

DID COPYRIGHT FAIL MUSIC ARTISTS?

(forthcoming 105 B.U. L. Rev. (2025))

Rachel Landy*

Music soundtracks our lives, supports over two million domestic jobs annually, and is being listened to more than ever before. The record industry is thriving, having made over \$17 billion in 2024. Yet, many professional artists are barely surviving. Artists signed to record deals lament royalty payments that amount to a fraction of a penny for each stream of their songs. So where is all the money going, and who, or what, is to blame? Public rhetoric and existing legislative proposals implicate copyright as a guilty party. But is it?

This Article unpacks the music supply chain. It builds on existing scholarship regarding the role of intermediaries to show just how the interplay between artists' contracts with record labels and labels' contracts with streaming services (such as Spotify) disempower professional music creators and prevent them from gaining financial rewards. Indeed, contract may be the real villain.

A review of the panoply of proposed solutions illustrates why focusing reform efforts on copyright is misplaced; instead, improving artist remuneration is better handled by addressing contract terms that would blunt the impact of the intermediaries throughout the supply chain. This Article makes two proposals that do just that, including by encouraging artists to adopt a longstanding practice in other leading creative industries vis-à-vis rightsholders: collective bargaining.

* Assistant Professor of Law, Cardozo School of Law. I'm very grateful to Kristelia García, Michael Goodyear, Paul Gugliuzza, Michael Pollack, Andrea Schneider, Stewart Sterk, Xiyin Tang, Saurabh Vishnubhakat, the New York University Tri-State Region IP Workshop, and the Cardozo Junior Faculty Workshop for helpful feedback.

DID COPYRIGHT FAIL MUSIC ARTISTS?

CONTENTS

INTRODUCTION.....	1
I. COPYRIGHT AND THE CONTRACTS	7
<i>A. Copyright Fundamentals</i>	8
<i>B. Artist and Label</i>	12
<i>C. Label and Streaming Service</i>	16
1. Economics	17
2. Programming Terms	19
3. Independent Labels	20
II. ARTIST EFFECTS.....	21
<i>A. Major Label Artists</i>	22
<i>B. All Artists</i>	26
III. SOLUTIONS	31
<i>A. Copyright Proposals</i>	35
1. Work for Hire Reform	35
2. Expanding Performance Right.....	38
<i>B. Copyright-ish Proposals</i>	40
1. Minimum Per-Stream Payments	40
2. Bypassing Recoupment.....	43
<i>C. Contract Proposals</i>	48
1. Collective Bargaining.....	48
2. Self-Regulation.....	54
CONCLUSION.....	58

INTRODUCTION

In 2014, Taylor Swift’s music disappeared from Spotify.¹ Swift described streaming as an “experiment” that does not “fairly compensate[] the writers, producers, artists and creators” of music, and was no longer willing to be a lab rat.² While she (now a billionaire) returned to the platform in 2017,³ professional artists at all levels of fame and fortune continue to share her view. Reports suggest it takes over 650,000 streams a month for an artist to earn roughly \$15 an hour.⁴ Singer-songwriter Nadine Shah describes herself as “financially crippled.”⁵ Grammy Award-winner India.Arie railed against streaming, saying it is “not the way [to support your favorite artists].”⁶ “What [Spotify is] paying now. . . is only fractions of a penny” on average, per stream, declared professional musician Damon Grukowski.⁷

Artists get paid “f—k all with this model,” Radiohead frontman Thom Yorke alleged.⁸ Jay-Z spent \$56 million trying to find a way to pay artists more for streaming.⁹ One executive threatens that “artists are about to go on

¹ Josh Duboff, *Taylor Swift Explains Why She Took All Her Music off Spotify*, VANITY FAIR (Nov. 7, 2014), <https://www.vanityfair.com/hollywood/2014/11/taylor-swift-spotify-explanation>.

² *Id.*

³ Chris Eggertsen, *Taylor Swift Will Earn Over \$100M From Spotify This Year*, BILLBOARD (Dec. 1, 2023), <https://www.billboard.com/business/streaming/taylor-swift-spotify-streams-how-much-worth-1235524477/>.

⁴ Edward Ongweso Jr., *‘Justice at Spotify’ Campaign from Musicians Union Demands Radical Changes*, VICE (Oct. 28, 2020), <https://www.vice.com/en/article/justice-at-spotify-campaign-from-musicians-union-demands-radical-changes/>.

⁵ Ben Sisario, *Musicians Say Streaming Doesn’t Pay. Can the Industry Change?*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/arts/music/streaming-music-payments.html>.

⁶ Travis M. Andrews, *Spotify backlash offers rare insight into reeling music industry and struggles of working musicians*, WASH. POST (Feb. 14, 2022), <https://www.washingtonpost.com/arts-entertainment/2022/02/14/spotify-young-rogan-music-industry/>.

⁷ Josh Terry, *More than 18,000 Musicians Are Demanding a Penny Per Stream from Spotify*, VICE (Nov. 13, 2020), <https://www.vice.com/en/article/union-of-musicians-want-penny-per-stream-from-spotify/>; see also Zoe Stern, *The Inequalities of Digital Music Streaming*, THE REGULATORY REVIEW (May 30, 2022), <https://www.theregreview.org/2024/05/30/stern-the-inequalities-of-digital-music-streaming/>.

⁸ Victor Luckerson, *Radiohead’s Thom Yorke Leaves Spotify. Will Others Follow?* TIME (July 16, 2013), <https://business.time.com/2013/07/16/radioheads-thom-yorke-leaves-spotify-will-others-follow>.

⁹ Hiranmayi Srinivasan, *Jay-Z’s Net Worth and Businesses, as the Rapper Gives Rare Interview with CBS*, INVESTOPEDIA (Nov. 25, 2023), <https://www.investopedia.com/jay-z-net-worth-and-businesses-8405817#:~:text=In%202015%2C%20Jay%2DZ%20bought,service%20Tidal%2C%20for%20%2456%20million>.

strike.”¹⁰ Paul McCartney, Stevie Nicks, and other music legends have weighed in, co-signing a 2021 letter to then-British Prime Minister Boris Johnson that read: “[f]or too long, streaming platforms, record labels and other internet giants have exploited performers and creators without rewarding them fairly. We must put the value of music back where it belongs – in the hands of music makers.”¹¹

Legislators hear the cry. Representative Rashida Tlaib, introducing a bill to guarantee minimum streaming compensation for artists, avowed “[i]t’s only right that the people who create the music we love get their fair share, so that they can thrive, not just survive.”¹² A British parliamentary committee studied the issue, concluding that “[w]hile in the short term, the [availability of low-cost or free music services] may be seen as a good deal for music-lovers, the danger is that without greater levels of revenue, some of the music they love may not be being made in ten years’ time.”¹³ Indeed, “more and more musicians [are] forced to sustain themselves with second jobs and ‘side hustles’” in order to make a living.¹⁴ These narratives suggest that streaming economics threaten artists’ incentives to create, and as a corollary, may jeopardize the promotion the core democratic values that copyright often represents, such as innovation, free speech, and social progress.¹⁵

¹⁰ Robert Leedham, “Artists are about to go on strike”: YouTube’s Lyor Cohen on his plans to save the music industry, *GQ* (Nov. 30, 2022), <https://www.gq-magazine.co.uk/culture/article/lyor-cohen-youtube-music>.

¹¹ Will Richards, *Paul McCartney, Kate Bush, Stevie Nicks and more sign letter calling on Boris Johnson to fix streaming economy*, *NME* (Apr. 20, 2021), <https://www.nme.com/news/music/paul-mccartney-kate-bush-stevie-nicks-and-more-sign-letter-calling-on-boris-johnson-to-fix-streaming-economy-2924096>.

¹² Press Release, *Tlaib Introduces Living Wage for Musicians Act* (Mar. 6, 2024), <https://tlaib.house.gov/posts/tlaib-introduces-living-wage-for-musicians-act>.

¹³ HOUSE OF COMMONS, DIGIT., CULTURE, MEDIA & SPORT COMM., ECONOMICS OF MUSIC STREAMING: SECOND REPORT OF SESSION 2021-2022, at 3 [hereinafter DCMS REPORT], <https://committees.parliament.uk/publications/6739/documents/72525/default/>.

¹⁴ United Musicians and Allied Workers, *Make Streaming Pay*, <https://weareumaw.org/make-streaming-pay> (last visited Oct. 19, 2024); *See* COMPETITION & MKTS. AUTH., MUSIC AND STREAMING: FINAL REPORT 17 (2022) [hereinafter CMA REPORT], https://assets.publishing.service.gov.uk/media/6384f43ee90e077898ccb48e/Music_and_streaming_final_report.pdf; *see* Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 502-03 (2015) (suggesting that fewer professional artists may lead to less desirable music); Lital Helman, *Fair Trade Copyright*, 36 COLUM. J.L. & ARTS 157, 171 (2013); Stern, *supra* note 7; Roseanne Cash, Facebook (Sept. 28, 2014), <https://www.facebook.com/RosanneCash/posts/10152713063225336/> (“I see young musicians give up their missions and dreams all the time because they can't make a living”).

¹⁵ Peter DiCola, *Centering Creators: The New Economics of Copyright and Alternative Policies for Creative Labor*, 2025 U. ILL. L. REV. 223, 272-73 (2025).

That incentive rhetoric sounds in copyright. After all, copyright provides the legal framework that purportedly incentivizes authors to make artistic works. Without copyright, works would be freely reproduced and distributed, eliminating the motivation to create.¹⁶ By providing exclusive rights that generate a potential for economic value where there would otherwise be none, copyright lets creators and distributors recoup their costs and earn a reasonable return, motivating further expression.¹⁷ This monopoly power, however, has been captured by large intermediaries (like record labels), who leverage their bargaining power throughout the content supply chain to secure the lion's share of both the copyrights and the revenues in the industry.¹⁸ That's where this Article comes in. When it comes to depressed streaming income for artists, I ask: is copyright the culprit or is contract the true villain?

Copyright has provided the foundation on which the music industry has flourished, now supporting \$170 billion in economic value and nearly 2.5 million domestic jobs.¹⁹ And critically, music itself is “culturally essential,”²⁰ “magical and transformative,”²¹ and a “defining part of the human experience.”²² It helps regulate our nervous systems,²³ power political movements, and unite people from all backgrounds, races, and

¹⁷ Harper & Row, Publishers, Inc., et. al. v. Nation Enterprises et. al., 471 U.S. 539, 558 (1985); Sony Corp. of Amer. v. Univ. City Studios, 464 U.S. 417, 428-29 (1984); Andy Warhol Found. Visual Arts v. Goldsmith, 598 U.S. 508, 534 (2023); Neil W. Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 349 (1996); Wendy J. Gordon, *On the Economics of Copyright, Restitution and Fair Use: Systemic Versus Case-by-Case Responses to Market Failure*, 8 J. L. & INFO. SCI. 7, 12 (1997); Xiyin Tang, *Intellectual Property Law as Labor Policy*, _ N.Y.U. L. REV. __, 10 202X); Tuneen Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J. L. & TECH. 274, 282-3 (2017); Christopher S. Yoo, *Copyright and Public Good Economics: A Misunderstood Relation*, 155 U. PA. L. REV. 635, 646 (2007); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 11.

¹⁸ See *infra*, Part I.

¹⁹ Recording Indus. Ass'n of Amer., *The U.S. Music Industries: Jobs & Benefits* (Oct. 2024); <https://www.riaa.com/reports/the-u-s-music-industries-jobs-benefits-economists-incorporated/> (citing \$170 billion in economic value and nearly 2.5 million jobs).

²⁰ UNITED STATES COPYRIGHT OFFICE, *COPYRIGHT AND THE MUSIC MARKETPLACE* (Feb. 2015).

²¹ MARIAH CAREY, *THE MEANING OF MARIAH CAREY* 7 (1st ed. 2020).

²² The Kennedy Center, *Music Matters*, <https://www.kennedy-center.org/education/resources-for-educators/classroom-resources/articles-and-how-tos/articles/educators/music/music-matters/#:~:text=Not%20only%20does%20music%20encourage,you%20mix%20learning%20and%20pleasure> (last visited Oct. 19, 2024).

²³ See, e.g., J. Matt McCrary & Eckart Altenmuller, *Mechanisms of Music Impact: Autonomic Tone and the Physical Activity Roadmap to Advancing Understanding and Evidence-Based Policy*, FRONT. PSYCHO. (Aug. 26, 2021) (describing music's effects on the interplay between the sympathetic and parasympathetic nervous systems).

viewpoints.²⁴ But for all the work copyright does to facilitate those benefits, there are things it does not do, too, such as *guarantee* compensation for creatives.²⁵ And even if it did, that would be of no use to professional artists. Typically, they have no copyright to leverage after they sign a record deal.

While the way that consumers access music has changed dramatically since the advent of streaming, the basic music supply chain has not. Typically, an artist signs a record deal, in which the record label obtains the copyright in the artists' recordings, and the label distributes the music to retailers and licenses it to streaming services.²⁶ The record labels are uniquely positioned, though, in that they have significant bargaining power in *both* transactions, and that directly affects artist economics. This is especially true because the fundamental shift in music consumption habits driven by streaming has complicate things, directly affecting how music is distributed (licensed) by record labels, promoted by streaming services, and paid for by users. It is the labels that determine how streaming services pay, which payments from those services are to be shared with artists, and at what rates and on what conditions.²⁷

Moreover, of the thousands of record labels, just three carry outsized weight on the trajectory of the industry: the major record labels (Universal, Warner, and Sony), with what are considered “must-have” catalogs for any streaming service and collectively control over eighty percent of the recorded music market (all other labels are called “independents”).²⁸ Because of their market share, the streaming services cannot launch without the majors' repertoires.²⁹ The result of such disparate bargaining power is amply reflected in their global deals, which have been described in detail by American and British regulators, policymakers, and industry experts.³⁰

²⁴ See ELTON JOHN, ME 21 (1st ed. 2019) (describing how rock and roll was a unifying force for a generation); TOM BREIHAN, THE NUMBER ONES 21 (1st ed. 2022) (describing how the 1960 hit “The Twist” was a “cultural unifier”).

²⁵ Stan Liebowitz, *The Case for Copyright*, 24 GEO. MASON L. REV. 907 (2017); see Rebecca Giblin, *A New Copyright Bargain? Reclaiming Lost Culture and Getting Authors Paid*, 41 Colum. J. L. & Arts 369, 392-93 (2018).

²⁶ See *infra*, Part I.

²⁷ *Id.*

²⁸ Dan Rys, *Record Label Market Share Q1 2024: Warner Records Posts Huge Gains, While Universal Enters a New Era*, BILLBOARD (Apr. 12, 2024), <https://www.billboard.com/business/record-labels/record-label-market-share-q1-2024-universal-warner-1235655068/>.

²⁹ See *infra*, Part I.

³⁰ CMA REPORT, *supra* note 14; DCMS REPORT, *supra* note 13; Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26368 (May 2, 2016) [hereinafter Web IV]; Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), 86 Fed. Reg. 59452, 59459

In earlier work, I summarized the publicly available terms of those deals and explained how the relationships between streaming services and the major labels result in significant externalities: they keep startups out of the streaming market, suppress innovation, and limit consumer choice.³¹ That prior work begged a new question, though: what are the effects of those contracts on the artists who sing and perform music and for whom many imply copyright incentives are lacking?³² This Article responds to that call.

In recent years, scholars have begun to zero in on the role of intermediaries, especially distribution platforms, in the copyright ecosystem and how these intermediaries affect authors and copyright's goals.³³ This Article builds on that scholarship, but takes both a broader and more detailed view of the landscape. To understand why professional artists struggle to earn a living wage in a world where more music is being listened to than ever before,³⁴ it's important to both zoom out and examine the relationship between the different intermediary contracts in the supply chain, while also zooming in on the actual contract terms in order to pinpoint the origin of the industry's seeming (or looming) market failure.

This Article proceeds as follows. Part I provides an overview of copyright and its role in the music supply chain, as well as the main contracts that comprise that supply chain: those between record labels and artists, and record labels and streaming services. Before streaming, all of the money a record label earned was directly tied to usage of particular content: a record was sold, and an artist's account was credited with a royalty. But that is not so anymore. In their deals with streaming platforms, the major labels secure economic terms that generate profits that cannot be attributed to any particular album, allowing labels to pocket money that artists do not share in.³⁵ Additionally, the streaming platforms are incentivized to prioritize (e.g., recommend) major label music, likely demoting independent music in the process.³⁶ And on top of those terms, the major labels are known to negotiate for additional

(Oct. 27, 2021) [hereinafter Web V]; BOB KOHN, KOHN ON MUSIC LICENSING (5th ed. 2019); DONALD PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS (11th ed. 2023).

³¹ Rachel Landy, *Downstreaming*, 65 B.C. L. REV. 1251 (2024).

³² See Julie E. Cohen, *Copyright as Property in the Post-Industrial Economy: A Research Agenda*, 2011 WIS. L. REV. 141, 154 (2011) (describing how a well-functioning copyright market must enable contracting)

³³ See, e.g., DiCola, *supra* note 15; Tang, *supra* note 17; Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 WASH. U. L. REV. 851 (2024).

³⁴ Intern'l Fed'n of the Phonographic Indus., *IFPI's global study finds we're listening to more music in more ways than ever* (Dec. 11, 2023), <https://www.ifpi.org/ifpis-global-study-finds-were-listening-to-more-music-in-more-ways-than-ever/>.

³⁵ See *infra*, Parts I.C.1, II.A.

³⁶ See *infra*, Part II.B.

promotional guarantees.³⁷ In the physical era, a music fan could rely on a record store clerk to recommend new music, without any incentive to choose one song, label, or artist over another. Now, the major labels have captured the clerk, making it harder for artists signed to independent labels to break through, especially in a sea of 100,000,000 songs.

In Part II, I describe how those contracts negatively affect all artists, whether signed to a major label or not. When the terms of both sets of contracts are examined in tandem, it becomes clear how artists have been disempowered throughout the entire music supply chain, but not entirely by copyright. No amount of copyright will alter the disproportionate bargaining power facing artists when they sign their record deals, the lack of control they have over the subsequent distribution of their music, and the way the major labels incentivize services to promote the most popular music.

With that context, in Part III, I analyze current proposals to enhance artist compensation and show that the further we move from fundamental copyright reform, the closer we get to a viable solution. In fact, copyright may be working as intended. After all, it is meant to allow not just the creators, but also the distributors, of works to recoup their (often larger) investments³⁸ and they seem to be doing just that. Record labels earned nearly \$15 billion from streaming in 2024.³⁹

I then offer two new suggestions that reinforce where we ought to redirect our thinking: the bargaining table where artists and labels sit. The first is a proposal that, while based on provisions in the Copyright Act, is actually an intervention into the payment terms of record deals. The second gets to the heart of artists' roles as workers providing labor for institutional copyright owners. Upon winning the 2025 Grammy Award for Best New Artist, Chappell Roan stated, "I told myself that if I ever won a Grammy and got to stand up here before the most powerful people in music, I would demand that labels in the industry profiting millions of dollars off of artists would offer a livable wage and health care, especially to developing artists."⁴⁰ I recommend artists adopt a practice used widely by other creatives that would help them achieve just that: collective bargaining.

³⁷ See *id.*

³⁸ Netanel, *supra* note 17, at 291; Yafit Lev-Aretz & Katherine J. Strandburg, *Regulation and Innovation: Approaching Market Failure from Both Sides*, 38 YALE J. REG. BULL. 1, 12 (2020); Gordon, *supra* note 17, at 13, 24.

³⁹ MATT BASS, RECORDING INDUS. ASS'N OF AMER.: RIAA 2024 YEAR-END REVENUE REPORT [hereinafter RIAA YEAR-END REPORT], <https://www.riaa.com/wp-content/uploads/2025/03/RIAA-2024Year-End-Revenue-Report.pdf>.

⁴⁰ Chappell Roan, 2025 Grammy Awards (Feb. 2, 2025).

I. COPYRIGHT AND THE CONTRACTS

Despite aggressive policy campaigns featuring household names,⁴¹ seemingly never-ending press cycles,⁴² and legislators complaining that artists cannot survive in the streaming era,⁴³ there are still varying narratives when it comes the source of artists' woes. It is the platforms?⁴⁴ The labels?⁴⁵ The law?⁴⁶ Scholars have danced around all three, articulating issues raised by the roles of intermediaries (e.g., enterprise rightsholders and distributors) and copyright law's deficiencies.⁴⁷ To get to the heart of the question, I examine the contractual framework that is the foundation of the music supply chain in this Part.

