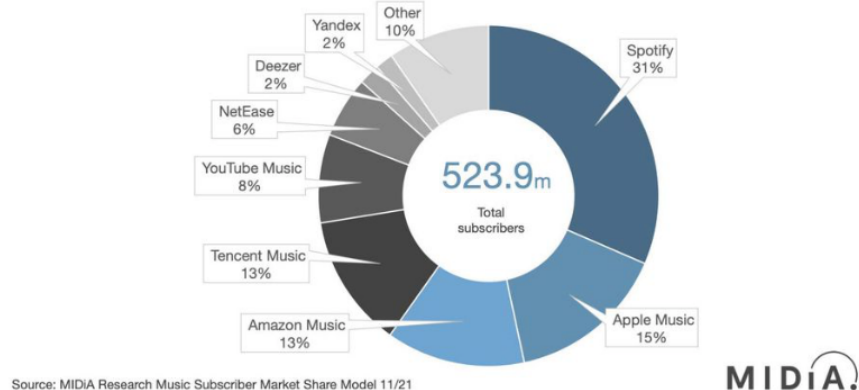


Figure 2 Market concentration in subscription streaming services

Streaming services also use their market power and technology to replace radio programmers with algorithmically derived “lay back” features that I will refer to generally as “enterprise playlists.” Note that Spotify “disrupts” the delicate balance hammered out with radio to protect culture and creators for its own profit. This income transfer is discussed at some length in the study I co-authored with Professor Claudio Feijoo for the World Intellectual Property Organization²⁰ and which I will return to briefly below.

The point is that Spotify appears to be trying to extract rents from the cultural and transparency protections accorded to radio without paying its fair share—that is not a question, it is the answer. This is not saving the workers who drive the music business. Spotify’s now former general counsel told the recent inquiry into the music streaming economy conducted by the UK Parliament’s Digital, Culture, Media and Sport Committee (the “DCMS Inquiry”)²¹, “Our job is sucking users away from radio”²² and Spotify uses its market power to do just that.

²⁰ Castle and Feijoo, *Study on Artists in the Digital Music Marketplace*, WIPO (2021) available at https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=540735 (hereafter “WIPO Study”) copy attached as Attachment A.

²¹ 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/>

²² Charlotte Krol, *Spotify tells DCMS inquiry that raising subscription price could push people to online piracy*, New Music Express (Feb. 23, 2021) available at <https://www.nme.com/news/music/spotify-tells-dcms-inquiry-that-raising-subscription-price-could-push-people-to-online-piracy-2887113>

Damian Green, MP, summed it up in a question to Apple Music:

More and more particularly younger listeners prefer to get their music through streaming services like yours or Spotify's and in the long run that is going to change everything.

One of the things it will change for musicians is that in the UK they get paid much more for a song played on the radio than a song played on a streaming service.²³

It requires more muscle than brains to hammer a competitive moat out of vertical and horizontal streaming dominance based in large part on massive collection of data derived from neuroscience and psychophysiology techniques.

Do not mistake market dominance for genius.²⁴

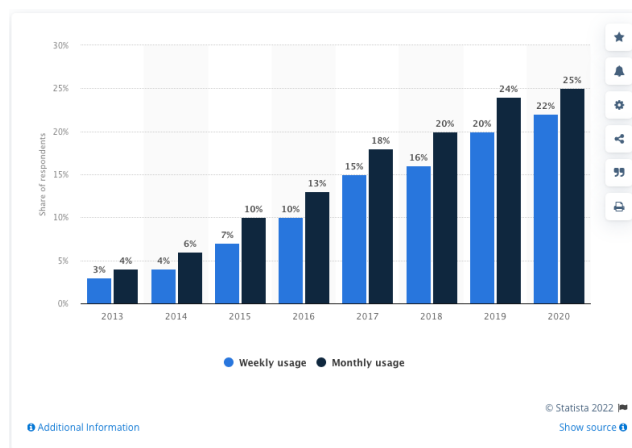


Figure 3 Share of Spotify Users in the US 2013-2020²⁵

Flexing muscle comes down to a handful of men who control these companies through “dual class” stock that creates “corporate royalty,” particularly at Spotify and Google. I argue that while Spotify poor-mouths about how it cannot turn a profit its offices are largely Potemkin Villages in the most expensive real estate markets in the world, its business is largely a self-

²³ DCMS Inquiry at Question 591.

²⁴ A paraphrase of *The Big Short* protagonist Steve Eisman’s bon mot speaking of investment bankers, “They mistook leverage for genius”, Niall McGee, *Invest like a Legend: Steve Eisman*, THE GLOBE AND MAIL (Jan. 29, 2016) available at <https://www.theglobeandmail.com/report-on-business/rob-magazine/invest-like-a-legend-the-skeptic-steve-eisman/article28378668/>.

²⁵ Source: Statista, available at <https://www.statista.com/statistics/294640/spotify-listenership-in-the-us/>

licking ice cream cone apparently based in large part on Internet addiction²⁶ using advertising research to find the “buy button in the brain”, lacks transparency in its dealings with consumers, artists and musicians, promotes payola any number of ways, extends its dominant reach beyond its lane, plus it spends fortunes on multi-billion dollar stock buybacks to juice the stock price of insiders—the oldest scam on Wall Street (and that’s saying a lot), and self-aggrandizement through naming rights on Camp Nou,²⁷ all while paying artists and songwriters a fraction of a penny per stream. And all this with a huge helping of gaslight.

It all starts in the boardroom, so we turn to some insights into how these decisions get made and how moguls like Daniel Ek keep getting away with it.

And as Austin songwriter and U.S. Supreme Court amicus Guy Forsyth wrote, “nothing says freedom like getting away with it.”²⁸

Corporate Governance at Spotify

Spotify, Facebook and Google each have a problem with “dual class” stock capitalizations.²⁹ Because regulators allow these companies to operate with this structure favoring insiders, the already concentrated streaming industry is actually controlled by Daniel Ek, Sergey Brin, Larry Page³⁰ and Mark Zuckerberg. While Amazon and Apple lack the dual class stock structure, Jeff Bezos has an outsized influence over both streaming and physical carriers. Apple’s influence is far more muted given their refusal to implement payola-driven algorithmic enterprise playlist placement for selection and rotation of music and their concentration on music playback hardware.

The voting power of Ek, Brin, Page and Zuckerberg in their respective companies makes shareholder votes candidates for the least suspenseful events in commercial history. However, based on market share, Spotify essentially controls the music streaming business. We now

²⁶ See, e.g., Adam Alter, *Irresistible: The Rise of Addictive Technology and the Business of Keeping Us Hooked* (2017) available at <https://www.amazon.com/Irresistible-Addictive-Technology-Business-Keeping/dp/1594206643>; *The Social Dilemma*, available at <https://www.thesocialdilemma.com>.

²⁷ Sid Lowe, *Barcelona close to £236m Spotify deal that includes Camp Nou naming rights*, *The Guardian* (Feb. 8, 2022) available at <https://www.theguardian.com/football/2022/feb/08/barcelona-close-to-236m-spotify-deal-that-includes-camp-nou-naming-rights>.

²⁸ Guy Forsyth, *Long Long Time* (2005) available at www.guyforsyth.com

²⁹ See generally FTSE Russell, FTSE RUSSELL VOTING RIGHTS CONSULTATION (July 2017) available at https://research.ftserussell.com/products/downloads/FTSE_Russell_Voting_Rights_Consultation_Results.pdf

³⁰ Tom Hals, *Google settlement clears the way for new Class C stock*, *Reuters* (June 17, 2018) available at <https://www.reuters.com/article/us-google-stockplan-settlement-idUSBRE95G0MU20130617>

consider the implications of dual class stock at Spotify and leave CMA to determine the implications for competition of this disfavored capitalization technique to give founders dead hand control.³¹

Commissioner Robert Jackson, formerly of the U.S. Securities and Exchange Commission, summed up the problem:

“[D]ual class” voting typically involves capitalization structures that contain two or more classes of shares—one of which has significantly more voting power than the other. That’s distinct from the more common single-class structure, which gives shareholders equal equity and voting power. In a dual-class structure, public shareholders receive shares with one vote per share, while insiders receive shares that empower them with multiple votes. And some firms [Snap, Inc. and Google Class B shares] have recently issued shares that give ordinary public investors no vote at all.