Artists themselves have no privity with distributors.⁴⁸ Instead, artists enter into contracts with record labels in which artists trade the copyrights in their performances (called sound recordings under copyright law) and a commitment to record for marketing, promotion, artist development, and other services to enhance and build the artist's career.⁴⁹ The labels then license

⁴¹ Richards, *supra* note 11; United Musicians and Allied Workers, *supra* note 14; John Harris, *Musicians call for industry shape-up to protect artists during lockdown*, THE GUARDIAN (May 11, 2020), <https://www.theguardian.com/music/2020/may/11/musicians-music-industry-lockdown-streaming-spotify-coronavirus>.

⁴² See *supra* notes 1-11.

⁴³ Press Release, *Tlaib Introduces Living Wage for Musicians Act* (Mar. 6, 2024), <https://tlaib.house.gov/posts/tlaib-introduces-living-wage-for-musicians-act>.

⁴⁴ Damon Krukowski, *Spotify made £.56m profit, but has decided not to pay smaller artists like me. We need you to make some noise*, THE GUARDIAN (Nov. 30, 2023), <https://www.theguardian.com/commentisfree/2023/nov/30/spotify-smaller-artists-wrapped-indie-musicians>.

⁴⁵ David Arditi, *How record contracts exploit musicians and how we can fix it*, THE TENNESSEAN (Nov. 24, 2020), <https://www.tennessean.com/story/opinion/2020/11/24/kanye-west-right-record-labels-exploit-musicians-how-fix/6062315002/>.

⁴⁶ See Letter from Andrei Iancu, Under Secretary of Commerce for Intell. Prop. & Director of the U.S. Patent & Trademark Office & Shira Perlmutter, Register of Copyrights & Director of the U.S. Copyright Office to the Honorable Lindsey Graham, Dianne Feinstein, Jerrold Nadler, and Jim Jordan (Jan. 19, 2021), <https://www.copyright.gov/laws/hearings/performance-rights-letter.pdf> (arguing for more expansive copyright to support artists' livelihoods).

⁴⁷ Jessica Litman, *What We Don't See When We See Copyright as Property*, 3 CAMBRIDGE L. J. 536-37 (2018); DiCola, *supra* note 15; Tang, *supra* note 17.

⁴⁸ Theoretically, this dynamic could change. Prominent artists who do not need the services of a record label could enter directly into contracts with streaming services, but regulatory inquiries have confirmed that at least one label contractually prevents streaming services from contracting directly with artists. CMA REPORT, *supra* note 14, at 70-71.

⁴⁹ See, e.g., CMA REPORT, *supra* note 14, at 22 (describing labels' functions as "sign and provide services to develop artists; and/or distribute and license rights in the sound recordings created by artists to retailers."); Glenton Davis, *When Copyright Is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make*, 16 CHI.-KENT J. INTELL.

their entire catalogs (via “blanket licenses”) to streaming services.⁵⁰ Because these contracts depend on copyrights, however, I first provide a brief overview of copyright law, particularly as it relates to sound recordings.

Before proceeding, a note on terminology. I use the term “artist” to refer to the featured singers and musicians that are marketed as having performed a song. An artist could be a band (the Beatles) or a solo artist (Beyoncé), but the artist is distinct, in this Article and in copyright law, from a songwriter, who composes the song’s music and lyrics (even if the artist is the same individual(s) as the songwriter).⁵¹ I also limit the discussion to professional artists—those who are signed to a record label (major or independent). Those artists have demonstrated both sufficient talent to warrant outside investment (suggesting a reasonable potential for economic return) and an intent to make music their career. This Article is confined to the issues associated with compensation for those artists.

A. Copyright Fundamentals

When a musician records a song, the resulting creative work—a sound recording—is entitled to copyright protection.⁵² Copyright attaches several exclusive rights to creative works.⁵³ Authors of *all* works have the exclusive right to reproduce, prepare derivative copies of, and distribute the work.⁵⁴ But beyond those rights, sound recordings are subordinated to other kinds of works.⁵⁵

Authors of other works have an exclusive right to perform the work publicly by any means, but sound recording rightsholders have a lesser right to only perform the work publicly on or through the Internet.⁵⁶ There is no exclusive right to publicly perform a sound recording on traditional broadcast radio.⁵⁷ Additionally, a sound recording owner may only sue for infringement when someone has reproduced or based a new work on their song (a derivative work) when the “actual sounds” of the original recording were appropriated;

PROP. 373, 386 (2017) (describing the range of services record labels provide); PASSMAN, *supra* note 30, at 70-74.

⁵⁰ CMA REPORT, *supra* note 14, at 70.

⁵¹ Songwriters and copyrights in musical works are subject to an entirely different industry and legal schematic that is significantly more regulated than what is found on the sound recording side.

⁵² 17 U.S.C. § 102(a).

⁵³ *Id.* § 106.

⁵⁴ *Id.*

⁵⁵ See Chisolm, *supra* note 17, at 287-88 (describing sound recording copyright as “intentionally limited”).

⁵⁶ 17 U.S.C. § 106.

⁵⁷ This means that songwriters get paid when songs are played on the radio, but artists do not. See *infra*, Part III.A.2.

a perfectly identical recreation (“sound-alike”) of the original is not actionable.⁵⁸ These limitations reflect, in part, the circumspect reason for granting sound recordings protection in the first place: to prohibit unauthorized bootlegging (i.e., to protect a growing economic market for the reproduction and distribution of records).⁵⁹

Copyright vests upon creation of a work in its human author,⁶⁰ except when the work is deemed a “work made for hire.”⁶¹ In that case, copyright belongs to the person or entity that ordered the work (by way of an employee-employer relationship (e.g., an advertising jingle) or when the work is specially commissioned and fits into one of several statutory categories, such as a “contribution to a collective work” (e.g., an encyclopedia entry)).⁶² There are two primary benefits to claiming a work as made for hire. The first is a more certain copyright duration than ordinary works (120 years from the date of creation or 95 years from the date of publication (whichever expires first), versus life of the author plus 70 years).⁶³ The second is that works for hire, unlike ordinary works, are not subject to termination rights. When authors assign or license their rights to others, those agreements are terminable 35 years after the date of the transfer, allowing the copyright to revert to the author.⁶⁴ Works for hire are not terminable because there is nothing to terminate; the copyright never vested in the individual that created the work. For this reason, institutional rightsholders (including record labels) frequently insist works be made for hire.⁶⁵

Copyright is meant to correct a market failure: without it, creative works could be freely used, reproduced, and distributed.⁶⁶ The granting of exclusive rights that can be withheld by a work’s owner creates an “artificial scarcity” that generates the potential for economic value, should demand for the work exist.⁶⁷ That potential value creates an opportunity for authors and distributors

⁵⁸ 17 U.S.C. § 114(b).

⁵⁹ H. Rep. on the Sound Recording Amendment of 1971.

⁶⁰ COPYRIGHT OFFICE, COMPENDIUM OF THE U.S. COPYRIGHT OFFICE PRACTICES 306 (3rd Ed.).

⁶¹ 17 U.S.C. § 101.

⁶² *Id.*

⁶³ *Id.* § 302.

⁶⁴ *Id.* §§ 203; 304; *see* Okamoto, *supra* note 238, at 795-6. The termination right is not waivable.

⁶⁵ *See* Abraham Bell & Gideon Parchomovsky, *Copyright Trust*, 100 CORNELL L. REV. 1015, 1025 (2015) (discussing the “drastic” implications for an author of a work for hire).

⁶⁶ Netanel, *supra* note 17, at 292; Zechariah Chafee, Jr., 45 COL. L. REV. 503, 507 (1945); Lydia Pallas Loren, *Redefining the Market Failure Approach to Fair Use in an Era of Copyright Permission Systems*, 5 J. INTELL. PROP. L. 1, 22-23 (1997); Lev-Aretz & Strandburg, *supra* note 38, at 14-15; Gordon, *supra* note 17, at 10.

⁶⁷ Netanel, *supra* note 17, at 293.

to recoup the investment needed to create and disseminate works and earn a profit, thereby incentivizing the continued creation of works by those authors and distributors (and benefitting the public).⁶⁸ Without that incentive, creative expression might be suppressed, under-produced, or under-distributed.⁶⁹ Incentives are balanced by the need to provide the public with access to creative works to foster learning and free expression.⁷⁰ To be clear, copyright's purpose is not to guarantee compensation for all creators of all creative works; rather, it is to create an economic opportunity where there would otherwise be none.⁷¹ Not all works (or creators) will reap financial gains, and copyright—theoretically—ought to only provide financial gains sufficient to incentivize more production.⁷² And the incentive theory itself is not perfect. It flat-out ignores the roles of intermediaries and the fact that many authors don't retain their copyrights.⁷³

Moreover, that theory is also frequently marginalized in copyright debates. Scholars are divided on whose, or what, aims copyright ought to be prioritizing. Jessica Litman has noted that the academy itself has divided into two camps: pro-author and pro-user/consumer.⁷⁴ Others have articulated alternate, non-incentive theories of copyright. Some believe copyright ought to protect creators' autonomy, labor, and morality interests.⁷⁵ Others see the doctrine as a tool for social justice, democracy, and open debate,⁷⁶ while simultaneously, copyright is increasingly used to suppress free speech, protect

⁶⁸ Stewart E. Sterk, *Rhetoric and Reality in Copyright Law*, 94 MICH. L. REV. 1197, 1207 (1996); Loren, *supra* note 66, at 24; Netanel, *supra* note 17, at 292; Lev-Aretz & Strandburg, *supra* note 38, at 12; Gordon, *supra* note 17, at 13.

⁶⁹ Harper & Row, 471 U.S. at 558; Netanel, *supra* note 17, at 293; 308-09; Gordon, *supra* note 17, at 10; Loren, *supra* note 66, at 24; Sterk, *supra* note 68, at 1204.

⁷⁰ LANDES & POSNER, *supra* note 17, at 20-21; *but see* DiCola, *supra* note 15, at 234 (arguing that incentive theory does not accurately describe how copyright actually works).

⁷¹ Liebewitz, *supra* note 25; *see* Giblin, *supra* note 25, at 392-93.

⁷² *Id.*; Glynn S. Lunney, Jr., *Copyright and the 1%*, 23 STAN. TECH. L. REV. P1, 57 (noting that excess returns are counterproductive to the point of copyright).

⁷³ DiCola, *supra* note 15 at 234, 243.

⁷⁴ Litman, *supra* note 47, at 536-37.

⁷⁵ *See* Jeanne Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1746 (2013); Stephanie Plamondon Bair, *Rational Faith: The Utility of Fairness in Copyright*, 97 B.U. L. REV. 1487 (2017); Kenneth Einar Himma, *Toward a Lockean Moral Justification of Legal Protection of Intellectual Property*, 49 SAN DIEGO L. REV. 1105 (2012); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Mala Chatterjee, *Lockean Copyright vs. Lockean Property*, 12 J. LEGAL ANALYSIS 136 (2020); John M. Newman, *Copyright Freeconomics*, 66 VAND. L. REV. 1407 (2013) (all describing, and attempting to reconcile, these theories with the prevailing economic rationale).

⁷⁶ Netanel, *supra* note 17; Lateef Mtima, *IP Social Justice Theory: Access, Inclusion, and Empowerment*, 55 GONZ. L. REV. 401 (2019).

privacy, and advance other “noncopyright interests.”⁷⁷ Copyright confusion abounds.

Even Congress changes copyright law to let rightsholders simply capture more revenue, without any incentive-based justification.⁷⁸ For example, in 2018, Congress replaced the standard used to determine certain songwriter royalties. The prior one required a balancing of the public’s interest in access to works with the appropriate incentives for copyright owners such that they can recoup their investments and earn a “fair return.”⁷⁹ In the 40 years that standard was in place, the number of professional songwriters increased.⁸⁰ Yet, it was jettisoned in favor of a standard that approximates what a willing buyer and willing seller would agree to in the “free” market (there is no “free” market when a seller holds exclusive rights), under the assumption that would lead to higher royalties.⁸¹

With competing narratives about what copyright can, or should do, and whose interests it should serve (not to mention a growing chorus of artists seeking more money to continue creating),⁸² it is not terribly surprising that some believe the economic problems creators face may be based in, or perhaps solved by, copyright. Policymakers (and artists themselves) express concerns that artists are not sufficiently incentivized to keep producing and respond with proposals sounding in copyright law.⁸³ Scholars argue that copyright rules could be used to mitigate economic injustices between creatives and intermediaries.⁸⁴ And there is no doubt that copyright plays a meaningful role: the entire industry is built on the value of protected content.⁸⁵ But academics

⁷⁷ Cathay Y.N. Smith, *Weaponizing Copyright*, 35 HARV. J. LAW & TECH. 193 (2021); but see Blake Reid, *What Copyright Can’t Do*, __ PEPP. L. REV. __ (2025) (describing copyright’s inability to properly address such concerns).

⁷⁸ See generally Sterk, *supra* note 68 (describing how expansions of copyright law bear little relation to correcting the underlying market failure).

⁷⁹ 17 U.S.C. § 801(b), P.L. 94-553 (94th Congress) (1976).

⁸⁰ PRS For Music, *New figures reveal songwriting as a profession is growing* (Oct. 3, 2024), <https://www.prsformusic.com/press/2024/songwriting-as-a-profession-is-growing>

⁸¹ 17 U.S.C. § 801(b). The advocates for this change were the songwriter and music publisher community. See, e.g., Ed Christman, *NMPA Chief David Israelite on Music Licensing Issues: ‘The Value of the Song Is More Important than the Process,’* BILLBOARD (Oct. 19, 2017), <https://www.billboard.com/music/music-news/nmpa-chief-david-israelite-music-licensing-issues-value-song-8006689/>.

⁸² See Peter DiCola, *supra* note 15, at 251 (describing how copyright plays different roles for different stakeholders, leading to diverging narratives about its purpose).

⁸³ See *infra*, Part III.

⁸⁴ Omri Alter, *Fairness Towards Authors: Does it Necessarily Mean Caring for the Weak?*, 43 S. ILL. U. L. J. 615, 634 (2019); Tang, *supra* note 17; see also Jennifer Jenkins, *MUSIC COPYRIGHT, CREATIVITY, AND CULTURE* 57 (2025) (describing copyright’s purpose as ensuring creators get paid).

⁸⁵ See Cohen, *supra* note 32, at 153–54 (describing how copyright helps provide a contracting framework for creative industries).

are also increasingly examining how compensation matters are better remedied outside copyright. Peter DiCola suggests that the introduction of new, large intermediaries (i.e., online platforms) has rendered the impact of any changes to copyright law nominal on individual creators. And the truth is, as Litman has pointed out, whatever protections copyright offers to creators can be contracted around or contracted away.⁸⁶

DiCola asserts that creators have been economically harmed by the double-layer of intermediaries in the music supply chain: the record labels and the streaming services, which DiCola terms “technological intermediaries.”⁸⁷ In his view, the technological intermediaries command too much power in negotiations to result in a fair outcome for creators.⁸⁸ DiCola is not wrong that creators are at the whim of those actually negotiating distribution deals; however, to actually understand and increase remuneration in a way that continues to support music creation by professional artists, one cannot minimize the role of the record labels. It is imperative, therefore, to look under the hood at what is really going on when artists deal with record labels and when record labels deal with streaming platforms.⁸⁹ What do the contracts say?

B. Artist and Label

Record labels have long had an important function in the mass creation and distribution of music. Even with a myriad of low-cost tools available for artists to self-produce and post music online, signing a record deal is still considered the most likely path to a long-lasting career and opens up promotional and marketing levers that are unavailable for do-it-yourself endeavors.⁹⁰ Critically, a record contract also enables short-term solid financial footing, allowing an artist to defer some of the immediate costs of recording an album and pocket some money to live on.⁹¹

The most fundamental component of any record deal is the transfer of ownership in the copyrights to the artist’s sound recordings to the label.⁹²

⁸⁶ Litman, *supra* note 47; DiCola, *supra* note 15, at 243.

⁸⁷ DiCola, *supra* note 15.

⁸⁸ *Id.*

⁸⁹ See Litman, *supra* note 47, at 555 (“we’ve failed, however, to pay enough attention to how – or whether – the intermediaries tasked with distributing. . . revenues actually disburse them”).

⁹⁰ PASSMAN, *supra* note 30, at 78.

⁹¹ Jonathan M. Barnett, *Copyright Without Creators*, 9 REV. L. & ECON. 389 (2013) (labels perform “financing and risk-diversification functions that fund cultural production and distribution”).

⁹² DCMS REPORT, *supra* note 13, at 19; see Kristelia García, *Private Copyright Reform*, 20 MICH. TELECOMM. & TECH. L. REV. 1, 18 (2013) [hereinafter, García, *Reform*]; Kristelia García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1134 (2014) [hereinafter

“Transfer,” in this context, however, is a bit misleading. Record labels have long taken the position that works created by artists under contract with them are contributions to collective works (the resulting album being the “collective work”), and therefore are works for hire.⁹³ As a result, the label owns the sound recordings upon creation and is deemed the author for copyright purposes; the artist never has any interest in the works to begin with.⁹⁴ For example, Kanye West’s 2005 record deal stated, “All Master Recordings recorded during the Term which embody the performances of Artist, from the inception of the recording thereof. . . shall be deemed “works made for hire” for [a Universal subsidiary];”⁹⁵ Limp Bizkit’s contracts with its first label (an independent) and second (a major) both included similar language.⁹⁶ While recent years have seen superstars negotiate for deals whereby they retain ownership of their recordings and exclusively license them to labels,⁹⁷ the

García, *Penalty*]; Peter DiCola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons about Copyright Incentives*, 55 ARIZ. L. REV. 301, 306 (2013) (each describing how artists typically transfer their rights to labels); *see also* Chisolm, *supra* note 17, at 307 (describing copyright ownership as one of the “most critical terms” of a record contract).

⁹³ KOHN, *supra* note 30, at 1434. Scholars disagree with the label’s determination. *See, e.g.*, Peter Lee, *Autonomy, Copyright, and Structures of Creative Production*, 83 OHIO. ST. L.J. 283, 321 (2022), *but see* Mary LaFrance, *Authorship and Termination Rights in Sound Recording Rights*, 75 S. CAL. L. REV. 375, 387 (2002) (arguing that a record could be a collective work) *See infra*, Part III.A.1 for a discussion of how a determination that recordings are not made for hire would affect artists.

⁹⁴ Chisolm, *supra* note 17, at 324; Helman, *supra* note 14, at 160-61. An exception to this would be an artist who has created works prior to signing the record deal. In those cases, the works ought to be subject to an assignment, since they were not created (under any stretch of any imagination) for the label. However, any resulting albums on which those works appear would be works for hire. The labels also obtain a “back-up” assignment of rights, should there ever be an issue with the work for hire designation. Chisolm, *supra* note 17, at 324; Helman, *supra* note 14, at 161. Relatedly, Raymond Shih Ray Ku has argued that artists might be better off without any copyright at all for their works. Ku, *The Creative Destruction of Copyright*, 69 U. CHI. L. REV. 263, 311 (2002).

⁹⁵ West leaked his own contract online in 2020. It has been archived here and a copy is on file with the Author: https://drive.google.com/file/d/1IEhQ02xLE4IEQkP8yz__jEhoqkA0b6d5/view (hereinafter “West Contract”). *See* Sec. 5.01(a).

⁹⁶ Limp Bizkit’s record contracts with Universal subsidiary Interscope and their original independent label, Flip Records, were included as an exhibit to the band’s breach of contract complaint against the label. *See* Agreement between Fred Durst, Jon Otto, Sam Rivers, Leor Dimant p/k/a DJ Lethal, and Wesley Borland and Interscope Records, dated Dec. 1, 2000 (Sec. 7.01) and Agreement between Fred Durst, Jon Otto, Sam Rivers, Leor Dimant p/k/a DJ Lethal, and Wesley Borland and Flip Records, dated July __, 1996 (Sec. 2(c)).

⁹⁷ Music Managers Forum & Featured Artists Coalition, Written Evidence Submitted by the Featured Artists Coalition and Music Managers Forum 4–5 (2021) [hereinafter MMF Evidence], <https://committees.parliament.uk/writtenevidence/15289/pdf/>. Even West’s deal got increasingly more favorable to him as his success grew. *See, e.g.*, West Contract, *supra* note 95.

status quo for the vast majority of artists remains the same.⁹⁸ And in either case, the label ends up with the sole ability to promote and license the works for a lengthy period of time.

In exchange for the rights and the artist's commitment to record music on a regular basis, a traditional record deal "involve[s] significant upfront investment"⁹⁹ by the label, which provides marketing, promotion, distribution, and creative feedback and counseling on material, in addition to royalties.¹⁰⁰ The risk of the investment is managed through the economic terms.

Artists are typically paid a recoupable advance against royalties—effectively, an interest-free loan with no repayment timeline.¹⁰¹ The advance is a flat amount paid by the label, intended to cover living and other day-to-day expenses incurred while recording.¹⁰² Then, artists are granted a royalty tied to the work's exploitations (including streaming). The United Kingdom's competition regulator, the Competition & Markets Authority (CMA), determined that an artist typically earns a net royalty of less than 25% of the label's profits attributable to the artist's material.¹⁰³ But before the artist sees a dime, they must pay the label back for the advance *and* any other expenses identified in their contract as recoupable.¹⁰⁴ These latter expenses typically include some or all recording costs, tour support, legal fees, website hosting and development, video costs, and television advertising costs.¹⁰⁵ West's deal identified 50% of costs associated with videos, websites, and any external marketing and promotion as recoupable.¹⁰⁶ Limp Bizkit's contract (seemingly never amended to address digital distribution) identified, among other things, all recording and video costs as recoupable (including all costs "incurred in

⁹⁸ Chisolm, *supra* note 17, at 312.

⁹⁹ CMA REPORT, *supra* note 14, at 31-32; Asay, *supra* note 216, at 198.

¹⁰⁰ CMA REPORT, *supra* note 14, at 31; DiCola, *supra* note 92, at 306. Peter Lee describes the relationship between artists and label as "formally vertically disintegrated and substantively semi-integrated" due to the involvement labels take in the production of music. Lee, *supra* note 92, at 314, 317.

¹⁰¹ PASSMAN, *supra* note 30, at 86; Chisolm, *supra* note 17, at 312.

¹⁰² Emily Tribulski, *Look What You Made Her Do: How Swift, Streaming, and Social Media Can Increase Artists' Bargaining Power*, 19 DUKE L. & TECH. REV. 91, 98 (2021).

¹⁰³ CMA REPORT, *supra* note 14, at 48; *see also* MMF Evidence, *supra* note 97, at 5 (stating that many modern deals set rates under 20%). Industry expert Donald Passman suggests royalties for new artists range between 15% and 20%. PASSMAN, *supra* note 30, at 90. Additionally, artists typically engage a range of other professional support: personal manager, business manager, lawyer, and booking agent. Each of those must be paid, too, usually on a percentage-of-income basis, which could reduce the artist's net profits by as much as 40%. PASSMAN, *supra* note 30, at 12-14, 35, 53, 58, 63.

¹⁰⁴ CMA REPORT, *supra* note 14, at 48-49; MMF Evidence, *supra* note 97, at 5, 6; PASSMAN, *supra* note 30, at 86; Helman, *supra* note 14, at 163.

¹⁰⁵ PASSMAN, *supra* note 30, at 88; CMA REPORT, *supra* note 14, at 48 (n. 110).

¹⁰⁶ 6.03(b)

preparing [the master recordings] for the production of metal parts”—identified as lacquer, copper, and other equivalents).¹⁰⁷ In addition, recoupable funds are “cross-collateralized” between albums: if an artist’s first album does not fully recoup, then the label will use proceeds from the second album to recoup both the first album’s and second album’s fund, and the artist will not see any royalties until both are fully repaid.¹⁰⁸ It could take years for an artist to fully recoup, and many never do.¹⁰⁹ Limp Bizkit had multiple hit albums and took 18 years to pay Universal back.¹¹⁰ Some labels have recently forgiven unrecouped balances for legacy acts so that, decades later, those acts could begin to earn royalties.¹¹¹

While often characterized as unfair and exploitative insofar as they function to keep artists in debt to labels,¹¹² the advance and recoupment component of these deals is not insignificant to the continued financing and production of music. Jonathan Barnett notes that without financing intermediaries like record labels, a sizable gap would arise in the mass creation of creative works.¹¹³ Presumably, there are some artists who would simply not make music, or be able to live while making music, without a record label’s support. Labels are better positioned to take risks on artists because they can diversify that risk across multiple artists, enabling more music creation, even if not all artists become superstars or pay off their recoupable funds.¹¹⁴ (One can view record labels similar to venture capital firms: each hopes that one of their investments—an artist or a startup—blows up and delivers massive returns in order to pay for those who don’t).¹¹⁵

¹⁰⁷ Limp Bizkit Interscope Contract, Sec. 5.02(a); 14.25.

¹⁰⁸ PASSMAN, *supra* note 30, at 90; *see* West Contract, *supra* note 95, at Sec. 6.01(b)(i)(B).

¹⁰⁹ CMA REPORT, *supra* note 14, at 49.

¹¹⁰ Complaint, Durst, et. al., v. Universal Music Group, Inc., Case No. 2:24-cv-08630, at 13 (C.D. Cal. Oct. 8, 2024).

¹¹¹ DMCS REPORT, *supra* note 13, at 19.

¹¹² *See* Lee, *supra* note 92, at 347 (noting that artist contracts in the recording industry reflect a “particularly bad” bargain due to the one-sided nature of negotiations); Helman, *supra* note 14, at 162; *see also* MMF Evidence, *supra* note 97, at 5-6.

¹¹³ Barnett, *supra* note 91, at [p. 19 in PDF]. The same rationale and custom holds true for book publishers, as well.

¹¹⁴ *Id.*; *see* DiCola, *supra* note 92, at 306. There are some artists (usually with established fan bases) that do distribution-only deals, with no advance and no marketing or promotional support. Royalties under those deals tend to be much higher (50%-80%). PASSMAN, *supra* note 30, at 209-10; CMA REPORT, *supra* note 14, at 32; MMF Evidence, *supra* note 97, at 5; DCMS Report, *supra* note 13, at 19.

¹¹⁵ *See* Davis, *supra* note 49, at 392 (making a similar analogy); Eric Priest, *An Entrepreneurship Theory of Copyright*, 36 BERK. TECH. L.J. 737 (2021) (exploring the similarities between creative artistry subject to copyright protection and entrepreneurship). Priest, however, does not address the implications of artists not owning their works. *See also* Olufunmilayo B. Arewa & Matt Stahl, *Prospecting, Sharecropping, and the Recording Industry*, 25

The above description applies generally to record labels of all sizes and artists of all degrees of popularity short of superstardom.¹¹⁶ In reality, however, there are two distinct categories of labels: the “majors” (Sony, Universal, and Warner) and all others—the “independents.” The three major labels collectively control roughly 74% of the music available on streaming,¹¹⁷ and critically, essentially all popular music. But independents play a critical role in the music ecosystem, too. They are typically home to more niche genres (jazz, heavy metal, alternative, etc.) and serve as incubators for up-and-coming pop artists who are subsequently signed to major labels.¹¹⁸ Yet, their success is heavily influenced by how the major labels deal with streaming platforms.

C. Label and Streaming Service

Prior to a streaming service’s launch, it must secure the requisite sound recording licenses from record labels (and other relevant copyright owners¹¹⁹) through blanket licenses; otherwise, it faces a near-certain demise from copyright infringement litigation.¹²⁰ Licenses from the three majors are particularly valuable. Each control what government officials have called “must-have” inputs for a streaming service: consumer expectations are that services will have effectively all mainstream music, and there are no substitutions among the three labels. Copyright exclusivity means that a service can only get Beyoncé’s catalog from Sony, Justin Bieber’s from Universal, Ed Sheeran’s from Warner, and so.¹²¹ Because independent catalogs

VAND. J. ENT. & TECH. L. 267, 282-83 (2023) (likening the recording industry to sharecropping).

¹¹⁶ See generally PASSMAN, *supra* note 30, at 69-119 (describing all record deals in the same way).

¹¹⁷ Murray Stassen, *The major record companies (and Merlin) saw their Spotify market share fall again in 2023. Yet even before ‘artist-centric’ changes, this decline started slowing*, MUSIC BUS. WORLDWIDE (Feb. 12, 2024), <https://www.musicbusinessworldwide.com/major-record-companies-and-merlin-spotify/>. This figure includes the labels and distributors that are marketed as indies, but are actually owned by major labels.

¹¹⁸ DCMS REPORT, *supra* note 13, at 64, 69.

¹¹⁹ Such as music publishers, for the rights to the underlying musical works.

¹²⁰ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (death of Napster); *Arista Records LLC v. Lime Grp. LLC*, 715 F. Supp. 2d 481, 492 (S.D.N.Y. 2010) (death of LimeWire), *withdrawn and superseded by* 784 F. Supp. 2d 398 (S.D.N.Y. 2011); *Universal Music Austl Pty Ltd v. Sharman License Holdings Ltd* [2005] FCA 1242 (5 September 2005) 1 (Austl.) (death of Kazaa).

¹²¹ See Meredith Filak Rose, *Streaming in the Dark: Competitive Dysfunction Within the Music Streaming Ecosystem*, 13 BERK. J. ENT. & SPORTS L. 24, 33 (2024) (there are no perfect substitutes in popular music).

are much smaller (and frequently more niche) than major label catalogs, no independent has been deemed a “must have” for a streaming service.¹²²

As I discussed in prior work, the “must haveness” of each of the majors’ catalogs endows them with a lot of bargaining power in negotiations with services.¹²³ That bargaining power appears to come with some certainty that each of the labels are going to be able to secure particular contract terms.¹²⁴ This dynamic has led to parallel contracting practices in the industry: each major label license, as described by regulators, policymakers, and industry experts, contains substantially similar economic terms and product restrictions.¹²⁵ In addition, there are other provisions that appear common to at least some of the three labels’ standard agreements, according to the CMA. A short description of those terms follows.

1. Economics

At the outset of each license term and subsequent renewal, a service pays each major label a prepayment known as the “minimum guarantee” that can run well into the tens (perhaps hundreds) of millions of dollars.¹²⁶ In 2016, reporting revealed that the major labels earned, on average, almost \$1.6 million a day in minimum guarantee payments from all services.¹²⁷ At the end of 2024, Spotify’s outstanding minimum guarantee liabilities to all licensors (across music and podcasts) was over €4.4 billion (roughly equivalent to just under \$5 billion).¹²⁸ With the major labels controlling most of the content available on the platform, it is fair to assume they commandeer a significant chunk of that figure.

That prepayment is coupled with a revenue share that is based on two components. The first is what is known as the “label pool”—this is the percent of revenue (from music-related subscription products) that the service

¹²² Merlin, an independent music distribution company that distributes “tens of thousands” of independent label catalogs to streaming service is frequently referred to as the “fourth major” because of the size of its portfolio (and Merlin is the only indie to have been granted any equity in Spotify, with 1% before Spotify’s IPO. However, economists have not deemed it a “must have.” Web V, *supra* note 30, at 59455.

¹²³ Landy, *supra* note 31, at 1275-76.

¹²⁴ *Id.* at 1278-80.

¹²⁵ CMA REPORT, *supra* note 14; Web IV, *supra* note 30; Web V, *supra* note 30; DCMS REPORT, *supra* note 13; KOHN, *supra* note 30; PASSMAN, *supra* note 30.

¹²⁶ *Id.* at 1281; SONY MUSIC ENTERTAINMENT & SPOTIFY USA INC. DIGITAL AUDIO/VIDEO DISTRIBUTION AGREEMENT, at Exhibit A § 4 (Jan. 18, 2011) [hereinafter SONY/SPOTIFY CONTRACT]; see also MMF Evidence, *supra* note 97, at 4.

¹²⁷ Paul Resnikoff, *Spotify, Apple Music, Tidal Paying \$1.6 Million a DAY in Major Label Guarantees*, DIGIT. MUSIC NEWS (Sept. 1, 2016), <https://www.digitalmusicnews.com/2016/09/01/spotifyapple-tidal-millions-daily-guarantees>.

¹²⁸ Spotify Technology S.A., Form 20-F, at 14 (for the year ending Dec. 31, 2024).

sets aside for all of the record labels (roughly 55%).¹²⁹ That pool is divided among all labels based on the usage of their catalogs over the relevant accounting period.¹³⁰ When payments are due, the service determines how many streams of music occurred on the whole platform, and how many of those were attributed to each label (this resulting figure is the “stream share,” the second component).¹³¹ Then, the 55% is divided according to each label’s stream share.¹³² Once a label’s revenue share earnings (on paper) equal the minimum guarantee amount, the service begins to pay the label under the revenue share.¹³³ To borrow an example from prior work, “if a service makes \$1,000 in subscriber revenues in a month and the labels’ revenue share pool is 55%, then \$550 will be allocated to the labels. That \$550 is divided among labels based on their relative stream share. . . If Universal artists commanded 40% of the streams in a month, Universal would be allocated 40% of \$550, or \$220. The revenue share amounts, however, are credited against the minimum guarantee and are not paid out until the minimum guarantee is recouped.¹³⁴ If a service paid Universal a \$5,000 minimum guarantee, then \$220 would be credited against the \$5,000 account. Once \$5,000 is earned, the regular revenue share payments kick in.”¹³⁵ The same calculation is done separately for any revenues generated from an advertising-supported service: advertising income is subject to a revenue share allocation for the record labels, which is then divided based on stream share.¹³⁶

If a service never recoups its minimum guarantee (i.e., it never makes any revenue share payments), then the label keeps the excess, and the service has

¹²⁹ U.S. *On-Demand Subscription Streaming Revenue: Who Gets Paid and How Much?*, DIGIT. MEDIA ASS’N, <https://dima.org/news-and-resources/whogets-paid-and-how-much/>; Web IV, *supra* note 30, at 26324 (summarizing the rightsholders’ proposed 55% revenue share, mirroring the interactive agreements); PASSMAN, *supra* note 30, at 142.

¹³⁰ DCMS REPORT, *supra* note 13, at 15, 90; DIGIT., CULTURE, MEDIA & SPORT COMM., ORAL EVIDENCE: ECONOMICS OF MUSIC STREAMING, 2021-22, HC 868, at Q671 (UK) [hereinafter DCMS HEARINGS], <https://committees.parliament.uk/work/646/economics-of-music-streaming/publications/oral-evidence/>; Chris Cooke, MUSIC MANAGERS F., DISSECTING THE DIGITAL DOLLAR: PART TWO—FULL REPORT 22 (2016), https://themmf.net/wp-content/uploads/2023/10/MMF_DDD-Part-Two_Full-Report_Web.pdf.pdf.

¹³¹ *Id.*; PASSMAN, *supra* note 30, at 83.

¹³² *Id.*

¹³³ DCMS HEARINGS, *supra* note 130, at Q256; MMF Evidence, *supra* note 97, at 4; Meredith Rose, PUB. KNOWLEDGE, STREAMING IN THE DARK: WHERE MUSIC LISTENERS’ MONEY GOES—AND DOESN’T 25 (2023), https://publicknowledge.org/wp-content/uploads/2023/03/Streaming-in-the-Dark_Meredith-Rose_Public-Knowledge_March-2023.pdf.

¹³⁴ *Id.*

¹³⁵ Landy, *supra* note 31, at 1283.

¹³⁶ DCMS REPORT, *supra* note 13, at 90.

overpaid for the content.¹³⁷ That leftover amount—the difference between the service paid and what was actually earned through usage of content (and can therefore be allocated to individual artists)—is called “breakage.”¹³⁸ Lastly, each major label customarily takes equity in new streaming services.¹³⁹ The three majors were collectively granted shares of stock amounting to 17% of Spotify in advance of its initial public offering in exchange for less than \$1,000.¹⁴⁰ Both Sony and Warner sold a portion of their shares shortly thereafter (valued at a combined \$1,150,000,000).¹⁴¹

2. Programming Terms

According to the CMA, at least “some” of the major label agreements mandate the service take certain actions to ensure their content is promoted.¹⁴² For example, some contracts prohibit services from discriminating against any major label compared to any other label, including by favoring lower-royalty content (e.g., content provided by an independent label).¹⁴³ This latter provision is known as an “anti-steering” provision and has, over time, been invoked by all of the major labels.¹⁴⁴ “Some” agreements also include most-favored-nation (MFN) clauses on the data and marketing support the service provides to the label.¹⁴⁵ These entitle the relevant major label to the “best level of data” and highest level of marketing support that the service provides to any other label.¹⁴⁶

There is also consensus that the major labels have negotiated for preferential or guaranteed playlist treatment, although there is no definitive reporting on what the treatment is. Some experts and artists assert that major label songs feature “disproportionately” on popular playlists (i.e., the share of major label songs on playlists exceeds the share of major label streams across

¹³⁷ DCMS HEARINGS, *supra* note 130, at Q256.

¹³⁸ CMA REPORT, *supra* note 14, at 117; KOHN, *supra* note 30, at 1497; DCMS HEARINGS, *supra* note 130, at Q255–56; Chris Cooke, *supra* note 130, at 56; Warner Music Group Corp., Registration Statement (Form S-1) F-21 (Feb. 6, 2020); Rose, *supra* note 133, at 25; MMF Evidence, *supra* note 97, at 4. Additionally, each major label also secures most-favored-nation (MFN) treatment from the services, so that they all get the best revenue share that any of the three negotiated. KOHN, *supra* note 30, at 1525; Landy, *supra* note 31, at 1283–84. One industry expert calls the MFNs “schmuck insurance.” KOHN, *supra* note 30, at 1525.

¹³⁹ CMA REPORT, *supra* note 14, at 28.

¹⁴⁰ DCMS REPORT, *supra* note 13, at 57.

¹⁴¹ *Id.* at 58.

¹⁴² *See* CMA REPORT, *supra* note 14, at 67.

¹⁴³ *See*, e.g. SONY/SPOTIFY CONTRACT, *supra* note 126, at 32–33.

¹⁴⁴ CMA REPORT, *supra* note 14, at 69; Web IV, *supra* note 30, at 26365. Although the details are redacted, the name of the witness indicates the relevant label (Harrison being Universal, Wilcox being Warner, and Kooker being Sony).

¹⁴⁵ CMA REPORT, *supra* note 14, at 70; SONY/SPOTIFY CONTRACT, *supra* note 126, at 34.

¹⁴⁶ CMA REPORT, *supra* note 14, at 69–70.

the entire platform).¹⁴⁷ The CMA notes that “some” major labels have negotiated for playlist “shares” that correspond to the labels’ overall stream share on the platform. For example, if a label’s catalog garnered 30% of streams on the platform, then that label would also be entitled to 30% of the slots on a service-curated playlist. The CMA also found, however, that there were no contractual clauses that “significantly impinge[d] upon the ability of streaming services to decide what music to include within playlists.”¹⁴⁸ That may simply be because of the size of a major label’s catalog. A playlist share commitment still provides the service with sufficient freedom insofar as it does not dictate what artist or song to play, just the catalog (of millions of songs) from which selections must be made. Or it may be because the recoupable minimum guarantee does the work for the labels by ensuring song placements that are likely to get a high number of plays. Spotify, for its part, has confirmed that they do not take the origin of content into consideration for their purely algorithmic playlists (distinct from editorial playlists, as described in Part II.B below).¹⁴⁹

3. Independent Labels

The CMA confirmed that independent labels do not secure as favorable terms as the majors.¹⁵⁰ They are typically compensated on the same pro-rata share basis (from the same label pool),¹⁵¹ but receive smaller (or no) minimum guarantees, and do not receive MFNs or any of the marketing and product guarantees.¹⁵² Only one non-major label entity, Merlin (a licensing vehicle for thousands of independent labels), received any equity in Spotify before its IPO (1%).¹⁵³

Earlier, I likened record labels to venture capital firms investing in startups. But artists are not founders. They retain no equity in their creations and while

¹⁴⁷ DCMS REPORT, *supra* note 13, at 69 (quoting Dr. Franco Mariuzzo and Dr. Peter Ormosi from the Centre for Competition Policy); 78.

¹⁴⁸ CMA REPORT, *supra* note 14, at 95.

¹⁴⁹ Spotify AB, Supplementary Written Evidence Submitted by Spotify AB 3 (Mar. 19, 2021) [hereinafter Spotify Supplementary Evidence], <https://committees.parliament.uk/writtenevidence/24796/pdf/>.