For most of the modern history of American equity markets, the New York Stock Exchange did not list companies with dual-class voting. That’s because the Exchange’s commitment to corporate democracy and accountability dates back to before the Great Depression. But in the midst of the takeover battles of the 1980s, corporate insiders “who saw their firms as being vulnerable to takeovers began lobbying [the exchanges] to liberalize their rules on shareholder voting rights.”³² Facing pressure from corporate management and fellow exchanges, the NYSE reversed course, and today permits firms to go public with structures that were once prohibited.

³¹ The cost of buying out WeWork’s founder, despite allegations of charlatanry, is a cautionary tale of what happens once a founder obtains voting power through dual class stock. See Rani Molla, *The WeWork CEO’s outsize power is one reason the company is imploding* (Sept. 24, 2019) available at <https://www.vox.com/recode/2019/9/24/20882133/wework-adam-neumann-dual-super-voting-stock-shares-tech-ipo>

³² Stephen Bainbridge, *Understanding Dual Class Stock Part I: An Historical Perspective* (September 9, 2017) ProfessorBainbridge.com available at <https://www.professorbainbridge.com/professorbainbridge.com/2017/09/understanding-dual-class-stock-part-i-an-historical-perspective.html>

Spotify is the dominant streaming firm³³ and the voting power of Spotify stockholders is concentrated in two men: Daniel Ek and Martin Lorentzon.³⁴ Transitively, those two men literally control the music streaming sector through their voting shares, are extending their horizontal reach into the rapidly consolidating podcasting business³⁵ and aspire soon to enter the audiobooks vertical.³⁶ Where do they get the money is a question on every artists lips after hearing the Spotify poormouthing and seeing their royalty statements.

Name	Ordinary Shares		Beneficiary Certificates ⁽⁷⁾		Percent of Total Voting Power
	Number	Percent	Number	Percent	
Daniel Ek ⁽¹⁾⁽⁶⁾	32,323,633	16.7 %	140,916,640	40.2 %	31.9 %
Martin Lorentzon ⁽²⁾	20,988,551	10.9 %	209,597,620	59.8 %	42.5 %
Baillie Gifford & Co ⁽³⁾	22,136,902	11.5 %	—	—	4.1 %
Morgan Stanley ⁽⁴⁾	17,293,378	9.0 %	—	—	3.2 %
T. Rowe Price ⁽⁵⁾	14,252,970	7.4 %	—	—	2.6 %
Tencent ⁽⁶⁾	16,631,969	8.7 %	—	—	— (8)

³³ Midia Research, *Global Streaming music subscription market, Q2 2021* (Jan. 18, 2022) available at <https://www.midiaresearch.com/blog/music-subscriber-market-shares-q2-2021> (“Spotify remains the DSP with the highest market share (31%)....With Apple Music being a distant second with 15% market share and Spotify adding more subscribers in the [prior] twelve months....than any other single DSP, there is no risk of Spotify losing its leading position anytime soon.”); Statista, *Share of Music Streaming Subscribers World Wide in First Quarter of 2021, by company* (Nov. 2021) available at <https://www.statista.com/statistics/653926/music-streaming-service-subscriber-share/> (“In the first quarter of 2021, 32 percent of music streaming subscribers worldwide had a subscription with Spotify, almost double the share who were subscribed to Amazon Music. Other services in the list included Apple, Tencent Music and YouTube.”)

³⁴ Spotify Form 20-F (Annual Report), Spotify (2021) at 79 available at https://s22.q4cdn.com/540910603/files/doc_financials/2021/q4/0307a021-254e-43c5-aeac-8242b0ea3ade.pdf (Item 7. Major Shareholders and Related Party Transactions)

³⁵ See, e.g., Mark Klienman, *Amazon and Spotify mull bids for London-listed podcaster Audioboom*, SkyNews (Feb. 13, 2022) available at <https://news.sky.com/story/amazon-and-spotify-mull-bids-for-london-listed-podcaster-audioboom-12541467>

³⁶ *Spotify Earnings Call* (Feb. 2, 2022) available at <https://news.alphastreet.com/spotify-technology-sa-spot-q4-2021-earnings-call-transcript/> (Daniel Ek: “Audiobooks in our view is a subset of the overall audio opportunity, but obviously, it touches a very important creator group which is authors. So we’re very excited about that opportunity. And long-term, **I think you can look at markets like China**, for instance, to look at just the **innovation that’s happening in audiobooks there [embedding advertising in books and scraping behavioral data for government surveillance]**. For me it’s strange to imagine why not more of that type of innovation have come to many of the Western markets as well.” Emphasis added.)

The effects of that control may be subtle; for example, Spotify engages in multi-billion dollar stock buybacks³⁷ and debt offerings,³⁸ but makes ever more spectacular losses while refusing to exercise pricing power. As we will see, the algebra of the “market centric” royalty method Spotify demands from artists and staunchly defends makes ever-declining per stream royalty payouts inevitable—to the point that it likely costs more to account for streaming royalties on a per-stream basis than the royalties earned.

Market Centric Royalty Model Makes the Rich Richer

The CMA will no doubt have heard complaints about low streaming royalty payouts.³⁹ Indeed, one could say that the entire DCMS Inquiry was based on understanding the issue. There are very good reasons for these complaints which revolve around a simple fact: Artists complain about low rates because the rates are not only low, but unsustainably low. Decades of progress against record companies have resulted in higher payouts generally in the sale of physical recordings, but streaming has shoved artists back to the future to rates that are too embarrassing even for the 1950s.

³⁷ Press Release *Spotify Announces Stock Repurchase Program, Up to \$1.0 billion*, Spotify (Aug. 20, 2021) available at <https://investors.spotify.com/financials/press-release-details/2021/Spotify-Announces-Stock-Repurchase-Program-Up-to-1.0-Billion/default.aspx>

³⁸ 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>

³⁹ See, e.g., Didier Martin, *Music Streaming Must Switch to a Fair and Logical Payment Model. There is No Time to Lose*, Music Business Worldwide (Feb. 8, 2021) available at <https://www.musicbusinessworldwide.com/the-streaming-music-industry-must-switch-to-a-fair-and-logical-payout-model-there-is-no-time-to-lose/>

	DSP / STORE	PER STREAM	STREAMS PER SONG	STREAMS PER ALBUM	MKT SHR BY STREAMS	MKT SHR BY REVENUE	MKT SHR BY STREAMS	MKT SHR BY REVENUE
1	Spotify	\$0.00348	175	1,752	22.09%	44.33%		
2	Apple Music	\$0.00675	90	902	6.36%	24.79%		
3	YouTube Content ID	\$0.00022	2,794	27,940	51.00%	6.42%		
4	Amazon Unlimited	\$0.01123	54	542	0.83%	5.35%		
5	Deezer	\$0.00562	108	1,084	0.80%	2.58%		
6	Google Play	\$0.00554	110	1,099	0.79%	2.54%		
7	Pandora	\$0.00203	299	2,993	1.91%	2.24%		
8	YouTube	\$0.00154	395	3,947	1.90%	1.70%		
9	Amazon Music	\$0.00426	143	1,431	0.65%	1.60%		
10	Facebook	\$0.05705	11	107	0.05%	1.56%	86.38%	93.12%
11	YouTube Red	\$0.01009	60	604	0.23%	1.37%		
12	Peloton	\$0.03107	20	196	0.07%	1.28%		
13	Taihe Music Group	\$0.00044	1,386	13,862	4.92%	1.25%		
14	Yandex LLC	\$0.00109	559	5,585	0.93%	0.58%		
15	TIDAL	\$0.00876	70	695	0.11%	0.58%		
16	Napster	\$0.00916	66	665	0.07%	0.37%		
17	TDC Play	\$0.00994	61	612	0.06%	0.37%		
18	LOEN	\$0.00235	259	2,594	0.13%	0.18%		
19	UMA	\$0.00022	2,779	27,794	1.17%	0.15%		
20	Play Network	\$0.00032	1,916	19,157	0.67%	0.12%	8.37%	6.24%
21	Telecom Italia S.p.A	\$0.01693	36	360	0.01%	0.09%		
22	KKBOX	\$0.00408	149	1,492	0.04%	0.09%		
23	VEVO	\$0.00083	737	7,374	0.13%	0.06%		
24	Slacker	\$0.00713	85	854	0.01%	0.06%		
25	iHeartRadio	\$0.01798	34	339	0.01%	0.05%		
26	Line	\$0.00970	63	628	0.01%	0.05%		
27	iMusica	\$0.02247	27	271	0.00%	0.05%		
28	Bugs Corporation	\$0.00427	143	1,426	0.01%	0.03%		
29	Reliance Jio	\$0.00176	346	3,463	0.02%	0.02%		
30	Gaana	\$0.00133	457	4,575	0.02%	0.01%	0.26%	0.51%
Total Aggregate / Average :		\$0.00173	352	3,516				

Figure 4 Per Stream Rates by Service 2019-2020 The Trichordist

We spend a good deal of time on this topic in the WIPO Study, to which I refer you for a deeper dive.⁴⁰ For this comment, I will discuss a few key points. First consider the essential formula at the heart of streaming royalties and the “market centric” model. Realize that this calculation is performed monthly; revenues decline or increase each month, but the discrete recordings that potentially comprise the “All Streams” number increases each month with new releases.