¹⁵⁰ CMA REPORT, *supra* note 14, at 76; DCMS REPORT, *supra* note 13, at 15, 17.

¹⁵¹ DCMS REPORT, *supra* note 13, at 90.

¹⁵² CMA REPORT, *supra* note 14, at 68, 69-70, 110; see Cory Doctorow, *Penguin Random House, AI, and writers’ rights*, PLURALISTIC (Oct. 19, 2024), <https://pluralistic.net/2024/10/19/gander-sauce/> (stating that independent music does not get the “playlist placement the Big Three get for free”).

¹⁵³ DCMS REPORT, *supra* note 13, at 58; One industry expert believes that Merlin, in addition to one other large independent distributor (CD Baby) has, at times, been able to obtain an MFN clause on royalty rates, but they have not been confirmed in any formal proceeding. KOHN, *supra* note 30, at 1525.

they may have some control over their recording process, they have very little control over how their product is manufactured and distributed to third parties, and how the record label will be compensated in return.¹⁵⁴

Indeed, there are some clear disconnects between how record labels (especially the major labels) secure rights from, and pay artists, and how they license (and are paid by) streaming services. Artist deals, as industry experts report, do not always reflect how breakage amounts or equity cash-outs are shared with artists, if at all.¹⁵⁵ While a small number of superstars can negotiate for enhanced economic terms and be confident their music will be found by fans and promoted across playlists, that is not true for the broader artist community. Independent artists, in particular, remain foreclosed from promotional and marketing opportunities reserved for major label artists, stifling their potential career growth, as described in the next Part.

II. ARTIST EFFECTS

Record labels earned almost \$15 billion from streaming services in 2024.¹⁵⁶ Despite that figure, many artists complain that the streaming services under-value their works, with reports of Spotify paying “less than one-tenth of a cent per stream” (recall, though, that services do not pay on a per-stream basis¹⁵⁷).¹⁵⁸ But any claim that Spotify (or any other service) values a stream at a fraction of a penny, for example, reads the record label’s role in the supply chain out of the equation entirely.¹⁵⁹

Spotify’s own marketing makes the same mistake. Spotify touts that 12,500 artists “generated” more than \$100,000 in 2024¹⁶⁰—a laudable statistic, but one that masks a critical nuance. Spotify paid the relevant record labels \$100,000 for usage of each of those artists’ content, but once the money leaves Spotify, the artist’s share is ultimately dictated by its label agreement.

¹⁵⁴ See Helman, *supra* note 14, at 160. Failed startup founders are also frequently given second chances in the VC industry; if an artist flops, or is a one-hit wonder, their career is usually over.

¹⁵⁵ See MMF Evidence, *supra* note 97, at 4 (describing the lack of transparency around equity and breakage payments).

¹⁵⁶ RIAA YEAR-END REPORT, *supra* note 39.

¹⁵⁷ I assume these figures are calculated by taking the total amount of money earned from streaming and dividing it by the number of plays. That figure, however, is not an accurate representation of the value of that work to the service because the service does not pay on a per-stream basis, as described above. Additionally, because services pay on a pro-rata revenue share basis, any “per stream” figure will fluctuate with each accounting period based on usage. See *supra*, Part I.C.1.

¹⁵⁸ Stern, *supra* note 7.

¹⁵⁹ Davis, *supra* note 49 at 383; Andrews, *supra* note 6.

¹⁶⁰ SPOTIFY, LOUD & CLEAR, (last visited Apr. 14, 2025), <https://loudandclear.byspotify.com/#payouts>.

As described in Part I.B, the actual amounts artists earn, rather than generate, are dictated by contracts with their labels and status of their recoupable funds.¹⁶¹ And it seems that artists at all levels of fame and fortune are unhappy with streaming economics and the public discourse suggests many may turn away from music entirely.¹⁶² So where is the money going? The supply chain is not complicated: artist signs with label and label licenses content to streaming service. But the record labels have significant bargaining power in *both* transactions, and that directly affects artist economics.¹⁶³

To begin, the most obvious determinant of how much an artist will earn from streaming is the royalty rate specified in their record deal and the size of the recoupable fund (including the advance). If an artist's royalty rate on streaming licenses is 25%, and that artist "generated" \$100,000 on Spotify in a given year, then the artist sees \$25,000 of that amount, if they are fully recouped. At the risk of over-simplifying what can be quite complex accounting, if the balance of the artist's recoupment fund is over \$25,000, then the artist does not see a dollar. If the balance is under \$25,000, say \$15,000, then the artist will earn \$10,000.¹⁶⁴ And from that point on, the artist would earn their full royalty until they record again, and are subject to another recoupable fund.

But the amount that an artist makes from streaming is also directly affected by license agreements between the services and the record labels—the major labels, in particular. And these deals do not just affect the artists signed to those labels, they affect *all* artists on a streaming platform, which, in turn, affects all revenue streams for artists. Before streaming, fans might take a chance on a live show without ever having heard an artist; now, with ready access to all music online, streaming is the first entry point for most fans, and then if they like the music, they might go to a show or spend other money (e.g., on merchandise) to support artists. As a result, promotional opportunities on streaming services have become critical for new and established artists. In this Part, I show how the contracts affect artist income and exposure, beginning with major label artists before expanding to all artists.

A. Major Label Artists

The major record labels are all publicly traded corporations, and for-profit corporations are meant to make money for shareholders by maximizing

¹⁶¹ See *supra* I.B.

¹⁶² See *supra*, Introduction.

¹⁶³ *C.f.* DiCola, *supra* note 15 (arguing that distribution platforms have lessened rightsholders' bargaining power).

¹⁶⁴ See Xiyin Tang, *Privatizing Copyright*, 121 MICH. L. REV. 753, 793 (2023) ("If a record label wants to use the royalties it receives from Spotify for a stream of an artist's song to recoup the advance paid to that artist, it is free to do so...as a result, someone who is uncoupled earns nothing").

revenues (e.g., by exploiting copyrights) and minimizing expenses (e.g., reducing payments to artists).¹⁶⁵ The labels appear to have accomplished this goal by negotiating for opaque amounts with streaming services that they can share with artists at their discretion (if at all), because unlike the royalty rate, these amounts are not directly linked to any actual usage of music. This approach to distribution deals marks a significant shift from the pre-streaming era.

Before streaming, record labels generated revenues from the sale of (depending on the era) downloads, ringtones, compact discs, cassette tapes, 8-tracks, and vinyl records. No revenue was generated in the absence of a fan purchasing a product. Tower Records did not pay Warner Music an additional fee for the privilege of stocking Warner's artists, for example. If a label made money from distributing music, the artists participated in those revenues.¹⁶⁶ That is no longer the case. When streaming became the dominant form of music consumption, and license agreements became the vehicle by which distributors obtained rights to music, that dynamic changed. Instead of simple wholesale purchase agreements that reflect inventory need between record stores and labels, entire catalogs (the good and the bad, the popular and the obscure) are licensed to distributors to make available for users, whether or not users consume the content.¹⁶⁷ This arrangement means that distributors pay upfront for everything, without any idea of what will resonate with listeners. This has created an opportunity for large rightsholders (the major labels) to maximize their profits regardless of what, or how much, music is listened to.

As described above, the economics of the streaming licenses are multi-layered, with the minimum guarantee, revenue share, and equity grants. Among those components, two result in funds for the labels that cannot be

¹⁶⁵ The major labels' parent companies are all headquartered in different jurisdictions (Warner is American; Universal's parent is Dutch; Sony's is Japanese), but each maintain their primary operations in the United States.

¹⁶⁶ PASSMAN, *supra* note 30, at 82-84.

¹⁶⁷ The major labels require that services license their entire catalog (as opposed to picking and choosing what is likely to be streamed). CMA REPORT, *supra* note 14, at 70; UNIVERSAL MUSIC GRP., MUSIC AND STREAMING MARKET STUDY: UNIVERSAL MUSIC GROUP'S RESPONSE TO THE CMA'S UPDATE PAPER DATED 26 JULY 2022, at 25 (Aug. 19, 2022), https://assets.publishing.service.gov.uk/media/63220501d3bf7f33d5ddd933/Universal_Music_Group_21.9.22.pdf; WARNER MUSIC GRP. CORP., WARNER MUSIC GROUP CORP.'S SUBMISSION FOLLOWING THE COMPETITION AND MARKETS AUTHORITY'S MUSIC AND STREAMING MARKET STUDY UPDATE 5-6 (Sept. 21, 2022), https://assets.publishing.service.gov.uk/media/632205f3d3bf7f33d11238e5/Warner_Music_Group_21.9.22_Redacted.pdf; SONY MUSIC, CMA MARKET STUDY INTO MUSIC STREAMING: SONY MUSIC ENTERTAINMENT'S RESPONSE TO THE CMA'S INTERIM REPORT 4-5 (Sept. 21, 2022), https://assets.publishing.service.gov.uk/media/632203f4e90e072ce3c633cd/Sony_Music_Entertainment_21.9.22.pdf.

directly attributed to any usage of content on the streaming platform: profits from the sale of equity and any unrecouped minimum guarantees (the breakage); after all, those amounts are not “earned” by (and therefore attributable to) any artist.¹⁶⁸ And in the absence of any provision in artist contracts or streaming licenses that address the sharing of those payments with artists, the record labels can keep it all.¹⁶⁹ As West’s contract was amended over time to, in part, address streaming royalties, it was clarified that he would only be paid a royalty from revenues that were “solely attributable” to his works.¹⁷⁰ It took several years (and assists from global pop icons) for labels to agree to share any breakage and profits from the sale of stock.¹⁷¹

In 2018, Swift reportedly negotiated a term in her Universal contract that required the label to share an undisclosed portion of any cash-out from the sale of Spotify stock with all artists on Universal’s roster.¹⁷² Sony and Warner have confirmed they followed suit: Sony reportedly shared \$250 million of the \$750 million it earned from selling Spotify stock with artists, while Warner paid out approximately \$100 million (of \$400 million), in both cases “on the same basis as [they] share revenue from actual usage and digital breakage.”¹⁷³ Warner, though, limited artist participation: artists only got a piece of the

¹⁶⁸ PASSMAN, *supra* note 30, at 148; see Xiyin Tang, *Copyright’s Techno-Pessimist Creep*, 90 FORD. L. REV. 1151, 1178 (2021) (describing how copyright owners can charge high prices because of their monopolies).

¹⁶⁹ Tang, *supra* note 164, at 793-4; see Bryan Lesser, *Record Labels Shot the Artists, But They Did Not Share the Equity*, 16 GEO. J.L. & PUB. POL’Y 289, 296 (describing misaligned incentives between artists and labels); Peter Menell, *Reflections on Music Copyright Justice*, 49 PEPP. L. REV. 533 (2022) (describing how the labels’ leverage in negotiations against streaming services enabled them to get a large share of the “pie,” including equity for themselves). See KOHN, *supra* note 30, at 1497 (stating that it remains an unknown as to whether artists ever got a share of equity cash-outs).

¹⁷⁰ West Contract, *supra* note 95, at Letter Dated May 7, 2012, Sec. 8(e) (page 90).

¹⁷¹ Tang, *supra* note 164, at 793-4; see CMA REPORT, *supra* note 14, at 28.

¹⁷² Amy X. Wang, *Taylor Swift’s New Record Deal Affects Thousands of Other Musicians*, ROLLING STONE (Nov. 19, 2018), <https://www.rollingstone.com/pro/news/taylor-swift-universal-republic-deal-spotify-758102/>; Tim Ingham, *Universal: We will Share Spotify Money With Artists When We Sell our Stock in Streaming Platform*, MUS. BUS. WORLDWIDE (March 5, 2018), <https://www.musicbusinessworldwide.com/universal-we-will-share-spotify-money-with-artists-when-we-sell-our-stock-in-streaming-platform/>; Ingham, *If Universal Music Sells its Spotify Stock Right Now, Artists Get \$500 million*, ROLLING STONE (Feb. 11, 2021), <https://www.rollingstone.com/pro/features/universal-music-spotify-ownership-artists-1126893/>.

¹⁷³ Michael Scott Barron, *Warner Music Group to Share Equity Stakes Revenue with Artists*, VICE (Feb. 4, 2016), <https://www.vice.com/en/article/warner-music-group-to-share-equity-stakes-revenue-with-artists/>.

windfall if they were fully recouped.¹⁷⁴ And as of November 2024, Universal had not sold a single share.¹⁷⁵

Lady Gaga was an accidental participant in artist advocacy, with her contribution stemming from the leak of her contract with a Universal owned-label in 2014. That contract stated that “no royalties or other monies shall be payable to [Gaga. . .] in connection with any payments received by [the label] pursuant to any blanket licenses under which the [streaming service] is granted access to all or a significant portion of [the label’s catalog].”:¹⁷⁶ if Universal kept any breakage from a streaming service failing to recoup its minimum guarantee, Gaga would not benefit.

In those early days of streaming, services frequently did not recoup. Even now, one industry expert believes that a minimum guarantee of \$30 - \$40 million might result in breakage of \$10 - \$20 million, all of which goes into the label’s pockets, with no way to allocate that money to any particular artist.¹⁷⁷ It is, after all, money generated from the *absence* of usage.

Following the leak, artists spoke up.¹⁷⁸ And in the years since, all three majors have publicly committed to sharing breakage with artists, but to what extent (and whether unrecouped artists can participate) is unknown.¹⁷⁹ One industry expert believes that breakage and equity distributions are not formalized in any contract; they are just ad hoc shows of goodwill by the labels.¹⁸⁰ And even now that labels are sharing these amounts, it still feels inequitable. The value of the catalog is primarily in the catalog—the works themselves. Yet, Sony and Warner shared just a third and a quarter, respectively, of what they earned from Spotify’s equity with artists.

¹⁷⁴ DCMS REPORT, *supra* note 13, at 58.

¹⁷⁵ Tim Ingham, *Universal Music Group’s Stake in Spotify is Now Worth \$3 Billion. Is it Time to Sell?*, MUS. BUS. WORLDWIDE (Nov. 18, 2024), <https://www.musicbusinessworldwide.com/universal-music-groups-stake-in-spotify-is-now-worth-3-billion-is-it-time-to-sell/>.

¹⁷⁶ Paul Resnikoff, *How Streaming Services are Screwing Lady Gaga (and Every Other Artist)*, DIGIT. MUS. NEWS (June 10, 2014), <https://www.digitalmusicnews.com/2014/06/10/streaming-services-screwing-lady-gaga-every-artist/>.

¹⁷⁷ KOHN, *supra* note 30, at 1497.

¹⁷⁸ See Scott Timberg, *Spotify’s secret big-label deals: When even Lady Gaga can’t get a fair shake, transparency is music’s only hope*, SALON (June 2, 2015), https://www.salon.com/2015/06/02/spotify_secret_big_label_deals_when_even_lady_gaga_cant_get_a_fair_shake_transparency_is_musics_only_hope/ (describing artists’ reactions to Gaga’s contract terms).

¹⁷⁹ Ingham, *Universal: Yes, We Share Digital Breakage Money With Our Artists*, MUS. BUS. WORLDWIDE (June 2, 2015), <https://www.musicbusinessworldwide.com/universal-yes-share-breakage-payments-artists/>; Tang, *supra* note 164, at 793-4.

¹⁸⁰ PASSMAN, *supra* note 30, at 148.

But for the labels, these giant paydays are a corporate success story, and their financial statements prove the point. As of October 2024, Warner Music’s market cap is over \$16 billion and Universal’s is over \$47 billion (Sony Music does not trade separately from its parent corporation). Universal Music’s CEO was awarded a \$150 million compensation package in 2024.¹⁸¹

Regardless of what an artist’s contract says or how generous a label decides to be, however, artists whose music is never heard are never going to make any money. Fans must consume music to generate income for artists.

B. All Artists

Record labels have always served a gate-keeping function. Before streaming and the increased availability of high-quality, low-cost recording equipment, securing a record deal was essentially the only way to get a record produced and commercially distributed. Record stores had limited quantities of music. They had to be selective in what they stocked to maximize their own revenues from a discrete amount of shelf space. The major labels, controlling most popular music, had no problem getting records in stores. For an independent artist, however, just getting stocked—convincing a record buyer that the music was good enough to be sold and that fans would come—was a victory; it meant some competition was edged out. While signing a record deal remains a marker of success,¹⁸² there is no longer any competition to get stocked in the store, so-to-speak. Almost anyone can record music at home and distribute it online, but labels—particularly the major labels—are still gate-keeping, just in a different way.

In the before times, how much an artist made from physical record sales was directly related to how many records were bought, and (for the most part, as described in subpart (a)) how much an artist (independent or major) makes from streaming is directly related to how much that artist is streamed. But easy access to an audience online does not equate an actual audience, and artists face significant challenges in figuring out how to “cut through the noise”¹⁸³ of 100 million songs to reach potential fans.¹⁸⁴ Therefore, promotional opportunities, such as playlist placement and advertising units, are key. Major

¹⁸¹ Ashley King, *Universal Music Group Shareholders Approve Chairman Lucian Grainge’s \$150 Million Compensation Package*, BILLBOARD (May 16, 2024), <https://www.digitalmusicnews.com/2024/05/16/umg-shareholders-approve-lucian-grainge-compensation-package>.

¹⁸² See CMA REPORT, *supra* note 14, at 31; PASSMAN, *supra* note 30, at 2.

¹⁸³ INDEP. MUSIC COS. ASS’N, CMA MUSIC AND STREAMING MARKET STUDY – IMPALA’S COMMENTS ON THE ISSUES RAISED IN THE STATEMENT OF SCOPE 2 (2022) [hereinafter IMPALA RESPONSE], https://assets.publishing.service.gov.uk/media/6329a224e90e073722497882/IMPALA_21.9.22.pdf.

¹⁸⁴ CMA REPORT, *supra* note 14, at 41-42; IMPALA RESPONSE, *supra* note 183.

labels can solve all their worries via either contract or, of course, money.¹⁸⁵ Independents cannot.

First, take, once again, the deal economics. Recall that a service needs to fully recoup its minimum guarantee payment to a major label in order to avoid overpaying for content.¹⁸⁶ To do so, that label must earn revenue share payments equal to the minimum guarantee, and those revenue share payments are based on the usage of the catalog across the platform.¹⁸⁷ This construct creates an incentive structure that negatively affects artists, especially those not signed to major labels. To facilitate recoupment, services are motivated to ensure that major label songs are programmed in places to maximize listenership, such as on popular playlists.

Second, despite this built-in incentive, the major labels have reportedly negotiated for the additional promotional guarantees from services described in Part 1.C.2, beginning with playlists. Playlists have become one of the most (if not the most) significant promotional vehicles in the streaming era.¹⁸⁸ 20% of streams on leading platforms come from service-programmed playlists (as opposed to user or third party-programmed playlists), and labels of all sizes look to playlist slots as a signal of how their music is performing.¹⁸⁹

Services typically provide two kinds of playlists: editorial, human-curated (e.g., Spotify's New Music Friday) and personalized, algorithmically-curated (e.g., Spotify's Discovery Weekly).¹⁹⁰ Landing a slot on an editorial playlist is the "white whale" for an artist, as Kristelia García and Chris Buccafusco have explained.¹⁹¹ It sets off an impactful cycle: music that is featured on editorial playlists reaches massive, new audiences, which perpetuates its popularity and programming on other playlists.¹⁹² By way of example, Spotify's flagship editorial hip-hop playlist, RapCaviar, commands over 16 million followers,¹⁹³ helped propel the careers of Megan Thee Stallion and Lil Uzi Vert, and

¹⁸⁵ See IMPALA RESPONSE, *supra* note 183; *see also* PASSMAN, *supra* note 30, at 78 (noting that record labels have the resources to get music widely distributed and heard due to their relationships and the ability to use significant amounts of data generated across their catalogs to optimize artist exposure).

¹⁸⁶ *See* text accompanying *supra* notes 137-138.

¹⁸⁷ *Id.*

¹⁸⁸ Christopher Buccafusco & Kristelia García, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 803, 828 (2022).

¹⁸⁹ CMA REPORT, *supra* note 14, at 61.

¹⁹⁰ Buccafusco & García, *supra* note 188, at 825.

¹⁹¹ *Id.* at 833.

¹⁹² *Id.* at 832; DMCS REPORT, *supra* note 13, at 78.

¹⁹³ SPOTIFY, RAPCAVIAR, <https://open.spotify.com/playlist/37i9dQZF1DX0XUsuxWHRQd>.

spawned a television show.¹⁹⁴ Placement on an editorial playlist spurs massive dividends for artists.

So major labels (at least in some of their contracts) have chosen not to compete; instead, they secure the guarantees described in Part 1.¹⁹⁵ If Universal (for example) commands 30% of Spotify streams across the entire platform, then 30% of the songs on certain marquee Spotify playlists would need to be Universal tracks.¹⁹⁶ Those terms ensure that Spotify (for example) cannot disproportionately program independent content on its editorial playlists. And for these terms, it does not matter that they are not uniform across all major label agreements. Any pro-rata share guarantee to a single major label reduces the number of slots available to all other artists, impairing the ability of those other artists to find that white whale.¹⁹⁷

Whether due to the incentive to recoup the minimum guarantee or express contract terms like pro-rata playlist guarantees, experts have confirmed that major label songs appear on Spotify playlists at a “disproportionately higher rate than independent songs.”¹⁹⁸ The result is that the artists signed to thousands of independent labels end up competing for a very small number of playlist opportunities. IMPALA, an independent label trade association, has stated “we believe that some streaming services choose to prioritise [sic] their deals with the majors, as well as visibility of their repertoire once on the service.”¹⁹⁹ Both the DCMS Committee and an artist advocacy organization have determined that more niche music genres (in terms of audience size), such as classical and jazz, are particularly disadvantaged.²⁰⁰ It is those that are

¹⁹⁴ Hugh McIntyre, *How Spotify’s RapCaviar Playlist Became a Must-See TV Series*, FORBES (Apr. 12, 2023), <https://www.forbes.com/sites/hughmcintyre/2023/04/12/how-spotifys-rapcaviar-playlist-became-a-must-see-tv-series/>; Kyla Demas, *Megan Thee Stallion And Saweetie Drop RapCaviar Free Style*, SNOBETTE (Mar. 8, 2018), https://snobette.com/2018/03/rap-caviar-megan-stallion-saweetie-freestyle/#google_vignette; Craig Marks, *How a Hit Happens Now*, VULTURE (Sept. 18, 2017), <https://www.vulture.com/2017/09/spotify-rapcaviar-most-influential-playlist-in-music.html>.

¹⁹⁵ See *supra*, Part I.C.2.

¹⁹⁶ *Id.*

¹⁹⁷ While it may seem that playlists on streaming services can be infinitely long, at some point users stop listening; there is an optimal length.

¹⁹⁸ DMCS REPORT, *supra* note 13, at 69, quoting Dr. Peter Ormosi and Dr. Franco Mariuzzo.

¹⁹⁹ INDEP. MUSIC COS. ASS’N, CMA MUSIC AND STREAMING MARKET STUDY – IMPALA’S COMMENTS ON THE CMA REPORT UPDATE 4 (2022) [hereinafter IMPALA COMMENTS], https://assets.publishing.service.gov.uk/media/6329a224e90e073722497882/IMPALA_21.9.22.pdf

²⁰⁰ See DMCS REPORT, *supra* note 13, at 45-46; IMPALA RESPONSE, *supra* note 183, at 3; United Musicians and Allied Workers, *supra* note 14; but see PASSMAN, *supra* note 30, at 76 (who asserts that niche genre artists may be better off unsigned because they may not make enough money to live under, given the economics of a record contract).

frequently represented by independent labels because their audiences tend to be smaller than that of pop music.

Additionally, non-discrimination clauses, anti-steering terms, and non-economic MFNs also distress independent labels because any attempt to get a leg-up on the major labels via contract negotiation doesn't pan out. For example, if an independent were to concede a lower royalty rate in hopes that it would result in more plays (because, once fully recouped with the major labels, the service would otherwise be incentivized to promote lower-cost content), an anti-steering provision in a single label agreement prohibits a service from favoring that cheaper, independent content over the major label content.²⁰¹ Once again, that sort of provision need not be in all three major label agreements to be effective: any preference of lower-cost content would be a breach of an anti-steering provision in a major label "must have" license (and a breach could result in the license being terminated²⁰²). MFNs on data and marketing support have a similar effect. An independent label cannot try to extract better terms (perhaps in exchange for a lower royalty rate) without the majors also getting the benefit of those terms.

Taken together, these provisions, whether in some or all of the agreements, mean that an independent label cannot negotiate a better deal with a service on marketing, data, economics and fully benefit from those more favorable terms because the net result is the same: major label content will continue to be prioritized even if it is more expensive, and all or some major labels will get the same level of data and marketing.

Artists signed to independent labels are therefore disadvantaged because of the reduced opportunities to get in front of fans and compete with those signed to major labels. But it is those artists for which that exposure is most critical because it is for them that royalty payments and follow-on opportunities (such as touring) are most meaningful. Without a sizable advance from a major label to live on while building a career, an independent label's artist will depend more on consumption-based income.

Lastly, to the extent a streaming service offers any promotional tools in exchange for money, independent labels and their artists suffer there, too. For example, Spotify has a program through which it offers labels a lower royalty rate in exchange for placements on algorithmic playlists, such as the personalized Discover Weekly playlist. This program has been both celebrated and criticized as a form of "reverse payola:" it gives independent labels and artists an opportunity to compete with the major labels, but it depresses royalty rates for artists who need every penny.²⁰³ It also works best for major labels,

²⁰¹ CMA REPORT, *supra* note 14, at 69.

²⁰² SONY/SPOTIFY CONTRACT, *supra* note 126, at §5(2).

²⁰³ Staff, *Spotify's 'Discovery Mode' is Payola, Just Not the Bad Kind*, BILLBOARD (June 28, 2021), <https://www.billboard.com/pro/spotify-discovery-mode-payola-guest-op-ed/>; Letter from

who can not only stomach the lower royalty costs (while smaller, independent labels cannot),²⁰⁴ but will, in an atypical way, benefit from it: because the service needs to recoup its minimum guarantee, any lower revenue share payment means that the label's artists will simply need to be promoted more and more for the service to achieve recoupment.

Services may also let labels purchase advertising for their music, which may get them in front of new potential fans that wouldn't have found their music organically.²⁰⁵ Labels (particularly independents) have confirmed that advertising is effective and yields spikes in plays.²⁰⁶ Once again, though, any advertising opportunity is going to come at a relatively higher cost to independent labels, which have fewer resources than the majors, and the majors could simply outbid an independent label for any slot. But moreover, at least one major was able to negotiate for free advertising units. In a leaked 2011 Sony/Spotify agreement, Spotify agreed to provide Sony with \$8.5 million in free advertising slots and the right to purchase advertising inventory at a discount rate (up to a total of \$15 million).²⁰⁷ If what the CMA says is true—that independent label agreements are not nearly as favorable as major label agreements—then it is unlikely independent labels are granted ad inventory.

Nevertheless, the services have stated they have total programming flexibility vis-à-vis the majors. And García and Buccafusco confirm that no one can “buy their way into editorial.”²⁰⁸ That may be true—the above terms may not meaningfully impact how a service creates playlists. In fact, García and Buccafusco believe that the current promotional opportunities, including the ability to purchase advertising and take a lower royalty rate for Discover Weekly ultimately help independent labels.²⁰⁹ Independent labels, they recount, were in favor of the original form of payola (paying radio deejays to play songs) because it allowed them to get on the same playing field as the major labels.²¹⁰ And it may also be true that without the ability to trade promotion for lower royalty rates, for example, there'd be no fighting chance for an indie. But they are still playing junior varsity, while the majors are in the

Jerrold Nadler, Chairman & Henry C. “Hank” Johnson, Chairman to Spotify (June 2, 2021), <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394661>; Letter from Spotify to The Honorable Jerrold Nadler, Chairman & The Honorable Henry C. “Hank” Johnson, Chairman (June 16, 2021), https://democrats-judiciary.house.gov/uploadedfiles/spotify_ltr_to_reps._nadler_johnson_6_16_21.pdf.

²⁰⁴ Buccafusco & García, *supra* note 188, at 841; IMPALA COMMENTS, *supra* note 199.

²⁰⁵ Buccafusco & García, *supra* note 188, at 829.

²⁰⁶ *Id.*

²⁰⁷ SONY/SPOTIFY CONTRACT, *supra* note 126, at 36-37.

²⁰⁸ Buccafusco & García, *supra* note 188, at 828.

²⁰⁹ *Id.* at 841.

²¹⁰ *Id.* at 817-18.

big leagues. The major labels' negotiation power versus the services ensures that they will be able to secure both economic and non-economic terms that continue to incentivize or obligate the services to put their music in front of fans, while diminishing others.

Copyright plays a significant role in the artist experience: artists transfer their copyrights to labels and labels license those rights to streaming services and those contracts provide the foundation for the entire music market. But in this industry, contract plays a bigger role. It does not just allocate copyrights, but dictates how money is distributed among stakeholders, what music gets promoted—and when and how—and it is the combination of those terms that directly affect compensation for all artists signed to record labels. Indeed, as the next Part shows, when it comes to supporting the careers of professional artists, the further away solutions move from copyright, the more viable they become.

III. SOLUTIONS

Successful recording artists make money from a variety of sources, not just streaming.²¹¹ But additional sources of income, such as touring, only become available after an artist has built up a fan base that will pay additional money to support the artist's career. Any potential fan's first interaction with an artist is likely to be through their music, and if an artist does not generate enough money from listening, they may not be able to continue building their career;²¹² professional musicians are increasingly being forced to work second jobs to make ends meet.²¹³ Without a conceivable path to a living wage, artists—especially those who are not yet household names, but are striving to be—may simply walk away from the profession.²¹⁴ This is especially true for artists coming from lower economic classes, as opposed to those who have pre-existing wealth to sustain them (consider that many of today's superstars—Swift, Bieber, Beyoncé, Miley Cyrus—began their careers in childhood, when still financially supported by their parents).²¹⁵ If musicians cannot earn a living,

²¹¹ DiCola, *supra* note 92, at 309. Passman states that new artists rarely make money on their initial tours, however. PASSMAN, *supra* note 30, at 187.

²¹² See Lunney, Jr., *supra* note 72, at 57 (noting copyright is supposed to provide creators with sufficient opportunities to recoup their investments).

²¹³ DiCola, *supra* note 15, at 278; United Musicians and Allied Workers, *supra* note 14.

²¹⁴ Asay, *supra* note 216, at 209; see Aloe Blacc, Irina D. Manta, & David S. Olson, *A Sustainable Music Industry for the 21st Century*, 101 CORNELL L. REV. ONLINE 39, 49-50 (2016); Davis, *supra* note 49, at 390; Tang, *supra* note 17, at 10; Helman, *supra* note 14, at 171; Sisario, *supra* note 5.

²¹⁵ United Musicians and Allied Workers, *supra* note 14; see Asay, *supra* note 216, at 196 (noting that copyright enables a diverse group of creators).

their incentive to create rationally decreases.²¹⁶ In the absence of change from the record labels, less music might lead to fewer recording sessions, fewer venues, and fewer tours, all of which would lead to fewer jobs for sound engineers, producers, bartenders, wait staff, sound and lighting crews, stagehands, choreographers, and background vocalists. So how much money artists can make at the beginning of their professional journey is not without consequence.

In Parts I and II, I described the obstacles many artists face in the streaming realm: they are disempowered through the contracts that form the supply chain. They give up their copyrights and have little-to-no leverage when negotiating with their record deal to ensure they can maximize their royalties and shares of equity and breakage payouts. The major labels' licensing practices vis-à-vis streaming services are designed to limit amounts payable to artists, create promotional opportunities for popular artists, and minimize exposure for all others. Those labels benefit from strong network effects ("streams beget streams beget streams"²¹⁷), exploitable regulatory frameworks (e.g., copyright's work for hire doctrine), and significant bargaining power in negotiations with artists and distributors. In prior work, I've explained how the major labels deter startup entry into the streaming market, but they may also deter entry into the content creation and distribution market by suppressing opportunities for independent music and impairing the ability of all artists to reap sufficient profits from their work to eke out a living.

Policymakers' and other stakeholders' gut reaction is too frequently to turn to copyright. Some argue that copyright is meant to—or can be used to—assure compensation for creatives.²¹⁸ Bills have been proposed that amend copyright law and/or employ copyright systems (such as existing regulatory frameworks), presumably under the theory that any path towards remedying deficiencies in the economic livelihood for creatives must run through copyright. After all, the threat of artists walking off the job without more income looks and feels like a copyright incentive problem. And copyright was meant to benefit creators, as well as distributors.²¹⁹ Alternatively, others have pointed to the way copyright has enabled intermediaries to amass large catalogs (for example, by taking advantage of the work for hire doctrine), which has perpetuated the disparities in bargaining power with individual creators, and so copyright ought to be used to give artists some power back.²²⁰

²¹⁶ Helman, *supra* note 14, at 169-71; Clark D. Asay, *Copyright's Technological Interdependencies*, 18 STAN. TECH. L. REV. 189, 209 (2015).

²¹⁷ Buccafusco & García, *supra* note 188.

²¹⁸ Iancu, *supra* note 46; Jenkins, *supra* note 84.

²¹⁹ Netanel, *supra* note 17, at 291; Lev-Aretz & Strandburg, *supra* note 38, at 12; Gordon, *supra* note 17, at 13, 24.

²²⁰ Litman, *supra* note 47, at 546-47; Tang, *supra* note 17, at 139-40.

On the other hand, copyright was never meant to incentivize all artists, just those for whom there is a viable commercial market.²²¹ Superstars are reaping massive rewards and supporting economic growth: Beyoncé’s 2023 Renaissance World Tour was estimated to contribute \$4.5 billion to the American economy alone.²²² Additionally, copyright is meant to promote free expression of a diverse array of ideas²²³ and there is no shortage there,²²⁴ with over 100 million songs on the leading streaming services (nor is there any underproduction or under-distribution problem).²²⁵ Sound recording copyright, in particular, was primarily intended to benefit distributors, and record label revenues are at a “record high” (with less costs to recoup than before due to offloading distribution expenses to streaming platforms²²⁶).²²⁷ Given this reality, it’s not clear that copyright is so problematic. Moreover, how can copyright help a constituency that largely has none? And even if we gave some copyright back, artists on their own would not be able to secure terms as favorable as the labels from streaming services—and even if labels were still involved, they might be less inclined to bargain as hard as they do if they don’t own the underlying rights.

In prior work, I’ve suggested that there may be a role for antitrust enforcement to play when it comes to the major labels.²²⁸ However, antitrust

²²¹ Liebewitz, *supra* note 25; see Giblin, *supra* note 25, at 392-93.

²²² Sughnen Yongo, *What Beyoncé’s Renaissance World Tour Says About the Economic Impact of Black Women*, FORBES (Oct. 3, 2023), <https://www.forbes.com/sites/sughnenyongo/2023/10/02/what-beyoncs-renaissance-world-tour-said-about-the-economic-impact-of-black-women/#:~:text=By%20the%20end%20of%20the,nothing%20short%20of%20a%20spectacle>.

²²³ Netanel, *supra* note 17, at 289.

²²⁴ Jo Vito, *In 2024, More Music is Released in a Day Than in All of 1989 Combined*, CONSEQUENCE OF SOUND (Nov. 17, 2024), <https://consequence.net/2024/11/more-music-released-in-a-day-than-all-1989/>.

²²⁵ *Modernizing Our Royalty System to Drive an Additional \$1 Billion Toward Emerging and Professional Artists*, SPOTIFY FOR ARTISTS (Nov. 21, 2023), <https://artists.spotify.com/en/blog/modernizing-our-royalty-system> (“Spotify hosts well over 100 million tracks”); see also DiCola, *supra* note 15, at 265 (“we have no reason to believe that [music] production is suffering”).

²²⁶ Services now bear the primary costs of distribution. See Tim Ingham, *Why Ingesting 100,000 Tracks a Day May Not Prove Sustainable for Spotify’s Business in the Long-Term*, MUS. BUS. WORLDWIDE (Nov. 1, 2022), <https://www.musicbusinessworldwide.com/ingesting-100000-tracks-a-day-may-not-prove-sustainable-for-spotifys/?ref=pennyfractions.ghost.io> (describing the costs of hosting music); CMA REPORT, *supra* note 14, at 86; see John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 533 (2018) (describing YouTube’s \$5 billion expense on technical infrastructure).

²²⁷ Matthew Bass, *2023 Year-End Music Industry Revenue Report*, RECORDING INDUS. ASS’N OF AMER., <https://www.riaa.com/wp-content/uploads/2024/03/2023-Year-End-Revenue-Statistics.pdf>.

²²⁸ Landy, *supra* note 31, at 1308-1311.

does not necessarily solve the problem at the heart of this Article: how to create an economic ecosystem that sustains continued creativity from professional artists.

This Part shows that the further we move from copyright and towards contract, the riper a more viable, immediate solution becomes. Other scholars agree that copyright is insufficient. DiCola argues that copyright's ignorance of the role of distribution platforms in the supply chain diminishes copyright's ability to help creators and instead, other policy areas of law (e.g., health care, labor, and local arts initiatives) are better-suited to addressing the economic reality most artists find themselves in.²²⁹ Copyright simply won't even out bargaining power.²³⁰ Litman plainly argues that any meaningful copyright reform is most likely to disproportionately benefit copyright owners (the labels, in this case), and "throw[ing] more money" at them won't help creators.²³¹ Other governments are beginning to recognize copyright's limitations in solving creative industry problems. Australia enacted non-copyright legislation requiring certain technology platforms to pay news organizations for content, in spite of pre-existing copyright law that might allow them not to.²³² That same statute allows certain news publishers to collectively bargain with Google and Facebook for compensation without running afoul of competition law prohibiting price-fixing.²³³ There have been similar proposals in the United States, including one described in Part III.C.1, and DiCola also asserts competition policy could take on a role.²³⁴ Taking a labor policy approach, however, may be the best alternative, and is more consistent with a close analog to music artists in the creative industries: actors. Yet, actors' performances have never been copyrightable and instead, they rely on collective bargaining to secure fair compensation. As set forth below, it may be time for artists to do the same.

The following subparts begin with pure copyright proposals (those that propose changes to the fundamental doctrine), before turning to what I call "copyright-ish" proposals. The latter are built on existing copyright systems and regulations, but do not disturb the underlying exclusive rights or how those rights vest in authors. In addition to reviewing existing legislative

²²⁹ DiCola, *supra* note 15, at 253.

²³⁰ *Id.* at 270

²³¹ Litman, *supra* note 47, at 555; *see also* DiCola, *supra* note 15, at 257 (arguing that copyright expansion is likely to be less useful than it would have been in a p, re-digital age).

²³² A Bill for an Act to amend the Competition and Consumer Act 2010 in relation to digital platforms, and for related purposes, The Parliament of the Commonwealth of Australia [hereinafter Australia News Code], <https://www.accc.gov.au/by-industry/digital-platforms-and-services/news-media-bargaining-code/news-media-bargaining-code>; Council Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Apr. 17, 2019), Article 15.

²³³ Australia News Code, *supra* note 232.

²³⁴ DiCola, *supra* note 15, at 281-82.

proposals, I add another one to the copyright-ish bucket, which (like others in the same category) is actually an intervention in the contracts that comprise the supply chain. The last subpart moves the furthest away from copyright, detailing proposals that more directly affect contract terms between artists and labels. Here I offer a second suggestion: artists ought to consider leveraging labor mechanisms in a manner consistent with other creative workers.

A. Copyright Proposals

Using copyright to increase artist compensation must address one or both of two copyright realities: artists typically do not retain their copyrights due to work for hire provisions in record deals and sound recordings are granted lesser protection than other copyrighted works. This subpart discusses initiatives to address both. Ultimately, however, neither proposal can lead to *guaranteed*, increased compensation for artists²³⁵ and more practically, neither are likely to be implemented into law.

1. Work for Hire Reform

Advocates have long complained that the gravest inequity in record deals is the work for hire clause, which strips artists of the rights in their works forever by deeming the label the “author” under copyright law. Musician Nile Rodgers has stated, “the music business is the only business where after you pay off the mortgage on the house they still own the house [(i.e., the copyrights)].”²³⁶

Works for hire arise in two situations: when a work is created in an employment context, or when it is specially commissioned in writing and fits into one of several enumerated categories, such as a collective work.²³⁷ It is relatively undisputed that artists are not considered employees: under a typical record deal, they do not get salaries, have no regular working hours, and regularly seek other work (e.g., touring). Instead, record labels take the position that their recordings (and even the resulting albums) comprise specially commissioned contributions to collective works and bake the necessary language into the recording agreement.²³⁸ This approach is a bit of a fiction, albeit one that is generally accepted in the industry.²³⁹

²³⁵ DiCola also notes that “nothing Congress does to expand copyright is going to increase” royalties for streaming. DiCola, *supra* note 15, at 260.