The essential formula across all streaming platforms is some version of these calculations:

$$\text{Net Monthly Income} \times [\text{Your Streams} \div \text{All Streams}] = \text{Your Royalty Share}$$

$$\text{Your Royalty Share} \div \text{Your Streams} = \text{Your Per Stream Rate}$$

Realize this calculation is made at the close of each month on a cash basis (i.e., not using accrual accounting notwithstanding unintelligible references to GAAP in U.S. law). Since the

⁴⁰ WIPO Study, Tables 5 and 6 and accompanying text. We also compare the market centric and “user centric” models which is a topic of broad interest but outside the scope of this comment.

calculation is of such a short duration (monthly), the effects of this calculation can only be fully understood by measuring rates of change in the terms over time.

First consider the function “[Your Streams ÷ All Streams]”. If the recordings that comprise “All Streams” increase each month at a rate that is greater than the increase in the recordings that comprise “Your Streams”, then what happens?

That quotient **declines** over time. If “Your Streams” is viewed at the individual artist level, this decline is all but certain. When you consider the algebra of this cornerstone metric in streaming royalties, the per-stream rate for any one artist (or songwriter) also declines over time. Bigger catalog owners may be able to get downside protection using greater formulas and other techniques, but even they are subject to this problem.

Even if “Your Streams” is viewed at the catalog or label level, the same tension is present, although with extremely large catalogs it will be more muted. This explains why market share has become so much more of an issue for owners—and aggregators—of already large catalogs— if Spotify adds 60,000 recordings a day⁴¹ and if streaming contributes 85% of record company revenues you can see why this interest in market share has become acute. Muscle matters.

In other words, the market centric formula is a hyper-efficient market share distribution at both the label level and the artist level. Again, do not confuse muscle for genius in streaming.

This calculation may vary slightly between subscription services and advertising services, but essentially comes down to the same calculation: It is a mathematical rendering of the expression “the rich get richer” and it is arguably doing exactly what it is intended to do.⁴² Unfortunately, Spotify CEO Daniel Ek missed the point on this math and said in an interview that artists need to record more: “[Y]ou can’t record music once every three to four years and

⁴¹ 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/>

⁴² 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.)

think that's going to be enough."⁴³ At scale, I think it's safe to say that no one artist can ever record enough to beat the odds on the house.

It is also worth noting the effect on Net Revenue of Spotify's long-term refusal to exercise pricing power over subscription pricing. Because Spotify refuses to raise subscription pricing significantly and emphasizes international growth in their story to Wall Street, over time it is likely that Net Revenues will also grow more slowly than the number of recordings throwing off streams in the "All Streams" denominator. Again, this failure to exercise pricing power (or include stock market valuation in "Net Revenue") tends to cause the per-stream rate to decline over time.

A word about the per-stream rate. Spotify in particular tries to deflect attention away from per-stream rates by saying they pay out X% of their revenues to rightsholders (lumping artists, songwriters, labels and music publishers together under "rightsholders"). I understand why they engage in this deflection—it's a bad look for them. It is true that Spotify itself does not negotiate a per-stream rate in pennies as a deal point in their music licenses.⁴⁴ Yet there is a per-stream rate in a meaningful sense because of "greater than" formulas that may fix a penny rate floor.

For example, in a "greater than" formula, the rightsholder may agree to take the market centric formula but no less than \$X per stream (say 1¢ per stream). And in any event, if Spotify pays a label \$10 for 100 artists streams combined, the label still has to account to each artist individually for their particular royalty which requires the label to calculate a per-stream rate that may be derived from that artist's recording agreement or license. That per-stream calculation allows the label to allocate a lump sum payment across artist accounts at different rates and subject to different recoupment terms.⁴⁵ So for any given artist, that artist sees a per-stream rate on their statement either directly or indirectly.

⁴³ Stuart Dredge, *Spotify CEO talks Covid-19, artist incomes and podcasting*, MusicAlly (June 30, 2020) available at <https://musically.com/2020/07/30/spotify-ceo-talks-covid-19-artist-incomes-and-podcasting-interview/>

⁴⁴ It must be said that distributed labels and artists licensing to streaming services through DIY distributors such as Tunecore have no idea of the terms that those distributors have negotiated with services. In fact, vanity distributors like Tunecore have essentially shifted the entire distribution risk onto artists by requiring the artist to prepay distribution "fees" to Tunecore instead of artists and distributors sharing the downside and upside as a percentage of revenues.

⁴⁵ Given the number of calculations required and the tiny per stream rates, it is likely that on a per-stream basis, the costs of accounting exceed the royalties. Record company accounting systems were expensed during the higher margin CD era. It is a question as to whether a small streaming-dominant record company starting today could afford to build accounting systems at the level of detail required to properly account for streaming royalties.

It is also handy to compare per-stream rates across services to determine who pays more. The Trichordist “Streaming Price Bible” above is measured at the label level. This debunks another shibboleth that one often hears from Spotify along the lines of “we pay millions to the labels, it’s not our fault that you artists don’t get paid by your evil gatekeeper record company.” The Trichordist chart measures revenues at the *label level*, not the artist level. This Trichordist chart is a medium sized independent label over a year’s worth of sales, so there are fewer distortions based on sales spikes.

Thus, while it is true that particular deals may not have a negotiated per-stream rate as a material deal point, there certainly are per-stream rate calculations going on in the administration of these contracts. Again, not very transparent to participants.

Songwriters follow a similar method of calculation with some twists and turns depending on the country.⁴⁶

Whenever the streaming royalty is analyzed, particularly for Spotify, it is well to remember the main item that is not included in the “Net Revenues” hotchpot—stock and the company’s market valuation, followed closely by any compensation for the value of the data Spotify derives from fans driven to their platform by the artists. Spotify had many opportunities to make stock, or cash bonuses based on stock performance, available to creators but has consistently refused to do so including during the COVID pandemic. The major labels and possibly independent labels were able to acquire shares of stock either through stock grants or stock purchases which were famously liquidated in large part when Spotify had its direct public

⁴⁶ As the reader can imagine, conducting a royalty compliance examination of streaming payments is a highly complex exercise. To be effective, these examinations require a combination of knowledge of technology, systems, industry royalty practices as well as accounting skills—but not a knowledge of accrual financial accounting methods reflected in the Generally Accepted Accounting Principles most often the province of Certified Public Accountants and Chartered Accountants who conduct financial audits. While both compliance exams and financial audits are sometimes called “audits” in the vernacular, they are not the same thing and do not require the same skills. Yet—and this may be of interest to CMA—the services frequently use their market power to require that any person conducting a royalty exam be a Certified Public Accountant and have even used their lobbying power to have this false requirement written into U.S. law. I pointed out the futility and really inaccuracy of this requirement to U.S. Senate Staff during the passing of the Music Modernization Act but was told that the services would not change that stipulation. So U.S. law now includes requirements that either disqualify the most effective royalty examiners or causes them to incur additional costs to engage a CPA or CA to comply. I mention this side issue due to the exercise of market power in a manner that certainly seems collusive for the purpose of making accuracy more difficult—but then accuracy in accounting is not a selling point for these services. *See, e.g.*, Copyright Royalty Judges, Docket No. 14-CRB-0001-WR (Web IV), Testimony of Ron Wilcox, available at https://www.crb.gov/rate/14-CRB-0001-WR/statements/SX/2B_SX_WDT_Ron_Wilcox_PUBLIC.pdf (“Because royalty audits require extensive technical and industry-specific expertise, in [Warner Music Group]’s experience a CPA certification is not generally a requirement for conducting such audits. To my knowledge, some of the most experienced and knowledgeable royalty auditors in the music industry are not CPAs.”)

offering—the point of which⁴⁷ is to offer liquidity for existing shareholders—which itself may be worth looking into as a measurement of value-per fan largely transferred to Spotify and other streaming services.⁴⁸

One of the main concerns that artists and even some independent labels have about the market centric model is that it inevitably **requires subscribers to pay for music they don't listen to**. This is because a portion, albeit perhaps a very small fraction, of their subscription payment benefits artists that other people listen to. Even if a subscriber listens to one artist for an entire month, that subscription payment will be paid largely to artists the subscriber does not listen to and may not even like (and, of course, shared with any label the artists are signed to).