²³⁶ DCMS REPORT, *supra* note 13, at 29.

²³⁷ 17 U.S.C. § 101.

²³⁸ PASSMAN, *supra* note 30, at 353; Scott T. Okamoto, *Musical Sound Recordings as Works Made for Hire: Money for Nothing and Tracks for Free*, 37 U.S.F. L. REV. 783, 805, 809 (2000); see West Contract, *supra* note 95, at Sec. 501(a).

²³⁹ PASSMAN, *supra* note 30, at 322, 352-53; Okamoto, *supra* note 238, at 802.

For one, record labels are unlikely to uniformly provide the input needed to make something “specially commissioned.”²⁴⁰ They might be very hands-on, or they might ask an artist to deliver a pop album, with little-to-no additional direction on the content.²⁴¹ At best, whether an album is truly specially commissioned requires a fact-by-fact determination—as one court recently held in declining to certify a class action seeking to settle the issue.²⁴² Yet, the labels impose the characterization across the board, which has profound consequences.²⁴³

Labels do not just get more certain copyright protection (i.e., they do not have to wait for someone to pass away to ascertain the copyright’s expiration date), but they also avoid termination battles. If a record label (say Universal) signs a deal with an artist (say Bob Marley), and Marley assigns his rights to the label, he can terminate that assignment after 35 years and reclaim his rights. But if Marley created his albums as works for hire, he has no such opportunity. The lack of a termination right is critical for record labels and ensures a long-term return on their upfront investment. It also eliminates the possibility that their own efforts in creating a massively successful artist will lead to a “hold-up problem” 35 years after the deal is signed.²⁴⁴

For that very reason, there are significant implications for artists. Although termination would occur 35 years into the future, having the right in-pocket means that there will be a guaranteed opportunity for renegotiation of key terms, which could lead to improved economics.²⁴⁵ Alternatively, artists would also have the option to abandon their label completely. In that case, they would also re-capture the sole right to sue for infringement and collect damages. In a work for hire scenario, the record label may pursue infringement

²⁴⁰ Courts apply an “instance and expense” test. *Waite v. UMG Recordings, Inc.*, 2023 U.S. Dist. LEXIS 14465 at *15.

²⁴¹ *See* NIMMER ON COPYRIGHT 5.03 (summarizing the Register of Copyright’s testimony as describing how the record label’s role had evolved to little more than upfront funding and backend distribution, with little in-between).

²⁴² Okamoto, *supra* note 238, at 808; *Waite*, 2023 U.S. Dist. at *15. Litman has noted that courts are unlikely to be helpful to artists, too. Litman, *supra* note 47, at 546. *See also* LaFrance, *supra* note 93, at 380-381 (describing litigation over whether recording artists are subject to the work for hire doctrine).

²⁴³ It is so profound that the labels were able to sneak “sound recordings” into the list of enumerated work made for hire categories by legislation, but only for a year—after the change, which was baked into a “technical amendment” bill was discovered, Congress was forced to repeal it. Satellite Home Viewer Improvement Act of 1999; Work Made for Hire and Copyright Corrections Act of 2000; *see* Okamoto, *supra* note 238, at 792-793 (describing the labels’ short-lived victory).

²⁴⁴ Barnett, *supra* note 91, at 27-28 [PDF]; *see* Okamoto, *supra* note 238, at 791.

²⁴⁵ *See* *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 172-3 (1985) (describing intent of termination right to let authors get out of bad economic deals).

claims, but it is not required to share any of the proceeds (as much as \$150,000 per work²⁴⁶) with the artist unless negotiated for under contract.

Unfortunately, however, the short-term benefits of re-characterizing sound recordings under record deals are mostly hypothetical. It is possible a label will concede more favorable terms earlier on as an artist's career develops to avoid a fight decades later. But that outcome is far from certain, and rationally, a label would not begin offering more favorable terms until after an artist has a proven track record of success. Ending work for hire in the industry would only favor prolific and prosperous artists who are still generating significant income decades after their first deal.

The termination right originated in Congress' 1976 Copyright Act overhaul, so a flurry of litigation challenging the work for hire designation was expected as soon as valid termination notices could be issued, early in the new millennium.²⁴⁷ But that flurry did not materialize.²⁴⁸ Instead, there have been just a small handful of cases testing the matter and none have resolved it with an outcome that would apply industry wide. Instead, disputes appear to be routinely settled, perhaps because of the high stakes to the label and cost of litigation for the artist.²⁴⁹ One of the first notable cases to analyze the issue was, in fact, brought by Bob Marley's family against his former label, Universal.²⁵⁰ The court ultimately determined that in that situation (decades ago), Universal *had* provided sufficient oversight of the recording process that the songs constituted works for hire.²⁵¹ As noted above, more recently, a court determined that the issue was simply too unique to each individual artist to make it appropriate for a class action.²⁵²

²⁴⁶ 17 U.S.C. § 504.

²⁴⁷ For transfers that include a right of publication (as most record deals would), termination notices may only be sent in a five-year period beginning on the earlier of the 35th anniversary of the date of publication of the transfer or the 40th anniversary of the execution of the agreement. 17 U.S.C. §203(a)(3).

²⁴⁸ *But see* Bell & Parchomovksy, *supra* note 65, at 1034 (describing a “spate” of termination rights litigation; however, much of that litigation has not dealt with the work for hire issue).

²⁴⁹ PASSMAN, *supra* note 30, at 353; *see* Mandy Dalugdug, *Sony Music Settles Copyright Dispute with Rock Musicians Including New York Dolls' David Johansen*, MUS. BUS. WORLDWIDE (Feb. 27, 2024), Blake Brittain, *Warner Music, country star Dwyane Yoakam settle copyrights dispute*, REUTERS (Feb. 14, 2022), <https://www.musicbusinessworldwide.com/sony-music-settles-copyright-dispute-with-rock-musicians-including-new-york-dolls-david-johansen/>. Where artists have successfully terminated their rights, it has been due to older recording agreements that do not include work for hire language. *See* Stillwater Ltd. V. Basilotta, 2022 U.S. App. LEXIS 12752 (9th Cir. May 11, 2022); David Minsky, *Fla. Jury Finds 2 Live Crew Can Take Back Music Rights*, LAW360 (Oct. 16, 2024), <https://www.law360.com/articles/1890351>.

²⁵⁰ Fifty-Six Hope Rd. Music Ltd v. UMG Recordings, Inc., 2010 U.S. Dist. LEXIS 94500 (S.D.N.Y. Sept. 10, 2010).

²⁵¹ *Id.*

²⁵² Waite, 2023 U.S. Dist.

Therefore, eliminating the ability of record labels to capture copyright ownership through work for hire provisions is not just difficult, but far from a panacea. Most artists would still be required to assign or exclusively license their rights to the label. At best, this path has the potential to even out long-term bargaining power between artists and labels, allowing for more equitable contract terms some number of years before the termination period begins, but that could be well after an artist's prime. And moreover, given that courts have declined class certification for artists seeking to void the work made for hire clause, it is likely that legislation would be needed to effectuate any universal fix; none has been introduced.

2. Expanding Performance Right

While it does not address streaming payments, there is one longstanding bill in Congress that would put more money in at least some artists' hands: what is currently called the "American Music Fairness Act" (AMFA).²⁵³ The AMFA (the fifth iteration of this bill since 2000) would expand the right to publicly perform sound recordings to apply to all performances, not just those made digitally.²⁵⁴ The direct effect is that broadcast radio stations would be required to obtain licenses from record labels. The current proposal would offer radio stations the choice between a statutory (regulated) license or negotiated agreements with record labels.²⁵⁵

A review of the robust history and debate around expanding the sound recording right is beyond the scope of this Article, but at a high level, it would undoubtedly generate more revenues for record labels, some of which would presumably flow to some artists.²⁵⁶ And beyond new revenues in the United States, expanding the sound recording right has meaningful international implications. Right now, American artists are denied royalties from radio performances around the world (where they must be licensed), with limited

²⁵³ H.R. 861 – American Music Fairness Act of 2025 (119th Cong. 2024-2025); but see H. Con. Res. 12 (119th Cong. 2025-2026) (defending broadcast radio against any new content costs).

²⁵⁴ H.R. 848 – Performance Rights Act (111th Cong. 2007-2008; 112th Cong. 2009-2010); H.R. 1836 – Fair Play Fair Pay Act (115th Cong. 2015-2016); H.R. 3219 – Free Market Royalty Act (113th Cong. 2013-2014), H.R. 5219 – Ask Musicians for Music Act (116th Cong. 2019-2020).

²⁵⁵ H.R. 791 § 2.

²⁵⁶ *But see* Litman, *supra* note 47, at 555. To be fair, some large broadcasters have agreed to license sound recordings for both their digital and broadcast services. In those contracts (the most famous being for Taylor Swift's catalog), the licensor reportedly agreed to lower digital royalty rates in exchange for a royalty on terrestrial plays. Kristelia García has written extensively on these deals, noting that it is likely the threat of legislation that brought the parties to the table. García, *Penalty*, *supra* note 92, at 1135-37; García, *The Emperor's New Copyright*, 103 B.U. L. REV. 837, 868-69 (2023) [hereinafter García, *Emperor*]; *see also* García, *Super-Statutory Contracting*, 95 WASH. L. REV. 1783, 1808 (2020) [hereinafter García, *Super-Statutory*].

exception.²⁵⁷ Under various reciprocal treaty terms, American artists could collect revenues generated by foreign radio broadcasts if it were to allow for the same within its borders.²⁵⁸ The Recording Academy estimates that \$200 million annually would become available to artists from broadcasts *outside* of the United States.²⁵⁹ But only one version of this bill has ever made it out of committee (and never to the floor in either chamber). Resistance from the broadcasting lobby has been nothing short of effective.²⁶⁰

Nevertheless, the AMFA (or any eventual successor bill) is unlikely to completely solve artists' financial woes. Radio is a limited medium: there are a finite number of spots for songs, and those spots frequently go to the most popular artists.²⁶¹ Many, many artists would see little revenues from radio airplay. Second, while broadcast radio listenership has not faced as significant declines as once predicted,²⁶² it is also unlikely to grow in today's online environment. At best, it will remain stable (as it has since 2020).²⁶³ Cars are the primary listening location for radio, and streaming services continue to make in-roads to the automotive experience.²⁶⁴ Indeed, increasing broadcast radio's operating expenses in what are considered precarious times for the format may result in its accelerated demise, which would negatively impact

²⁵⁷ *Id.* at 888; PASSMAN, *supra* note 30, at 325.

²⁵⁸ 2 NIMMER ON COPYRIGHT 8.21; Daniel Gervais, *The Protection of Performers under U.S. Law in Comparative Perspective*, 5 IP THEORY 116, 127-8 (2015); WIPO - <https://www.copyright.gov/docs/regstat073107.html>.

²⁵⁹ The Recording Academy, American Music Fairness Act: Supporting Artists' Rights on Radio, <https://www.recordingacademy.com/advocacy/issues-policy/american-music-fairness-act> (last visited Nov. 3, 2024).

²⁶⁰ See García, *Penalty*, *supra* note 92, at 1134-35; Statement of Marybeth Peters, The Register of Copyrights before the Subcommittee on Courts, the Internet, and Intellectual Property, Committee on the Judiciary (110th Cong., July 31, 2007), Ensuring Artists Fair Compensation: Updating the Performance Right and Platform Parity for the 21st Century, <https://www.copyright.gov/docs/regstat073107.html>; García, *Super-Statutory*, *supra* note 256, at 1807; Peter DiCola, *Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1881 (2013).

²⁶¹ H.R. 848 – Performance Rights Act (111th Cong. 2009-2010).

²⁶² *New survey shows that the death of broadcast radio was greatly exaggerated*, THE DJ REVOLUTION (Feb. 16, 2024), <https://www.thedjrevolution.com/survey-shows-the-death-of-broadcast-radio-was-exaggerated/>.

²⁶³ Naomi Forman-Katz, *For National Radio Day, key facts about radio listeners and the radio industry in the U.S.*, PEW RESEARCH (Aug. 17, 2023), <https://www.pewresearch.org/short-reads/2023/08/17/for-national-radio-day-key-facts-about-radio-listeners-and-the-radio-industry-in-the-us/>.

²⁶⁴ Mary Whitfill, Roeloffs, *Americans Listen To Far More Radio Than Podcasts—Even Young People, New Data Shows*, FORBES (Apr. 30, 2024), <https://www.forbes.com/sites/maryroeloffs/2024/04/30/americans-listen-to-far-more-radio-than-podcasts-even-young-people-new-data-shows/>

both songwriters (who currently receive radio royalties) and artists (some of whom, even without royalties, still depend on radio for exposure).

Additionally, arguments for bringing terrestrial radio within the ambit of sound recording licensing are undercut by the realities of the industry, namely that any money paid to record labels would be filtered through artists' recoupable funds.²⁶⁵ Just because a record label can claim more money from the exploitation of music does not mean all artists see more money. The AMFA, however, has one notably positive feature in this regard, discussed more in the next subpart: it would require that half the royalties paid under the terms of any license be re-directed to a nonprofit collective, which would distribute those funds directly to artists.²⁶⁶ More on this shortly.

B. Copyright-ish Proposals

Without a clear fix from core copyright principles, stakeholders are increasingly looking at how copyright systems and regulations can be leveraged to increase artist remuneration, while keeping the underlying doctrine in place. These proposals take advantage of those systems and regulations but are really interventions in contractual arrangements in disguise.²⁶⁷ They are discussed next.

1. Minimum Per-Stream Payments

In 2024, Representative Rashida Tlaib, whose district encompasses the birthplace of Eminem, techno music, and Motown,²⁶⁸ introduced the Living Wage for Musicians Act.²⁶⁹ Speaking on the floor of the House of Representatives, Tlaib argued:

“Streaming now represents 84% of the recorded music industry’s revenue in the United States, but most of the artists who bring joy to our lives and culture aren’t seeing any of it...[the bill] would . . . support[] a much more diverse set of artists, enabl[e] more recording and touring, and send[] a ripple effect throughout local economies by supporting professionals throughout the music industry.”²⁷⁰

How would it accomplish those objectives? By requiring services to pay into a fund, with the goal of generating at least one penny per stream for artists

²⁶⁵ Davis, *supra* note 49, at 399.

²⁶⁶ H.R. 791 § 5; see García, *Reform*, *supra* note 92, at 33 (endorsing this regime).

²⁶⁷ Some have referred to these sorts of laws as “mandatory copyright rules.” Alter, *supra* note 84.

²⁶⁸ This is, of course, Detroit.

²⁶⁹ H.R. 7763 – Living Wage for Musicians Act of 2024 (118th Cong. 2023-2024). [Not yet re-introduced]

²⁷⁰ Musicians Deserve a Living Wage, 170 Cong. Rec. H. 1005, March 7, 2024.

(an amount long advocated for by artists²⁷¹).²⁷² Unfortunately, that rallying cry ignores reality.

Take Spotify, for instance. The company's total revenues in the fourth quarter of 2024 were €4.2 billion (roughly \$4.587 billion) from 675 million monthly active users.²⁷³ If each user initiated just six or seven streams that quarter, each costing Spotify a penny, that would account for *all* of Spotify's revenues (and leave no money for songwriters, much less Spotify employees or the infrastructure needed to stream music). It is not an overstatement to suggest that requiring Spotify to pay a cent per stream would put Spotify out of business.²⁷⁴ At the same time, high per-stream payments would likely cement Big Tech's place in the market. Xiyin Tang argues that *any* initiative to make streaming platforms pay more money further entrenches the companies that can use music as a loss leader.²⁷⁵ Apple, Amazon, and YouTube (owned by Google) all have many other profitable businesses that offset any losses from their respective music platforms; Spotify does not.²⁷⁶ This would be true for any per-stream amount (a penny or not)—fixed royalties risk services paying out more than they bring in. The benefit of the revenue share model is that it cements a certain margin (on a percentage basis) for services that correlates to fluctuations in income.

Moreover, proposals that create artist funds (like Tlaib's) fail to account for the fact that any additional payment to artists results in services double-paying for content. Recall that artists do not hold the copyright to their works. To be on solid footing under copyright law, a license from the record label is still necessary, and that license is subject to all the economic terms on which the labels insist. A separate remuneration scheme for artists does not diminish the must-have-ness of a major label's catalog and the leverage that comes with it. All services get in return for paying an additional artist compensation is to avoid some to-be-determined non-copyright penalty. A better approach is to let services deduct artist fund payments from label payments, so that services do not lose additional margin and the labels participate in the redistribution of royalties.

There are ample other deficiencies with Tlaib's bill. For example, it requires consumers of subscription services to foot the bill for the artist fund

²⁷¹ Josh Terry, *More Than 18,000 Musicians Are Demanding a Penny Per Stream from Spotify*, VICE (Nov. 13, 2020), [URL].

²⁷² Press Release, *supra* note 43.

²⁷³ Spotify, Q4 2024 Update (Feb. 4, 2025), https://s29.q4cdn.com/175625835/files/doc_financials/2024/q4/Q4-2024-Shareholder-Deck-FINAL.pdf.

²⁷⁴ It would certainly be a barrier to entry for startups. *See generally* Landy, *supra* note 31.

²⁷⁵ Tang, *supra* note 168, at 1185.

²⁷⁶ *Id.*

through a 50% surcharge on monthly subscription prices (capped at \$10).²⁷⁷ While this lessens the effect on the services, it ultimately backfires. Subscription prices are already on the rise, with all leading services recently implementing increases (arguably at the labels' behest).²⁷⁸ At some point, if prices continue to rise, consumers will abandon paid subscriptions for the advertising-supported tier, which the record labels openly disfavor.²⁷⁹ It pays less, they assert, and promotes the notion that music can be free (it was this framing that sparked Swift's 2014 protest).²⁸⁰ Any legislation that forces a price increase of at least 50% jeopardizes the subscription business—the industry's primary source of revenue.²⁸¹ Legislators may feel this impact is mitigated by forcing services to pay 10% of their advertising revenues to the fund.²⁸² But that is also not insignificant, considering that services already pay close to 70% of their revenues for music rights (sound recordings and musical works).²⁸³

Additionally, anytime Congress provides for a statutory payment to a third party, issues with unclaimed royalties (i.e., those attributed to artists that cannot be located) must be addressed. In the music publishing (songwriting) space, industry stakeholders have legislated a pro-rata, market share-based distribution that primarily benefits the major labels' music publishing arms. That is similar to what is proposed in the Living Wage Act,²⁸⁴ which would allow the more popular artists to make more money and nominally impacts more niche artists. In subpart III.B.2, I propose a more equitable approach to dealing with unclaimed royalties.

As of March 2025, Tlaib's proposal had not been re-introduced, yet proponents argue that it would support “a more sustainable income for a broader and more diverse set of artists,” and take control out of “the hands of the major label CEOs [who have] been reaping profits under the current system.”²⁸⁵ Those supporters also suggest that the bill would support the vitality of more niche genres, like jazz, worship music, and regional music, and

²⁷⁷ H.R. 7763 § 4(a).

²⁷⁸ Tom Warren, *Spotify is Increasing US Prices Again*, THE VERGE (June 3, 2024), <https://www.theverge.com/2024/6/3/24170301/spotify-us-price-increase-plans>; See, e.g., Etan Vlessing, *Universal Music Group CEO Welcomes Spotify Raising Subscription Prices*, HOLLYWOOD REPORTER (July 26, 2023), <https://www.hollywoodreporter.com/business/business-news/universal-music-group-ceo-spotify-prices-1235545617/>.

²⁷⁹ DCMS HEARINGS, *supra* note 130, at Q326, 327.

²⁸⁰ As a result, the major record labels impose much more restrictions on how their content can be used for the advertising-supported tier than they do the subscription tier: they want users to pay a monthly fee. CMA REPORT, *supra* note 14, at 67.

²⁸¹ BASS, *supra* note 227.

²⁸² H.R. 7763 § 2(b)(2)(B).

²⁸³ DIGIT. MEDIA ASS'N, *supra* note 129.

²⁸⁴ 17 U.S.C. 115 § (d)(3)(j).

²⁸⁵ United Musicians & Workers Alliance, *supra* note 14.

lessen the need for artists to hold multiple jobs.²⁸⁶ Other commentators state that it won't change a thing for the major labels, who have already adapted their business models to maximize their profits from streaming.²⁸⁷ These latter reports are not wrong. What this legislation demonstrates is manifest: addressing the inequities of artist compensation cannot be fixed at the service (or consumer) level, and instead, must directly target the label arrangements imposed on artists.

2. Bypassing Recoupment

There is a common refrain in the industry: “the pie is only so big.”²⁸⁸ Streaming services only have so much money to pay rightsholders and still operate a sustainable business. But there is no reason why some pieces cannot be redistributed. This subpart offers such a redistribution, but one that may ring a familiar tone with proponents of the AMFA and Living Wage bills by leveraging an existing program from the Copyright Act to put money directly into artists' pockets. The following proposal, however, also considers the nuances and terms baked into the supply chain contracts. If copyright must be involved, this may be how to do it.

Sections 112 and 114 of the Copyright Act provide for a statutory license for noninteractive webcasters (i.e., Internet radio providers) that enables those services to obtain a blanket license to all sound recordings, subject to paying royalties and abiding by the terms set every five years by an administrative

²⁸⁶ *Id.*

²⁸⁷ See Hilltop Staff, *Congress Proposes New Bill Aimed at Increasing Royalty Payments for Musicians*, THE HILLTOP (Apr. 1, 2024), <https://thehilltoponline.com/2024/04/01/congress-proposes-new-bill-aimed-at-increasing-royalty-payments-for-musicians/>.

²⁸⁸ Truly, this industry *loves* pie. See DCMS HEARINGS, *supra* note 130, at Q221, 282, 340, 430, 452, 490, 597, 602, 607, 610, 637, 671, 688 (representatives of Spotify, Amazon, Universal, independent labels, collecting societies, songwriter advocacy groups, and members of parliament all discussing the “pie”); Supplementary written evidence submitted by the BPI to the DCMS Committee at 1 [hereinafter BPI Evidence], <https://committees.parliament.uk/writtenevidence/23103/pdf/> (labels' British trade association discussing the pie); see also Menell, *supra* note 169, at 550-51; *How Should the Music Streaming Revenue Pie Be Split*, MUS. BUS. WORLDWIDE (Jan. 19, 2021), <https://www.musicbusinessworldwide.com/how-should-the-music-streaming-revenue-pie-be-split/>; Caitlin Kelley, *RIAA Reports That Music Streaming Went From 7% To 80% Of The U.S. Market This Decade*, FORBES (Dec. 31, 2019), <https://www.forbes.com/sites/caitlinkelley/2020/12/31/riaa-reports-that-music-streaming-went-from-7-to-80-of-the-us-market-this-decade/>; *Carving Up, or Growing the Pie*, MUS. BUS. WORLDWIDE (June 7, 2023), <https://www.musicbusinessworldwide.com/carving-up-or-growing-the-pie/>; Lanre Bakare, *The music streaming debate: what the artists, songwriters and industry insiders say*, THE GUARDIAN (Apr. 10, 2021), <https://www.theguardian.com/music/2021/apr/10/music-streaming-debate-what-songwriter-artist-and-industry-insider-say-publication-parliamentary-report> (all discussing pie).

tribunal, the Copyright Royalty Board.²⁸⁹ The license is extremely limited in scope and applies only to services that offer a true, “lean back” radio functionality akin to the traditional broadcast experience.²⁹⁰ The statute itself imposes several music programming requirements on licensees such that once they cross a low interactivity threshold, they are out of bounds of the statute and must negotiate directly with record labels.²⁹¹ As a result, the license is used sparingly by the major streaming services; their products simply don’t fit.²⁹² That is unfortunate, because it is the only section of the Copyright Act that provides for direct payment to artists irrespective of any agreements with intermediaries, even when artists have relinquished the rights in their works.²⁹³

Royalties owed under the statutory license are paid to a nonprofit entity designated by regulation, SoundExchange.²⁹⁴ The Copyright Act mandates how SoundExchange must distribute those royalties (after taking a small administration deduction) for a given song played on an eligible service: 50% are paid to the copyright owner (the record label, which distributes those royalties according to its artist contracts), 45% are paid directly to the featured artist(s), and the remaining 5% is distributed to a union-administered fund for nonfeatured musicians and vocalists.²⁹⁵ In contrast, when a song is played on Spotify, all of the royalties are paid to the record label and subject to the artist’s contract terms (including recoupment).²⁹⁶

Scholars approve this regime: García notes that without SoundExchange, it would be easier for intermediaries to short-change artists.²⁹⁷ Both Lydia Pallas Loren and DiCola also endorse direct payments, in light of the challenges and inequities associated with recoupable funds.²⁹⁸ Both the AMFA and Tlaib’s bill include variations of the program.²⁹⁹ But it need not be so

²⁸⁹ 37 C.F.R. §§ 370, 380.

²⁹⁰ *See* 17 U.S.C. § 114(d) (imposing limits on the statutory license).

²⁹¹ *Id.*

²⁹² *See Who Pays SoundExchange Q3 2023*, <https://www.soundexchange.com/wp-content/uploads/2023/10/Who-Pays-SoundExchange-Q3-2023.pdf> (listing licensees).

²⁹³ 17 U.S.C. § 114(g)(2).

²⁹⁴ 37 C.F.R. § 382.5(d).

²⁹⁵ 17 U.S.C. § 114(g)(2).

²⁹⁶ Kristelia A. García, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L. J. 183, 227 (2016); *see* García, *Copyright Arbitrage*, 107 CAL. L. REV. 199, 247 (2019) [hereinafter García, *Arbitrage*] (describing how the statutory license distribution scheme benefits artists in the short term).

²⁹⁷ García, *Reform*, *supra* note 92, at 33; *see also* Litman, *supra* note 47, at 548 (noting that private collecting societies are more likely to short-change artists)

²⁹⁸ DiCola, *supra* note 260, at 1851; Lydia Pallas Loren, *Copyright Jumps the Shark: The Music Modernization Act*, 99 B.U. L. REV. 2519, 2541 (2019).

²⁹⁹ H.R. 791 § 2; H.R. 7763 – Living Wage for Musicians Act of 2024 (118th Cong. 2023-2024).

limited. This royalty distribution scheme (which, for simplicity, I'll refer to as the SoundExchange program) ought to be extended to all voluntary blanket catalog license agreements, including those entered into by Spotify and the other interactive services with record labels, effectively increasing artist royalties to 45% and enabling direct payment.

The SoundExchange program has several benefits. First, while it does redistribute the pie, it only reduces the piece that is currently paid to record labels and adds a piece for direct payments to artists (leaving the pieces for songwriters and platforms undisturbed). Second, it ameliorates the inequities that have been cemented into recording agreements through work for hire provisions and unchecked recoupable funds. It ensures that artists see income from their works from the very first play, rather than having to wait to recoup their advances and other costs.³⁰⁰ This was intentional: the legislative history of the 112/114 license confirms Congress' concerns about artists not receiving their "fair share" of royalties.³⁰¹ Third, the program pays artists on a regular, predictable timeline. Artists subject to recoupment have no idea when they will start seeing any money (if ever), or enough money to quit a second job.³⁰² The SoundExchange program requires services to pay SoundExchange monthly and SoundExchange to pay artists promptly.³⁰³ Fourth, expanding the SoundExchange program would also be consistent with international trends to legislate direct payment paths for artists. Policymakers in Spain, Belgium, and Germany have all enacted legislation in recent years that ensures some amount of money bypasses record labels and goes straight to artists.³⁰⁴

From an administration standpoint for the services, little would change. The services would simply pay SoundExchange instead of the labels. SoundExchange would then remit and report to the various payees. And little would need to change from SoundExchange's standpoint, as it already has the data indicating who gets paid for which song and how from its administration of the noninteractive statutory license.

Things get a bit more complicated on the label side (especially for major labels) because of the economics of their licenses, with the upfront minimum

³⁰⁰ DiCola, *supra* note 260; Loren, *supra* note 298, at 2541.

³⁰¹ H. Rep. 104-274, at 23-24 (104th Cong. Oct 11, 1995).

³⁰² CMA REPORT, *supra* note 14, at 50; see García, *Arbitrage*, *supra* note 296, at 247 (describing the "long-term negative impact on creation and societal wellbeing" of artists not earning money from their recordings); Priest, *supra* note 115, at 778-779 (analogizing artist to entrepreneurs).

³⁰³ 37 C.F.R. § 385.2(a).

³⁰⁴ Royal Legislative Decree 1/1996 § 108(4) (Spain); Art. XI.228/11 of the Code of Economic Law (Belgium); Act on the Copyright Liability of Online Content Sharing Service Providers, Part 2, §4(3) (Germany). Uruguay has enacted a law ensuring record labels pay artists fairly. Paul Sawers, *Spotify u-turns on Uruguay exit after government gives assurances on artist payments*, TECHCRUNCH (Dec. 13, 2023), <https://techcrunch.com/2023/12/13/spotify-u-turns-on-uruguay-exit-after-government-gives-assurances-on-artist-payments/>.

guarantee payment that is not allocated to artists until subsequent usage is reported. SoundExchange could hold the minimum guarantee payments in an interest-bearing account until usage reporting begins to come in. As royalties are earned, SoundExchange would debit the minimum guarantee account to pay the labels and artists, and it would pay any remaining breakage to the label and its artists (based on relative stream share) at the end of each relevant contract term. Alternatively, the minimum guarantee could be treated as a true-up that occurs at the end of a contract term, rather than the beginning, eliminating the need for SoundExchange to manage any related accounting. Either approach could have broader effects, too and mitigate the negative externalities of the current status quo.

The minimum guarantees were originally implemented as a form of security interest against a service's viability, so their purpose is still served by ensuring the service is on the hook for the fee. It just may not flow to the label directly immediately. If the labels are not seeing those giant payments upfront, it might encourage them to lower the amount, at least for established services where viability is no longer seriously in doubt (those services also pay the highest minimum guarantees). Any incentive to reduce the minimum guarantees has ripple effects throughout the whole ecosystem, because recoupment gets easier for services, which means they have more freedom in programming content, which helps level the playing field between major and independent label artists.³⁰⁵

To the extent any changes to the current structure of the SoundExchange program are warranted, it could be to how unclaimed royalties are handled. Currently, if any royalties remain unclaimed after three years, SoundExchange may retain those amounts to offset its administrative costs.³⁰⁶ But if the concern is supporting the continued creation of music, then another approach would be to have those funds go to nonprofits and other organizations that support the creative industries, similar to how governments in other countries allocate streaming taxes and levies.³⁰⁷ There, the money goes to providing support for the artists who may need it most. In Canada, for instance, a government agency designates certain funds for receipt of money collected from broadcast and online services (pursuant to law).³⁰⁸ Those funds must be approved and certified by the agency as being consistent with the law's aims

³⁰⁵ See Landy, *supra* note 31, at 1300-02 (arguing that the size of the minimum guarantee also affects the survivability of a startup).

³⁰⁶ 37 C.F.R. § 380.4(b).

³⁰⁷ See, e.g., Centre Nationale de la Musique, *Streaming Tax* (Sept. 16, 2024), <https://cnm.fr/en/news/streaming-tax/#:~:text=The%20tax%20rate%20is%20set,the%2020%20million%20Deuro%20threshold> (describing how proceeds from France's music streaming levy is allocated).

³⁰⁸ Canadian Radio-television and Telecommunications Commission, *Certified Independent Production Funds*, <https://crtc.gc.ca/eng/general/cipfund.htm> (last visited Dec. 13, 2024).

to support the creative sector.³⁰⁹ Certified funds include those seeking to promote regional culture, independent creators, and historically marginalized communities.³¹⁰ In exchange, any interest earned from the minimum guarantee payments (if paid upfront) could be split between SoundExchange and the labels, with the former using the money to subsidize its administrative costs (which, in turn, reduces the administrative charge levied on artists and other smaller labels).

The primary downside to expanding the SoundExchange program is not insignificant insofar as it could take artists longer to recoup their balances with their labels. Recoupment status, however, may not matter as much if an artist is seeing money from the first stream onward. And additionally, the statute could be drafted to give artists an option. For those who wish to recoup more quickly, they could simply opt-out of the program.

Major record labels have opposed new royalty distribution schemes that cut them out, even when those schemes put more money in artists' hands.³¹¹ They assert that any dollar that does not flow through their systems reduces the amounts available to invest in new talent.³¹² And they—as the primary investor in new sound recordings—might argue that reducing their incentives to invest in new creative works by lowering their income runs counter to copyright. But copyright incentives are not intended to allow investors to maximize their profits to the point of excess; rather they ought to be limited to what is necessary to encourage further investment.³¹³ While it is hard to pinpoint the exact number, the major labels' profits have fallen and risen (and fallen and risen) in the last several decades, and the companies never stopped investing in music.³¹⁴

As potential solutions move away from fundamental changes to copyright law and closer to the contract terms that dictate artist compensation, they begin to ripen. But as the above shows, any solution leveraging existing copyright systems must consider the complex nuances of the industry. More simple and enduring solutions may be found at the first bargaining table in the supply chain. Those are the subject of the next subpart.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ BPI Evidence, *supra* note 288.

³¹² *Id.* They have joined with the streaming services in a lawsuit challenging the constitutionality of Belgium's new law. Arrêt n° 98/2024 du 26 septembre 2024, cour constitutionnelle, <https://www.const-court.be/public/f/2024/2024-098f.pdf>.

³¹³ Shani Shisha, *Commercializing Copyright*, 65 B.C. L. REV. 443, 494 (2024); Lunney, *supra* note 72, at 57.

³¹⁴ Recording Ind. Ass'n of Amer., U.S. Music Revenue Database, <https://www.riaa.com/u-s-sales-database/> (last visited Dec. 23, 2024).

C. Contract Proposals

As the above subparts show, it is difficult to fix a compensation problem primarily deriving from contract solely with copyright. But compensation for work created under contracts is a problem ably handled through different policy: labor. In fact, Tang argues that the labels are little more than firms that order and organize labor inputs.³¹⁵ The challenges described in this Article must then consider the role of human labor.³¹⁶ After all, artists are the workers creating the inputs that are subsequently commercialized by record labels and streaming services.³¹⁷ How that work is compensated is dealt with through contract.

Embracing labor policy to empower musicians to join a union and develop a collective bargaining agreement with record labels would help level the playing field between the creators of works and exploiters of those works, as the case has been for decades with other entertainment industry constituencies, and as other scholars have begun to recognize.³¹⁸ Subpart 1 explores what that could look like. In Subpart 2, I describe a different approach taken by policymakers in the United Kingdom, who have turned to self-regulation to try and level that same playing field.

1. Collective Bargaining

In 2023, Representative Deborah Ross introduced the Protect Working Musicians Act, which would authorize independent musicians and small labels to collectively bargain with streaming platforms to license their works, without running afoul of the antitrust laws that prohibit price-fixing among competitors.³¹⁹ The bill is sound policy in the abstract, but one that does not square with reality. Tens of thousands of independent labels are already members of Merlin, a licensing vehicle that collectively licenses their works to streaming services (seemingly with no competition issues). Second, any unsigned artist must still license their works to a streaming platform through a third party: no artist grants direct licenses to streaming services.³²⁰ Instead, unsigned artists license their works through aggregators, who enter into agreements with streaming services.³²¹ Those aggregators play important roles

³¹⁵ Tang, *supra* note 17, at 19.

³¹⁶ Tang, *supra* note 17.

³¹⁷ See DiCola, *supra* note 92, at 336, 340 (suggesting that policymakers ought to look at policy that goes beyond copyright in order to ensure sufficient returns for artists, which includes examining labor outcomes).

³¹⁸ DiCola, *supra* note 15, at 270; see also Tang, *supra* note 17.

³¹⁹ H.R. 5576 – Protect Working Musicians Act of 2023, § 2 (118th Cong. 2023-2024).

³²⁰ See *supra*, Part I.

³²¹ See Spotify for Artists, Getting Music on Spotify, <https://support.spotify.com/us/artists/article/getting-music-on-spotify/> (last visited Dec. 13, 2014) (listing approved distributors for unsigned artists).

for both sides of the supply chain: they handle the technical aspects of delivery (file formatting, metadata, etc.), collect and remit royalty statements, and have teams that interface directly with streaming services to try and promote music.³²² Rep. Ross' bill simply does not solve a real problem.³²³ It does, however, signal an appetite from legislators to look at labor and contract-related solutions to creative industry problems.

Nearly a decade ago, 16 marquee artists, including Jay-Z, Coldplay, Alicia Keys, Daft Punk, and Madonna, launched their own streaming service, Tidal.³²⁴ Keys said at the time “[w]e believe that it is in everyone’s interests. . .to preserve the value of music, and to ensure a healthy and robust industry for years to come.”³²⁵ While Tidal struggled to succeed (in part because it sought to pay the record industry more than other platforms³²⁶), and was ultimately sold to the payments company Square in what a Delaware court called “a terrible business decision,”³²⁷ the artists behind the initiative were right about one thing: banding together can yield impactful results. Yet, when it comes to the most powerful form of unified action—collective bargaining—featured artists have used the tool far less effectively than other creatives who relinquish their copyrights (e.g., actors, writers, directors, and background musicians). That leaves a lot of room for progress.

Employment law allows workers to unionize and collectively bargain, without running afoul of antitrust laws.³²⁸ The benefits of unions are well-documented: they help achieve greater equity throughout society in ways, including economic, political, and democratic engagement.³²⁹ Unions help even out power imbalances between workers and executives to create more fair outcomes and address issues that may otherwise be swept under the rug.³³⁰

Unions have played a famously critical role in many creative industries, negotiating for minimum compensation terms, workplace conditions, and

³²² See, e.g., TuneCore, <https://www.tunecore.com/>.

³²³ It also fails to acknowledge that the sound recording comprises just half of the rights that a service must license to stream music. Services must also obtain licenses from composition copyright owners, whose priorities do not always align with those of sound recording rightholders, but the “pie” from which both are paid is the same.

³²⁴ Rishi Iyengar, *Jay Z Just Launched His Own Music-Streaming Service Called Tidal*, TIME (Mar. 30, 2015), <https://time.com/3764675/tidal-for-all-jay-z-streaming-music-spotify/>.

³²⁵ *Id.*

³²⁶ Tribulski, *supra* note 102, at 119.

³²⁷ *City of Coral Springs Police Officers' Pension Plan v. Dorsey*, No. 2022-0091, 2023 Del. Ch. LEXIS 107, at *2 (Del. Ch. May 9, 2023).

³²⁸ 29 U.S.C. § 157.

³²⁹ Kate Andrias, *The New Labor Law*, 126 YALE L. J. 2, 10, 21, 76 (2016); Benjamin I. Sachs, *The Unbundled Union: Politics without Collective Bargaining*, 123 YALE L. J. 148, 167-68, 169 (2013); Richard Epstein, *Labor Unions: Saviors or Scourges*, 41 CAP. U. L. REV. 1, 32 (2013).

³³⁰ Andrias, *supra* note 329, at 75-76.

more.³³¹ They have the power and ability to shift (and have shifted) industry practices through contract.³³² Following the 2023 actors strike, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) secured terms addressing the allocation of flat-fee payments (i.e., those not tied to the usage of any particular work), residuals (royalties for the usage of legacy works), data transparency, and artificial intelligence.³³³ The Writers Guild of America achieved similar wins for writers.³³⁴ There has been no correlative, industry-wide collective effort on the music front to address the workplace relationship between labels and artists.

Featured artists are eligible for membership in SAG-AFTRA, and many are (including Swift).³³⁵ But music membership in SAG-AFTRA is low: in 2019, SAG-AFTRA boasted just 5,000 singers.³³⁶ Most of those are, reportedly, signed to major labels.³³⁷ As a result, it seems to have a limited mandate to represent artists, yet it has sought to achieve some benefits for those members.

In Spring 2024, SAG-AFTRA and “leading record labels,” including the major labels, agreed to a National Code of Fair Practice for Sound Recordings, building on an agreement that originated in 1951.³³⁸ The SAG-AFTRA Code achieves, among other things: (1) minimum payments per-recording session (\$295 for soloists and duos, for example), (2) increased payments (from labels) into health insurance and retirement plans, and (3) a requirement that labels

³³¹ Duncan Crabtree-Ireland, *Labor Law in the Entertainment Industry*, 31 ENT. & SPORTS LAW 4 (2015); DiCola, *supra* note 15, at 280.