A growing number of users have become aware of this curiosity and it does not take a mathematical whiz to understand that the system is designed to benefit owners of large catalogs who are paid on every stream of their recordings, and, of course, like any good racket, the house always wins.

We have not discussed songwriters much so far but let us now look at a process with the imprimatur of legality that is currently happening before the Copyright Royalty Board in the United States that directly involves UK songwriters whose interests are largely undefended before that tribunal.

⁴⁷ A direct listing is entirely different than a full-commitment underwriting initial public offering. In its direct listing, Spotify's *outstanding* shares pre-listing were listed on the New York Stock Exchange without either a primary or secondary underwritten offering. That is, it appears that the company itself did not raise capital through the direct offering. Existing shareholders, such as the major record labels, employees, investors, and other selling stockholders were able to sell their shares to the public without regard to lock-up agreements or other restrictions. See, e.g., John McDuling, *Spotify's \$8.4 billion valuation gives artists another reason to hate it*, Quartz (April 13, 2015) available at <https://qz.com/382042/spotify-s-8-4-billion-valuation-gives-artists-another-reason-to-hate-it/> (Quartz estimates that the value that artists drove to Spotify was approximately \$140 per user.)

⁴⁸ Spotify did not have a full commitment underwriting for its shares and did not issue new shares to the public. Therefore the shares traded to the public came from existing holders of the company's common stock. The price of the shares on the first day of trading was a reference price divined by the price for privately traded shares pursuant to a special SEC ruling. See, e.g., Securities and Exchange Commission, Release No. 34-82627 (Feb. 2, 2018) available at <https://musictechpolicy.files.wordpress.com/2018/02/34-82627.pdf>; see also Harvard Law School Forum on Corporate Governance, *Spotify Case Study: Structuring and Executing a Direct Listing*, Harvard Law School (July 3, 2018) available at <https://corpgov.law.harvard.edu/2018/07/05/spotify-case-study-structuring-and-executing-a-direct-listing/>

Bootstrapping Statutory Rates at the U.S. Copyright Royalty Board: Frozen Mechanical Royalties

The CMA may wish to investigate the effects of the U.S. Copyright Royalty Board’s rate setting practices for songwriter royalties on mechanical royalty rates in the UK. This is highlighted in two current CRB proceedings⁴⁹ relating to statutory mechanical royalty rates paid by record companies to their music publishing affiliates, among others, represented by the National Music Publishers Association.⁵⁰

U.S. statutory rates are required by a compulsory license that forces songwriters to license to all comers after the initial release of a song on a phonorecord (a distinction honored in the breach). Those rates are set by a government entity titled the Copyright Royalty Board staffed by officials styled as the Copyright Royalty Judges. “Judges” in this case is a bit of a misnomer as the CRJs are not “judges” in the sense of being appointed and confirmed properly under the U.S. Constitution to hear all cases and controversies for life tenure on good behavior as part of the judicial branch. The CRJs are instead appointed by the Librarian of Congress and are part of the legislative branch of government, not the judicial branch. So the Kafka-esque experience at the CRB begins there. In fact, the CRB is an administrative agency with narrow powers, but almost total power over songwriter income.

The statutory royalty for songs is divided into two parts—physical carriers and permanent downloads,⁵¹ paid by the record companies, and streaming royalties paid by the services. Each rate is conducted in separate hearings, although “hearing” is a bit strong in the case of physical and downloads where the major publishers and major labels simply submitted a private voluntary negotiation settlement⁵² and asked the CRJs to effectively rubber stamp it as they

⁴⁹ Copyright Royalty Board, *Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords III)*, Dkt. No. 16-CRB-0003-PR (2018-2022) (Remand) available at <https://app.crb.gov/case/detail/16-CRB-0003-PR%20%282018-2022%29%20%28Remand%29>; Copyright Royalty Board, *Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)*, Dkt. No. 21-CRB-0001-PR (2023-2027) available at <https://app.crb.gov/case/detail/21-CRB-0001-PR%20%282023-2027%29>.

⁵⁰ It is important to note that the National Music Publishers Association is a trade group that acts for its members—not for *all* music publishers and certainly not for *all* songwriters. The authority of the NMPA is a major topic of discussion in both Phonorecords III (remand) and Phonorecords IV. For example, the Ivors Academy as an organization and Helienne Lindvall as an individual are both objectors to the NMPA’s proposed rate settlement in Phonorecords IV.

⁵¹ 37 CFR §385.11 available at <https://www.ecfr.gov/current/title-37/chapter-III/subchapter-E/part-385/subpart-B/section-385.11> (so-called “Subpart B” rates).

⁵² *Motion To Adopt Settlement Of Statutory Royalty Rates and Terms For Subpart B Configurations*, Docket No. 21-CRB-0001-PR (2023-2027), Copyright Royalty Board, Washington, DC. available at <https://app.crb.gov/document/download/25288>

had done three times before over the last 15 years (each proceeding sets a rate for a five-year period).

Because the CRB is essentially an administrative agency, US law requires the CRJs to seek public comment and they sure got some on the frozen mechanicals. In fact, twelve different songwriter groups including the Ivors Academy and many individual songwriters opposed the “settlement.”

Becoming an active participant in a rate setting proceeding is one of the most over-lawyered experiences in the music industry which is saying a lot as an American. Needless to say, songwriters typically cannot afford the representation and so very often don’t appear at the CRB.

The consequence? Process becomes punishment. The royalty that the record companies pay to songwriters has been “frozen” for 15 years and the record companies and their music publishing affiliates have recently reached a “voluntary” settlement in the current proceeding (styled “Phonorecords IV”) that would extend that frozen rate another five years—with no adjustment for any reason including inflation, a topic on everyone’s mind who buys a steak or gasoline. Opposing this freeze can only realistically be accomplished through public comments of which there have been many and I attach a sample of the ones I filed on behalf of my own clients for ease of reference.

This “frozen mechanicals” crisis is relevant to your competition inquiry because of nonobvious factors. First, the U.S. physical and download rates have been frozen at a nominal 9.1¢ rate since 2006; adjusted for inflation, the real statutory rate is approximately 6¢ (which is lower than the nominal rate in 1992). Due to America’s long commercial shadow, these artificially lowered rates may form the basis for the UK branches of the same firms to argue in the UK for comparable rates or no increase. This is particularly alarming ***because the same firms currently seek a cost-of-living adjustment based on the U.S. Consumer Price Index (Urban) —as well as a rate increase—for the streaming mechanical rates⁵³ that are paid by the services, not their record company affiliates.***⁵⁴

In other words, when the affiliates pay, no rate increase; when the services pay, a full rate increase including a COLA. This disparity has not been lost on the services, who have whipped the disparity into a major gating item on settling the streaming mechanical.

⁵³ 37 CFR §385.21 available at <https://www.ecfr.gov/current/title-37/chapter-III/subchapter-E/part-385/subpart-C> (so-called “Subpart C” rates).

⁵⁴ *Written Direct Statement of Copyright Owners*, Phonorecords IV, at B-17, available at <https://app.crb.gov/document/download/25858>

Why would even these affiliated companies agree to this commercially bizarre arrangement? One explanation is that the record companies and a select group of the largest publishers have reached a side deal—which in fairness was eventually disclosed publicly in part—that settles funds held by record companies that are “unmatched” or what is called the “black box” or the “late fee program.” That settlement agreement does not disclose an actual amount of the settlement but past versions of this deal have been in the hundreds of millions of dollars.

The CMA may not be surprised to learn there’s a catch—in prior versions of this story, in order to participate in the black box settlement, a self-administered songwriter or publisher would have to join the National Music Publishers Association, pay dues and also perhaps a commission on the black box recovery to the NMPA (apparently listed as “Program Service Revenue” on its tax return).⁵⁵

		Business Code			
Program Service Revenue	2a	MEMBERSHIP DUES	900099	11,886,081.	11,886,081.
	b	ROYALTY LATE FEE PROGRAM	900099	2,908,955.	2,908,955.
	c	ANTI-PIRACY PROGRAM	900099	70,362.	70,362.
	d	SONGWRITER FREEDOM PROJECT	900099	180,000.	180,000.
	e	LITIGATION SETTLEMENTS	900099	574,302.	574,302.
	f	All other program service revenue		86,969.	86,969.
	g	Total. Add lines 2a-2f			15,706,669.

Figure 5 NMPA Form 990 US Federal Tax Return

The frozen rate was, it appears, a quid pro quo for a black box settlement—without putting in place any of the safeguards regarding black box that are present in Title I of the Music Modernization Act that created the Mechanical Licensing Collective—itsself controlled by the same people who ran the statutory rate into the ground in the first place but paid for by the streaming services.

In other words, conflicts abound. As of this writing, the frozen mechanicals crisis is ongoing, but it does not appear to be getting resolved any time soon. If past is prologue, the songwriters will have to throw themselves on the tender mercies of the U.S. Congress in order to obtain even a hope of justice.⁵⁶

This may happen despite the extensive Congressional attention paid to songwriter issues in the much-ballyhooed Music Modernization Act from 2018 which sought to establish a mechanical rate based on a “willing buyer/willing seller” standard but failed to resolve what happens if the willing buyer and seller are the same corporate person. Indeed, Congressman Lloyd Doggett

⁵⁵ Gwendolyn Seale, #FrozenMechanicals Take 2: @sealeinthedeal Finds Some Facts on the NMPA Tax Return and MOU FAQ, The Trichordist (Dec. 1, 2021) available at <https://thetrichordist.com/2021/12/01/frozenmechanicals-take-2-sealeinthedeal-finds-some-facts-on-the-nmpa-tax-return-and-mou-fag/>

⁵⁶ See, e.g., Letter regarding Phonorecords IV from Hon. Lloyd Doggett to Librarian of Congress Dr. Carla Hayden and Register of Copyrights Shira Perlmutter (July 13, 2021), available at <https://thetrichordist.files.wordpress.com/2021/07/letter-library-of-congress-register-of-copyrights-7.13.21.pdf>

raised this very question in his recent letter to the Librarian of Congress and the Register of Copyright regarding the crisis,⁵⁷ a question which to my knowledge has yet to be answered.

The CMA, however, is in a position to call attention to this matter and investigate how much, if at all, it is affecting UK songwriters and independent music publishers. The songwriters filing public comments have almost uniformly called for the appointment of a permanent songwriter representative independent of the National Music Publishers Association which seems to be an idea long past due.

Let us now consider a source of revenue and valuation that no creator participates in: The value of the data collected from the very fans the artists are compelled to drive to these platforms—scraping in the dark recesses of the data mine where regulators rarely tread.

The Streaming Data Honeypot: Data Scraping and Spotify’s Neuromarketing Agenda

Creators often ask, why are they doing this to us? What do companies like Google and Facebook⁵⁸ as well as Spotify and TikTok gain from this massive infringement on the Internet of other people’s things?

Data, and all the riches it brings.⁵⁹

The Economist recently told us that data is the new oil:

Internet companies’ control of data gives them enormous power. Old ways of thinking about competition, devised in the era of oil, look outdated in what has come to be called the “data economy”. A new approach is needed.

⁵⁷ *Id.* at paragraph (2).

⁵⁸ Jacob Silverman, *Inside Jedi Blue, Facebook’s Shady Deal with Google*, New York Magazine (Oct. 28, 2021) available at <https://nymag.com/intelligencer/2021/10/inside-jedi-blue-facebooks-secret-deal-with-google.html> (“Over the past year, a series of court filings by 15 state attorneys general have exposed what amounts to secret collusion between Google and Facebook to rig the online ad market in their favor and to keep out competitors.”); Texas, Alaska, Arkansas, Florida, Ohio, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Nevada v. Google LLC, Alphabet Inc., Facebook Inc. and YouTube, LLC, *Second Amended Complaint, In Re: Google Digital Advertising Antitrust Litigation* (U.S.D.C. S.D.N.Y. Case No. 1:21-md-03010 Aug. 12, 2021) available at https://storage.courtlistener.com/recap/gov.uscourts.nysd.564903/gov.uscourts.nysd.564903.152.0_1.pdf

⁵⁹ We do not address artificial intelligence, but one of the reasons the music fan data is so valuable to companies like TikTok is due to the Big Data requirements of artificial intelligence developments.

[A]rtificial-intelligence (AI) techniques such as machine learning extract more value from data. Algorithms can predict when a customer is ready to buy, a jet-engine needs servicing or a person is at risk of a disease. Industrial giants such as GE and Siemens now sell themselves as data firms....

Vast pools of data can thus act as protective moats. Access to data also protects companies from rivals in another way. The case for being sanguine about competition in the tech industry rests on the potential for incumbents to be blindsided by a startup in a garage or an unexpected technological shift. But both are less likely in the data age.⁶⁰

It is not a stretch that streaming music companies are uniquely positioned to harvest and store significant amounts of consumer data using music as the main attraction. Crucially, adding music to the data honeypot allows segmentation by many demographic categories, including age. I am not aware of any parental controls on Spotify or any other music platform that restricts the service’s ability to scrape data or use data in the background for “non-display uses,” i.e., uses such as user profiling, although certain uses of data derived from children may be prohibited by various laws. *The Economist* has a suggestion for antitrust regulators:

A radical rethink is required—and as the outlines of a new approach start to become apparent, two ideas stand out.

The first is that antitrust authorities need to move from the industrial era into the 21st century.... The second principle is to loosen the grip that providers of online services have over data and ***give more control to those who supply them***. More transparency would help: ***companies could be forced to reveal to consumers what information they hold and how much money they make from it.***⁶¹

I would point out that if Spotify is not engaged in massive levels of data scraping and the selling of that data, the company certainly seems to spend a lot of money and time on some very Orwellian actions.

For example, Spotify has integrated “neuromarketing” into its advertising sales efforts. “Neuromarketing” is an ethically controversial area of research; the literature tells us, for example, that “...recent opinions on ‘neuromarketing’ within the neuroscience literature have strongly questioned the ethics of applying imaging techniques to the purpose of “finding the ‘buy button in the brain’ and ...creating advertising campaigns that we will be unable to

⁶⁰ The Economist, *The World’s Most Valuable Resource is no Longer Oil, but Data: The data economy demands a new approach to antitrust rules* (May 6, 2017) (hereafter “Data Oil”) available at <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>

⁶¹ See Data Oil, emphasis added.

resist.”).⁶² In other words, “neuromarketing” marries quite well with the addictive qualities of social media⁶³ and the endless playlist of the celestial jukebox designed to keep “users” connected to Spotify, or what I call the “streaming data honeypot.”

The streaming data honeypot not only raises public health and mental health concerns, it also raises competition issues given the value of the data collected which seems to increase the closer to the ethical line the services are willing to go to collect it as well as selling or simply using it for profit or to advance another agenda.

As Spotify tells us:

In today’s crowded media landscape, advertisers are finding it increasingly difficult to break through. But through the Spotify Advertising experience, fusing the power of personalized audio and interactivity, advertisers have the chance to connect with their audience in a meaningful context while they’re deeply immersed in what they’re listening to.

Spotify’s impact on the brain, measured by Neuro-Insight, can result in a significant impact on Ad Memorability and Brand Impact alike. Our research showed that 93% of the brain’s engagement with the content transferred directly into ad engagement as the listener moved from their music and podcasts to the ad. As a result, the ads saw 19% higher Brand Impact on Spotify compared to all other media.⁶⁴

Spotify’s neuromarketing campaign derives from an extensive study that Spotify undertook with “the research team at Neuro-Insight”⁶⁵, an international company run by the ex-WPP ad

⁶² Nick Lee, Amanda J. Broderick, Laura Chamberlain, *What is ‘neuromarketing’? A discussion and agenda for future research*, 63 INTERNATIONAL JOURNAL OF PSYCHOPHYSIOLOGY 199, 200 (Feb. 2007) available at <https://www.sciencedirect.com/science/article/abs/pii/S0167876006001073?via%3Dihub>

⁶³ See, e.g., Anita Restrepo et al, *Problematic Internet Use in Children and Adolescents: Associations with Psychiatric Disorders and Impairment*, 20 BMC PSYCHIATRY 252 (2020) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7251845/> (“The terms “problematic internet use”, “internet addiction”, “compulsive internet use” and “pathological internet use” have been used to refer to patterns of problematic behavior associated with internet use. Regardless of the specific terminology employed, concerns about the potential harms of internet use are growing rapidly, particularly in light of the inclusion of gaming disorder as a formal condition in the ICD-11 and as a condition requiring further study in the DSM-5.”)

⁶⁴ Spotify Advertising, *All Ears on You: What It Means for Brands*, Spotify (June 2021) available at <https://ads.spotify.com/en-US/news-and-insights/sonic-science/>

⁶⁵ Neuro-Insight claims to include music streamers Google, Facebook, Pandora and Amazon among its clients. Company site available at <https://www.neuro-insight.com/>

man John Zweig that encourages its Fortune 50 customers to “make your subconscious conscious.” The goals of Spotify’s neuromarketing efforts while not secret are largely unknown to the artists and songwriters whose works are the honey in the data honeypot:

[T]he unique power of sound actually can be explained—with science, of course.

We’ve partnered with the research team at Neuro-Insight, a leading firm in the field of cognitive research, to break down why sound—specifically, digital audio—has such a distinct impact. What we found, through both survey data and Neuro-Insight’s Steady State Topography technology that measures brain activity in real-time, is that digital audio is uniquely powerful thanks to its interactivity and personalization. For advertisers, that means there’s a huge opportunity to have all ears on you.⁶⁶

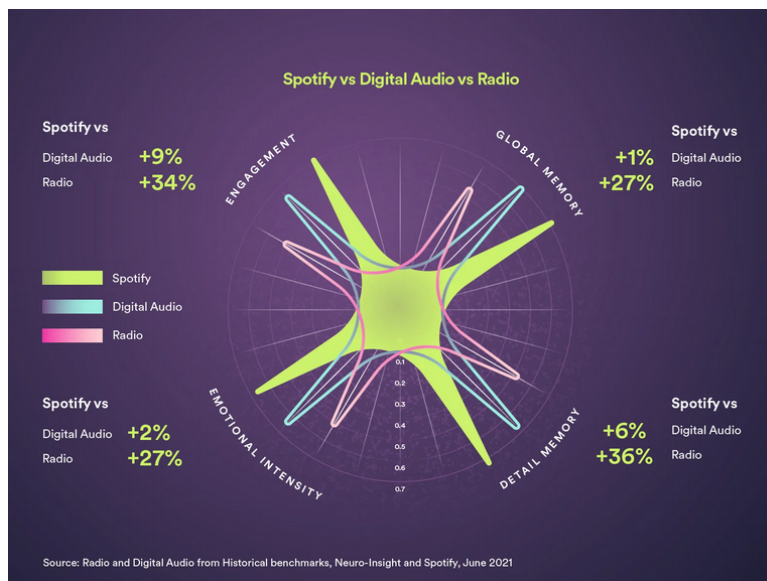


Figure 6 This is your brain on Spotify⁶⁷

⁶⁶ *Id.*, “New Research reveals that Spotify digital audio is more engaging than radio, TV and social media.”

⁶⁷ *Id.*

Axios provides further analysis on the methods and purpose of Spotify's findings:

Why it matters: Neuromarketing technology allows brands to "understand more of what is happening inside of the human mind" as users consume different kinds of media, says Jon Gibs, global director and principal data scientist at Spotify.

- The results of the study suggest that digital audio and ads seem to generate more engagement and emotional activation than other forms of media — which is a useful insight for anyone selling ads against streaming audio.

How it works: Spotify partnered with the neuroanalytics company Neuro-Insight to study how brain activity changed as more than 600 subjects listened to digital audio on the music streaming platform.

- The users consumed different kinds of streaming audio — like rock, rap and Latin music, as well as ads — while researchers took real-time readings of their brains using steady state topography (SST), a brain tracking method developed by Neuro-Insight founder Richard Silberstein that measures brain electrical activity and speed of response to stimuli.
- SST is able to "tap the speed of different parts of the brain very sensitively, and by virtue of the fact that different parts of the brain are specialized for different functions, we're able to infer psychological processes," says Silberstein.

What they found: The study found that digital audio was more likely to engage long-term memory for both details and past memories and increase emotional intensity than radio, TV, social media or digital video.

- Different kinds of music had a measurably different effect on the brain — speech-driven genres like rap music tended to produce more engagement, while instrumental or acoustic genres like rock tended to produce greater emotional intensity.
- Notable for a partially ad-driven platform like Spotify, 93% of the brain's measured engagement with the musical or podcast content transferred directly into engagements with the ads that followed.⁶⁸

We cannot entirely overlook the relationship that Spotify has with Tencent in either the corporate governance area or data transfers. It is apparent from the reporting on Tencent's

⁶⁸ Bryan Walsh, *This is your brain on streaming audio*, Axios (Sept. 21, 2021) available at <https://www.axios.com/spotify-neuromarketing-streaming-music-93fa6238-1ca6-4294-8803-45637b1d1ad3.html>

role in China’s government surveillance operations⁶⁹ that data collected from apps like WeChat are turned over to government authorities⁷⁰ and may be used in violation of competition law. It is unclear if offshore data transfers are occurring, but it seems more worthy than not of an investigation into Spotify’s data practices along with TikTok’s own operations.

The Streaming Data Honeypot: TikTok’s Data Practices

If data is the new oil, then TikTok certainly seems to be on the podium⁷¹ as a gold medal winner for offshore drilling and certainly is deserving of silver for anti-competitive waivers and arbitration clauses in its take it or leave it privacy policy. That policy was on full display in the Illinois class action for violating the State’s biometric privacy laws among other things that resulted in a \$92 million settlement with, of course, no admission of liability or offshoring data but with a number of objectors to the settlement.

The settlement actually highlights the problem with damages awards against the tech behemoths—while the award may seem large to the legislative body trying to craft a law for all comers, it’s actually peanuts for the defendants. TikTok may well make \$92 million before you finish reading this sentence, or perhaps this paragraph. (The several multi-billion euro awards against Google for violating the competition law are not much different, even though the number sounds huge.) My contention with all these companies is that the only thing that really gets their attention is behavioral--injunctive relief or prison.

⁶⁹ Colum Lynch and Robbie Gramer, *U.N. Backs Down on Partnership with Chinese Firm for 75th Anniversary*, Foreign Policy (April 15, 2020) available at <https://foreignpolicy.com/2020/04/15/united-nations-backs-down-china-coronavirus-censorship-tencent-seventy-five-anniversary-international-organization/> (“The United Nations has backtracked on a pact with the Chinese telecommunications giant Tencent Holdings to provide videoconferencing and text services for the international organization’s 75th anniversary, following backlash from U.S. officials and lawmakers as well as human rights groups. Critics claim the arrangement rewards a company that has enabled Beijing’s digital surveillance efforts and stifled free speech on the internet in China.”).

⁷⁰ See, e.g., Mimi Lau, *Chinese free speech advocate takes aim at Tencent over WeChat account shutdown*, South China Morning Post (Feb. 7, 2022) available at <https://www.scmp.com/news/china/politics/article/3166139/chinese-free-speech-advocate-takes-aim-tencent-over-wechat>; Louise Matsakis, *How WeChat Censored the Coronavirus Pandemic*, Wired (Aug. 27, 2020) available at <https://www.wired.com/story/wechat-chinese-internet-censorship-coronavirus/>; Ryan Broderick, *The WeChat Messaging App has been Censoring Coronavirus Content Since January*, BuzzFeed News (March 3, 2020) available at <https://www.buzzfeednews.com/article/ryanhatesthis/china-tencent-wechat-vy-censorship-coronavirus>.

⁷¹ *In re: TikTok Inc. Consumer Privacy Litigation* (Case No. 1:20-cv-04699. U.S.D.C. N.D. Ill.).

As *The Economist* tells us:

The nature of data makes the antitrust remedies of the past less useful. Breaking up a firm like Google into five Googlets would not stop network effects from reasserting themselves: in time, one of them would become dominant again.⁷²

There are lingering questions about where TikTok's data actually resides as well as the effect of China's National Intelligence Law that was enacted on June 27, 2017, and came into effect in July 2017.⁷³ The National Intelligence Law is part of a portfolio of statutes (including the Cybersecurity Law) that gives China's government statutory authority that is unique in the world. The statute is an actual legal requirement for all Chinese companies and citizens to cooperate with China's massive intelligence agencies.

The reason for the concern about TikTok is that the National Intelligence Law has broadly drafted and loosely defined provisions that raise issues. Two parts of the Intelligence Law are particularly concerning, Article 7 and Article 14. Article 7 mandates that "any organization or citizen shall support, assist, and cooperate with state intelligence work according to law" and Article 14 empowers Ministry of State Security officials to demand this cooperation, stating that "state intelligence work organs, when legally carrying forth intelligence work, may demand that concerned organs, organizations, or citizens provide needed support, assistance, and cooperation." As I understand it, the Ministry of State Security is kind of a combination of MI5 and MI6 or the FBI and CIA.

Other clauses are equally alarming. Article 16 authorizes State Security to interrogate any individual and to search their reference materials and files. Article 17 authorizes police to seize and take over the operation of communications equipment (such as happened at Apple Daily in Hong Kong), transportation, buildings, and other facilities of both individuals and organizations.

⁷² See Data Oil.

⁷³ A translation is available from Brown University. The National Intelligence Law of the People's Republic of China, Adopted at the 28th meeting of the Standing Committee of the 12th National People's Congress on June 27, 2017, available at http://cs.brown.edu/courses/csci1800/sources/2017_PRC_NationalIntelligenceLaw.pdf. Commentators have cautioned that the National Intelligence Law "applied in concert with the new Cybersecurity Law" could create "even more serious burdens" for companies as it "accords officials far more specific authority to access and regulate many features of corporate networks...." Dr. Murray Scot Tanner, *Beijing's New National Intelligence Law: From Defense to Offence*, Lawfare (Brookings) (July 20, 2017) available at <https://www.lawfareblog.com/beijings-new-national-intelligence-law-defense-offense>

It's not surprising, then, that "intelligence" in China is quite different than in the West and includes commercial activities as stated in Article 2 of the Intelligence Law:

National intelligence work adheres to the overall national security concept, provides intelligence reference for major national decision making, provides intelligence support for preventing and defusing risks that endanger national security, and safeguards state power, sovereignty, unity and territorial integrity, people's wellbeing, ***and economic and social Sustainable development and other important national interests.***

The concern is that Chinese law requires TikTok to turn over on demand any data it gathers on TikTok users and even requires TikTok to allow the State Security police to take over the operation of TikTok for intelligence gathering purposes on any aspect of the users' lives. Users would not necessarily know this takeover had occurred. TikTok seems to have capabilities well beyond what is necessary for its functionality, including snooping on your clipboard (which is how many people use strong passwords).⁷⁴

It must be said that TikTok routinely denies exporting user data to China. I would argue that when TikTok denies that they are handing over user data to the State Security police, they need to also offer an explanation of exactly how Chinese law does not apply to them *because the Intelligence Law seems designed to apply to them exactly.*

It must also be said that Mr. Zhang Yiming, the CEO of TikTok's parent company ByteDance has made statements in the past that suggest he fully intends to comply with China's laws. According to his Wikipedia page:

ByteDance's first app, Neihan Duanzi, was shut down in 2018 by the National Radio and Television Administration. In response, Zhang issued an apology stating that the app was "incommensurate with socialist core values", that it had a "weak" implementation of Xi Jinping Thought, and promised that ByteDance would "further deepen cooperation" with the ruling Chinese Communist Party to better promote its policies.⁷⁵

Needless to say, if it turns out that TikTok is complying with China's laws and not those of the UK, the company will have been scraping an unimaginably large amount of data and shipping it home.

⁷⁴ *TikTok records what you copy-paste? IOS 14 reveals extend of clipboard snooping*, The Week (July 26, 2020) available at <https://www.theweek.in/news/biz-tech/2020/06/26/tiktok-records-what-you-copy-paste-ios-14-reveals-extend-of-clipboard-snooping.html> ("TikTok is grabbing the contents of my clipboard every 1-3 keystrokes.")

⁷⁵ *Zhang Yiming*, Wikipedia (last accessed 2/13/22) available at https://en.wikipedia.org/wiki/Zhang_Yiming

I commend to you Prince Charles' diary entry after the 1997 handover of Hong Kong just 25 short years ago:

[Then Chinese Communist Party General Secretary Jiang Zemin] gave a kind of propaganda speech which was loudly cheered by the bussed-in party faithful at the suitable moment in the text....At the end of this awful Soviet-style display we had to watch the Chinese soldiers goose-step on to the stage and haul down the Union Jack and raise the ultimate flag....Thus we left Hong Kong to her fate and the hope that Martin Lee, the leader of the Democrats, would not be arrested."⁷⁶

Martin Lee, of course, sits in a Chinese prison this very day.

When an Algorithm is not an Algorithm: Playlist Payola and the Return of the \$50 Handshake

Jerrold Nadler, Chairman, U.S. House of Representatives, Committee on the Judiciary and Henry C. Johnson, Jr., Chairman, U.S. House of Representatives, Subcommittee on Courts, Intellectual Property and the Internet, both wrote to Spotify CEO Daniel Ek on June 2, 2021 expressing their concerns about Spotify's "Discovery Mode" amid allegations of payola.⁷⁷

The Chairmen premised their question on this statement of fact:

Discovery Mode appears to allow artists and record labels to identify particular songs that they would like to prioritize in Spotify's algorithmic recommendations in exchange for agreeing to be paid a lower, "promotional" royalty rate for those prioritized streams.

This may set in motion a "race to the bottom" in which artists and labels feel compelled to accept lower royalties as a necessary way to break through an extremely crowded and competitive music environment.

Depending on how the program is implemented, there is a further concern that accepting lower rates for this boosting Spotify's algorithm may not even guarantee more airplay if virtually all commercial artists are also doing the same....Such a race to the bottom threatens to weaken the core goal of copyright and intellectual property— incentivizing creativity by offering a fair return on one's work.⁷⁸

⁷⁶ Charles' diary entry lays thoughts bare, BBC (Feb. 22, 2006) available at http://news.bbc.co.uk/2/hi/uk_news/4740684.stm

⁷⁷ Spotify Press Release, *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/>

⁷⁸ Jerrold Nadler and Henry C. Johnson, Jr., Letter to Daniel Ek (June 2, 2021) available at https://judiciary.house.gov/uploadedfiles/hjc_letter_to_daniel_ek.pdf

The Chairmen have a point here. A great man once said, if something feels illegal it probably is; perhaps not quite as poetic as “to thine own self be true” from Lord Polonius, but still pretty good advice, meeting with triumph and disaster being what it is.

This is payola pure and simple and it is or should be a crime.

In fairness to Spotify, Discovery Mode is not the first time we have seen this “inverse payola”. The practice started with “steering agreements” under direct deals with Pandora which accomplished essentially the same thing and that were criticized to the U.S. Federal Communications Commission⁷⁹ as thinly disguised payola where the undisclosed consideration is paying less rather the notorious “\$50 handshake”. It also raises the question of whether all Spotify playlists are essentially infomercials or teleshopping channels for music that are not that different than QVC or High Street TV.

It may well be worth the CMA’s resources to look into playlist payola from a competition point of view *at the streaming service level* remembering that Apple, for example, is not really in the playlist game to the extent that Spotify has been. The DCMS Committee Report noted the moral hazard present with both Spotify’s algorithms in general and Discovery Mode in particular and the lack of regulation analogous to broadcast radio:

In many ways, these playlists act like traditional radio, with a human gatekeeper deciding what tracks to include. Unlike streaming services, however, Ofcom’s Broadcasting Code specifically precludes practices such as pay-for-play, known as ‘payola’: section 10.5 states that “no commercial arrangement that involves payment, or the provision of some other valuable consideration, to the broadcaster may influence the selection or rotation of music for broadcast”.

This raises questions as to the basis under which tracks are selected and whether this is open to manipulation, particularly for independent and self-releasing artists. In fact, several creators did argue that editorial playlists favour those signed to major labels, claiming that 85 percent of music on Spotify is major owned and comprise 90 percent of editorial playlists, which creates a self-fulfilling cycle whereby major-owned

⁷⁹ Dr. David C. Lowery, *Comments of David Lowery In the Matter of Media Bureau Seeks Comments on Petition for Class Waiver of the Commission’s Sponsorship Identification Requirements Filed by the Radio Broadcasters Coalition*, FCC Docket MB 15-52 (May 10, 2015) (“I respectfully suggest that “steering agreements” are already creating a “payola lane” on both terrestrial and Internet radio to which the listener is none the wiser....”)

music dominates playlists, achieves significant reach and then continues to dominate new playlists.⁸⁰

Even though streaming is not regulated like broadcast radio, the inquiry may not end at a Neddie Seagoon-like “Blast, why didn’t I think of that!” The well-known American broadcasting law expert David Oxenford cautioned when this general issue arose in 2008 in America that limitations on payola have not been the end of the story, particularly in common law jurisdictions. He wrote:

The payola statute, 47 USC Section 508, applies to radio stations and their employees, so by its terms it does not apply to Internet radio (at least to the extent that Internet Radio is not transmitted by radio waves – we’ll ignore questions of whether Internet radio transmitted by wi-fi, WiMax or cellular technology might be considered a “radio” service for purposes of this statute). But that does not end the inquiry. Note that neither the prosecutions brought by [the New York Attorney General] a few years ago nor the prosecution of legendary disc jockey Alan Fried in the 1950s were brought under the payola statute. ***Instead, both were based on state law commercial bribery statutes on the theory that improper payments were being received for a commercial advantage. Such statutes are in no way limited to radio, but can apply to any business.*** Thus, Internet radio stations would need to be concerned.

Second, the Federal Trade Commission ***has in the last few years expressed concerns about viral marketing and other advertising schemes where the consumer is not aware that he or she is being subjected to advertising.*** Whether it be the stranger in the bar who is paid to brag about the taste of some brand of beer or the chain email that endorses some product without revealing that the testimonial was bought and paid for, the FTC has been concerned that these techniques are false and deceptive trade practices. ***Again, an all-payola channel would seem to trigger these concerns.***⁸¹

I am not one who sees majors under the bed⁸² and I don’t think that product managers or promotion executives at any label wake up in the morning and say, “What I really want to do

⁸⁰ *Economics of Music Streaming: Editorial Curation*, HOUSE OF COMMONS, DIGITAL, CULTURE, MEDIA AND SPORT COMMITTEE (2021) at 78 available at <https://publications.parliament.uk/pa/cm5802/cmselect/cmcmds/50/50.pdf>.

⁸¹ David Oxenford, *Payola on Internet Radio—Legal?*, Broadcast Law Blog (Sept. 10, 2008) available at <https://www.broadcastlawblog.com/2008/09/articles/payola-on-internet-radio-legal/>

⁸² Both majors and independent labels play a vital role in the music business as investors in talent and marketers of records. That role will continue regardless of what happens with distribution or audio configurations. When the day comes that a bank will loan money to an artist to make a record they haven’t recorded yet, for songs they haven’t written yet, and allow the loan to accrue no interest, no periodic payments with no maturity date, payable

today is bribe some playlist gatekeepers.” I do think that they have a strong desire to break new artists⁸³ and will do what they must to accomplish that goal. Being shocked at the lengths to which they will go is about like Captain Renault being shocked at gambling in Rick’s American Cafe. Someone in the music business is trying to juice the charts? Say it ain’t so, Joe.

The better question is who exactly is in control of these playlists and the algorithms and by “who” I mean names of those on the other side of the handshake. Once they are known, the question to ask of them—probably under caution—is what opportunity were they dangling and what did they have in mind with the dangle? A lot of this happens in the background and is not transparent to anybody outside the company, including the labels and certainly not to regulators. The competition issues here go through many levels, not only artists trying to break in (or paying charlatans who tell them for a certain price they can break in), but also streaming services trying to compete who are not willing to stoop to payola in order to do it. Transparency certainly can’t hurt which I think was one goal of Chairmen Nadler and Johnson’s timely letter.

And to my knowledge, the Chairmen are still awaiting reply. Perhaps you’ll have better luck.

Having said that, the business practice on playlist payola dovetails nicely into another, less obvious, competition problem which is the influence over talent buyers at live venues exercised by streaming platforms and transitively by these very same playlist gatekeepers.

Live Venues and Streaming

In order to establish new artists in the marketplace, it is essential to introduce them to a wider audience and this is often accomplished the old fashioned way—through concert touring. In order to have a concert tour, one eventually must persuade talent buyers to take a chance on an artist that is new to their venue or community and may not be a draw.

It is somewhat inevitable that streaming is going to have an effect on an artist’s ability to book a live show in a new market (which could be the village down the road, or a major city in another country). The talent buyer who has gotten a pitch from an artist she doesn’t know and hasn’t booked before is going to look for some reassurance that the artist can draw enough to make it worthwhile. This is true even if the artist is not being paid a guarantee or is even working for tips.

solely from a narrow stream of income—you’ll know it. That day is unlikely to ever arrive. The same could be said of music publishers. One can argue about a fair rate of return, but this is high risk investing and with high risk comes high reward if payday ever comes at all.

⁸³ Respectfully, I would also say that it is well for the CMA to remember that in many ways every record is a new record, be it Adele or a breakout artist. Resting on your laurels does not sell records.

It is pretty commonplace for the talent buyer (who may be the venue owner in smaller venues or festivals) to ask about followers on Spotify, YouTube or Facebook. While that is understandable and predictable, the number of followers, likes, shares, etc., doesn't tell you much about whether that artist can open a show in a particular venue because the data that *artists* get back from any of these services is not granular enough to give the venue owner any meaningful comfort.

It's not that the streaming services don't scrape that level of granularity, they very likely do and may do in shocking detail, particularly companies like Google and Facebook who are in the business of surveillance capitalism. To my knowledge, that level of detail is not available even to major labels.

What this means is that if the artist does not want to be part of the entire streaming ecosystem due to the cannibalizing effect on sales of other configurations or direct to fan sales on a site like Bandcamp.com, it's difficult for that artist to find work in my experience.

While I think that artists signed to labels are just as subject to this dynamic as independents, there comes a point where the label can affect "ticket buys" which is a way to take the financial risk out of the booking for the venue. This is not just major labels that do ticket buys, but after a certain financial point it is easier for the major to absorb the cost as the P&L may allow it more easily. This "tour support" is one of the reasons for an artist to sign with a major label and has been for decades before Spotify or social media.

Having said that, it may be of interest to CMA from a competition point of view to determine whether the influence of streaming platform occurs naturally or unnaturally (again, specifically Spotify because they inject themselves into this game by reporting stream counts).

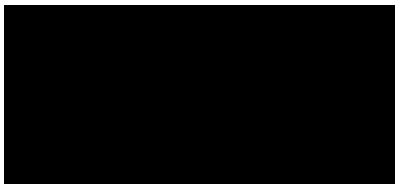
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Conclusion

The streaming music ecosystem is shot through with potential conflicts, injustice, payola or near-payola and nearly unregulated expansion and control over markets. The CMA will determine whether any of this rises to the level of actionable competition law violations.

I appreciate the opportunity to comment to the Competition and Markets Authority and am happy to answer any questions you may have for me in the future.

Very truly yours,

A large black rectangular redaction box covering the signature area.

Christian L. Castle

Enclosures
CLC/ko

Attachment A
WIPO Study

Attachment B
Frozen Mechanicals Comments