³³² Andrias, *supra* note 329, at 79.

³³³ See also Tang, *supra* note 17, at 29-30 (describing the negotiations).

³³⁴ Writers Guild of America, *What We Won*, <https://www.wgacontract2023.org/the-campaign/what-we-won> (last visited Nov. 4, 2024).

³³⁵ AFTRA stands for the American Federation of Television and Radio Artists; the latter were historically recording artists. Background musicians and vocalists are eligible for membership (and collectively bargain) through a different union, the American Federation of Musicians.

³³⁶ Elias Leight, *There's a Musician's Union. Many Musicians Are Unaware – or Unable to Join*, ROLLING STONE (May 6, 2019), <https://www.rollingstone.com/music/music-features/theres-a-musicians-union-many-musicians-are-unaware-or-unable-to-join-831574/>.

³³⁷ Leight, *supra* note 336; see also Camille Cordova, *Stronger Together*, 22 PEPP. DISP. RESOL. L.J. 39, 58-59 (describing SAG-AFTRA's limited recording artist membership).

³³⁸ Press Release, SAG-AFTRA, Record Labels Reach Tentative Sound Recordings Agreement (Apr. 12, 2024), <https://www.universalmusic.com/sag-aftra-record-labels-reach-tentative-sound-recordings-agreement/>; some version of this agreement dates back to 1950. Sound Recordings, SAG-AFTRA, <https://www.sagaftra.org/production-center/contract/806/getting-started> (last visited Nov. 3, 2024).

obtain consent from any artist whose voice is being replicated with the use of artificial intelligence (AI) in a new sound recording.³³⁹

The SAG-AFTRA Code is a good start, but it is just that. It barely skims the surface of label/artist economics. The 2023 Hollywood strikes demonstrated how effective unions (the very same union!) can be in negotiating economic and non-economic terms that benefit members across the board. A membership drive, coupled with more robust collective bargaining could significantly impact the artist experience,³⁴⁰ and yield improvements on several matters.³⁴¹ For example, the union could achieve parity for artists on how unallocated money, such as breakage and profits from the sale of equity, are distributed to artists. It could seek to limit what sort of monies are recoupable and what are not—a particularly salient point in this context, as labels have taken the position that union payments made by the labels under the SAG-AFTRA Code to session vocalists are recoupable.³⁴² It could step in to help address practices and streaming remuneration related to evolving technological issues. It could set minimum royalty rates for all artists. Critically, it could provide the kind of “social safety net” DiCola (and Chappell Roan herself) argues is necessary for all creators, by guaranteeing health insurance.³⁴³

The union could also negotiate for the sharing of settlement payments in catalog-wide copyright infringement cases. The major labels have sued two generative AI companies for using their catalogs to train models; if they win, the artists ought to participate in any recovery. There are criminal cases against individuals who have fraudulent stream operations (designed to run up

³³⁹ SAG-AFTRA Sound Recordings Code, Appendix: Artificial Intelligence Agreement, <https://www.sagaftra.org/sites/default/files/Sound%20Recordings%20Code%20Appendix%20on%20Artificial%20Intelligence.pdf>; SAG-AFTRA Sound Recordings Code Memorandum of Agreement (Apr. 6, 2024), <https://www.sagaftra.org/sites/default/files/2021-2026%20Sound%20Recordings%20Code%20MOA.pdf>.

³⁴⁰ See Epstein, *supra* note 329, at 29 (noting that workers are more likely to join unions when the union can provide them more than they can get on their own).

³⁴¹ See Chisolm, *supra* note 17, at 321-22 (describing how the Code insufficiently addresses record deal terms); see also Cordova, *supra* note 337, at 56 (suggesting that recording artists would benefit from stronger union representation); Brandon Milostan & Graham Fenton, *Swimming With the Stream*, 47 LOS ANGELES LAWYER 26 (2024) (describing data terms of the Hollywood agreements that followed the strikes).

³⁴² PASSMAN, *supra* note 30, at 88; Chisolm, *supra* note 17, at 322; West Contract, *supra* note 95, at Sec. 6.01(c); see Limp Bizkit Contract, at Sec. 5.01 (classifying as recoupable union scale payments made to the band itself).

³⁴³ DiCola, *supra* note 15, at 279-80; see @Nirvana, X (Feb. 7, 2025, 10:21 AM), <https://x.com/nirvana/status/1887884378472374466?s=46&t=7FsPROXk-HNFX3UDQFgdMg> (Krist Novoselic encouraging artists to obtain health insurance through SAG-AFTRA); Roan, *supra* note 40.

streaming numbers with automated technologies to collect more revenues³⁴⁴); if any money is ultimately recovered from that litigation and distributed to the labels, artists ought to share in it as well. In the past, label contracts have made clear that they will not share in general settlements.³⁴⁵ A stronger union could also partner with labels to conduct studies on unresolved matters, such as the appropriate way to calculate the stream share.³⁴⁶ It could seek more favorable terms on data transparency (like those seen in the United Kingdom's Code).

Right now, movement on those matters is reserved only to superstar artists who have individual leverage to negotiate.³⁴⁷ A fortified union balances not just the relative bargaining power between the artists and the labels, but also promotes equity among the artist community that is otherwise impossible to achieve.³⁴⁸

It may not be easy, however, to secure stronger representation. Music membership is low. Perhaps that is because artists who are not signed to major labels are not aware they can join the union; it has not been sufficiently marketed. For those who are aware, they may see union membership as purely a cost, with little benefit, since the labels have already voluntarily agreed to abide by the SAG-AFTRA Code.

Legally, artists' employment status may be a barrier. Individuals must typically be classified as employees to join a union.³⁴⁹ Artists are independent contractors. However, courts have interpreted the notion of an "employee" under the National Labor Relations Act (which authorizes unions) broadly, such that other Hollywood creatives are considered employees, even when they have no set working hours or schedule.³⁵⁰ While Hollywood agreements

³⁴⁴ Complaint, U.S. v. Michael Smith, 24 Crim. 504 (S.D.N.Y.), <https://www.justice.gov/usao-sdny/media/1366241/dl>; Ben Sisario, *While Some Cry 'Fake,' Spotify Sees No Need to Apologize*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/business/media/wholesome-cry-fake-spotify-sees-no-need-to-apologize.html>; Tang, *supra* note 17, at 49.

³⁴⁵ 19 Recordings Ltd. v. Sony Music Entm't, 97 F. Supp. 3d 433, 444-45 (S.D.N.Y. 2015).

³⁴⁶ See *supra*, note 380.

³⁴⁷ See García, *Emperor*, *supra* note 256, at 874 (describing the difficulties facing non-superstars in obtaining fair contract terms).

³⁴⁸ See *id.* (framing the difference in bargaining power between superstars and other artists as an issue of distributed justice); see also *id.* at 883 (noting that Swift and other superstars may be able to negotiate groundbreaking terms for themselves, but that does not necessarily equate to better terms for others).

³⁴⁹ 29 U.S.C. § 157; see Brent Salter & Catherine L. Fisk, *The Fragility of Labor Relations in the American Theatre*, 83 OHIO ST. L.J. 217 (2022) (describing how playwrights have yet to achieve full, enforceable union representation because they are considered independent contractors, while other Hollywood creatives are considered employees).

³⁵⁰ In re Metro-Goldwyn-Mayer Studios, 7 N.L.R.B. 662 (N.L.R.B. 1938); Salter & Fisk, *supra* note 349, at 250. This seems to be a very broad interpretation of the test commonly applied by the NLRB, which considers individuals employees when the firm has the right to

(for writing, acting, directing, etc.) are more frequently structured as employment agreements, the nature of their work and relationship with any given employer is much shorter than that of an artist signing a record deal (the former could be for weeks or months, while the latter is frequently for several years).³⁵¹ And like recording artists, their agreements give complete control over exploitation to their “employer”—frequently, the intermediary production company who owns the copyright.³⁵² Additionally, a 2023 National Labor Relations Board ruling has made it easier for individuals who look more like independent contractors to unionize. Under that case, workers seeking to unionize may do so even if not classified as employees under *employment* law if they meet the common law test for an employee under *agency* law.³⁵³ Taken together, these circumstances may collide to provide a solid foundation for artists to formally unionize and insist on a true collective bargaining agreement, especially since the same common law agency test is already used in copyright law to determine if a work is made for hire as the result of an employer/employee relationship.

There are drawbacks to unionization. The greatest weapon a union wields is to strike—a tool that many artists may not wish to even have in their arsenal.³⁵⁴ Strikes can be costly for middle and lower-income creatives, especially if they were to require the cancellation of tours and live appearances, in addition to recording new music. A collective bargaining agreement with better economic terms for current artists may mean that labels cannot afford to sign as many new artists.³⁵⁵

And if artists are able to mobilize such that they can collectively bargain, then they may be able to offer a trade to labels in return: recognize our union, and we’ll agree to be considered employees for work for hire purposes, so long

control the result of the work and the “manner and means” in which it is brought about. Michael C. Harper, *Defining the Economic Relationship Appropriate for Collective Bargaining*, 39 B. C. L. REV. 329, 334 (1998).

³⁵¹ Catherine L. Fisk, *Hollywood Writers and the Gig Economy*, 2017 U. CHI. LEGAL F. 177, 182 (2017).

³⁵² *Id.* at 183.

³⁵³ *In re Atlanta Opera, Inc.*, 372 NLRB No. 95 (2023); *Horror Inc. v. Miller*, 15 F. 4th 232, 244 (2d Cir. 2021); *see Tang, supra* note 17, at 23-24, noting that one can be an employee in one area of the law and an independent contractor in others.

³⁵⁴ To be clear, a strike would lead to recording artists refusing to record, not the takedown of preexisting material from streaming services.

³⁵⁵ *See* Daniel J. Gifford, *Redefining the Antitrust Labor Exemption*, 72 MINN. L. REV. 1379, 1410 (1988) (describing how securing higher wages means a reduction in jobs). This is a more likely outcome than higher consumer prices, given the nature of the deals with the streaming services (who cannot afford to pay more out of pocket or lose consumers).

as we're under contract with you.³⁵⁶ That switch in classification would give the record labels stronger arguments as to their ownership of recordings, eliminating the weak argument that songs and albums are contributions to collective works.³⁵⁷ The tradeoff between employment status and copyright ownership is a feature of the origin narratives regarding other Hollywood unions.³⁵⁸ Screenwriters exchanged their right to unionize for copyright ownership. In music, the artists do not have anything more to give, they'd just be getting more in return.

2. Self-Regulation

Somewhere between copyright reform and actual interventions in contract falls self-regulation, in the spirit of “something” being better than “nothing.” While lacking the force of legislation, self-regulation (such as an industry-wide agreement³⁵⁹) nevertheless presents an opportunity to openly address systemic disparities in bargaining power and transparency in a less expensive, more flexible, and better-informed manner than regulation.³⁶⁰ Advertising, cotton supply chain, and electronics companies have all signed on to codes of conduct and other self-regulatory devices.³⁶¹

In early 2024, the United Kingdom's Intellectual Property Office announced a Voluntary Code of Good Practice on Transparency in Music Streaming among trade associations representing major and independent

³⁵⁶ Salter & Fisk, *supra* note 349, at 261 (describing how stage directors traded unionization for copyright in the 1960s); This is not a costless change for the labels, as classification also affects unemployment insurance, tax withholding, and more.

³⁵⁷ *Id.* at 247 (describing how the Screen Writers Guild was able to achieve NLRA-recognized union status in part because of the work for hire provision in the screen writers' agreements).

³⁵⁸ Salter & Fisk, *supra* note 349, at 247; Fisk, *supra* note 351, at 200. However, it's worth noting music production is less centralized than Hollywood productions. While movie studios tend to control the entire production of a movie, the record label may have varying degrees of control of the creation of a record, the engagement of engineers, producers, and additional vocalists and musicians, depending on the artist's stature.

³⁵⁹ Angela J. Campbell, *Self-Regulation and the Media*, 51 FED. COMM. L.J. 711, 714 (1999).

³⁶⁰ *Id.* at 715-716; William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 55 (2013); Campbell, *supra* note 359, at 716; Stephanie Wong, *Self-Regulation by the Private Industry and its Effectiveness in Today's Online Environment*, 3 NOTRE DAME J. EMERGING TECH. 161, 164 (2022); *see also* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION*, Oxford University Press 38 (1992) (describing how effective self-regulation can be the “least burdensome approach” to “taxpayers and the regulated industry”).

³⁶¹ Interactive Advertising Bureau, *Self-Regulation* (Apr. 7, 2014), <https://www.iab.com/news/self-regulation-2/>; Dep't of Labor: Bureau of Int'l Labor Affairs, *Key Topic: Multi-Stakeholder and Industry-Wide Codes of Conduct*, <https://www.dol.gov/agencies/ilab/comply-chain/steps-to-a-social-compliance-system/step-3-develop-a-code-of-conduct/key-topic-multi-stakeholder-and-industry-wide-codes-of-conduct> (last visited Dec. 13, 2024).

labels, streaming services, and music creators.³⁶² While this Code does not solve everything, or actually anything—it does not directly increase artist compensation—it is a positive first step towards evening out the bargaining power between the entities in the supply chain and ensuring, at least, a minimal level of information is made available to artists, “so that any lack of clarity or misunderstandings over methods of calculating and reporting revenues and royalties does not undermine the trust that is essential to a thriving music industry.”³⁶³

As between labels and artists, the Code requires that labels strongly advise artists to seek legal representation in their negotiations and draft economic terms clearly in any contract; they cannot be buried in opaque legalese.³⁶⁴ That is not a small give; consider the following excerpt from West’s contract (all capitalized terms are separately defined):

“Artist’s royalty and net profit account pursuant to the Recording Agreement (collectively, the “Recording Agreement Royalty Account”) and the RTW Account [as defined below] which is a portion of the Recording Agreement Royalty Account, shall at all times remain uncrossed from Grantor’s share of Net Proceeds pursuant to the P&D Agreement (and this P&D Amendment) (the “P&D Account”), except as follows: solely in connection with the P&D Albums and following recoupment of any and all costs paid or incurred by UMG on a P&D Album-by-P&D Album basis (including, without limitation any market costs and/or Third Party Marketing Costs [as defined below]), UMG shall apply the next Two Million Dollars (\$2,000,000) of Grantor’s share of Net Proceeds otherwise payable per P&D Album to the unrecovered Recording Agreement Royalty Account (inclusive of the RTW Account), subject to an aggregate cap of Six Million Dollars (\$6,000,000) across all P&D Albums.”³⁶⁵

Labels must also be transparent about how royalties are calculated and provide track-level reporting on a per-streaming service basis, to the extent practicable, so that artists have a granular idea of how their music is

³⁶² Intellectual Property Office, UK Voluntary Code of Good Practice on Transparency in Music Streaming (Jan. 31, 2024) [hereinafter UK Code], <https://www.gov.uk/guidance/uk-voluntary-code-of-good-practice-on-transparency-in-music-streaming>

³⁶³ *Id.*

³⁶⁴ *Id.* §§ 1.1, 1.4.

³⁶⁵ West Contract, *supra* note 95, at Letter Dated Aug. 11, 2014, Sec. 4(a) (page 13-14).

performing.³⁶⁶ Additionally, under the Code, every artist has a right to audit their record label, a privilege that was historically subject to negotiation.³⁶⁷

With respect to the contract terms with streaming services, the Code states that labels must be transparent with artists about how any breakage and profits from the sale of equity are shared and reported on (although the Code also defers to confidentiality provisions in the license agreements between the labels and services, so that labels may share terms in the aggregate where the license prohibits disclosing specific information³⁶⁸).³⁶⁹

But codes of conduct like this one are not law. They are not final and there is no formal, legal enforcement mechanism.³⁷⁰ Even without formal enforcement capabilities, however, they are not toothless. Instead, they can be rather effective tools, particularly when all relevant stakeholders participate in drafting with equal input and signatories commit to the terms of the code. Additionally, in lieu of a formal enforcement mechanism, there is ample opportunity for informal enforcement, an effective tool in this industry.

Informal norms (like trust), as described in prior work, play an outsized role in facilitating parallel conduct in the recording industry.³⁷¹ Trust is derived from the threat of reputational sanctions, reciprocity, and repeat player dynamics.³⁷² All are present in the industry. With an active trade press and vocal artist community, the threat of reputational sanctions is significant: the public is likely to find out if the Code is not complied with.³⁷³ Reciprocity is baked into the Code, with signatories from all steps of the supply chain, so everyone abides by the same framework.³⁷⁴ And lastly, the repeat player dynamic in the industry is pervasive. I previously described the musical chairs

³⁶⁶ *Id.* §§ 1.5, 3; see Rose, *supra* note 121, at 35-36 (describing how opaque contract terms strategically advantage labels vis-à-vis their artists).

³⁶⁷ PASSMAN, *supra* note 30, at 173; UK Code, *supra* note 362.

³⁶⁸ UK Code, *supra* note 362, at § 5.5. Meredith Rose suggests the Federal Trade Commission ought to require labels to provide an annual accounting of any non-cash compensation to artists. Rose, *supra* note 121, at 60-61.

³⁶⁹ *Id.* § 5.6

³⁷⁰ Campbell, *supra* note 359, at 718; Emily Hammond, *Double Deference in Administrative Law*, 116 COLUM. L. REV. 1705, 1720 (2016); Ira S. Rubenstein, *Privacy and Regulatory Innovation: Moving Beyond Voluntary Codes*, 6 ISJLP 355, 370, 383 (2011); Wong, *supra* note 360, at 165. Per the preamble to the Code, non-compliance is not a breach of any law or any contracts.

³⁷¹ Landy, *supra* note 31, at 1290-95.

³⁷² *Id.* at 1293-94.

³⁷³ See Hammond, *supra* note 370, at 1719; see Stephane Rousseau, *Enhancing the Accountability of Credit Rating Agencies: The Case for a Disclosure-Based Approach*, 51 MCGILL L.J. 617, 656 (2006) (describing threat of reputational harm as being motivating factor for signatories to comply).

³⁷⁴ See Rubenstein, *supra* note 370, at 371 (describing how firms tend to comply when they've had a hand in drafting).

between executives at the major labels,³⁷⁵ but that game could be expanded to include executives at streaming services, independent labels and music management firms: it is common for executives to rotate not just among firms at one step in the supply chain, but among all.³⁷⁶

The Code's utility is unproven. Yet, as described above, the inequities across the industry primarily stem from a few actors (the major labels) who benefit at the expense of all others—circumstances that other scholars believe make voluntary agreements effective tools.³⁷⁷ Rightfully, the Code does not appear to enable additional wealth transfer to the major labels; rather, its goal is to even out the information gap between artists, labels, and music distributors.³⁷⁸ This is likely a result of wide industry participation, with groups representing all stakeholders at the table.³⁷⁹ Therefore, government agencies and industry players in other countries ought to consider following suit and encourage the adoption of the same Code (to avoid conflicting regimes), at a minimum. Given the international nature of the music industry, Britain cannot go at it alone.

But self-regulation of this kind will not cure short-term economic issues; it merely forces stakeholders to get in the same room and start openly discussing them. For so long as the major labels are in that room (and they would have to be), any voluntary agreement is unlikely to effectuate significant change because any such change would require the major labels to give up something meaningful. Take, for example, what was not addressed in the Code: how royalties are determined at the streaming service level, a topic of otherwise vigorous debate,³⁸⁰ or when recoupable funds ought to be forgiven

³⁷⁵ Landy, *supra* note 31, at 1293.

³⁷⁶ See, e.g., Ben Sisario, *Warner Music Finds a New Chief at a Former Frenemy: YouTube*, N.Y. TIMES (Sept. 21, 2022), <https://www.nytimes.com/2022/09/21/arts/music/warner-music-group-robert-kynclv.html>; Todd Spangler, *YouTube Hires Lyor Cohen, Former Top Warner Music Exec, as Global Head of Music*, VARIETY (Sept. 28, 2016); Jem Aswad, *Steve Savoca, formerly of Spotify, joins Apple Music*, BILLBOARD (Feb. 2, 2017), <https://www.billboard.com/pro/steve-savoca-joins-apple-music-formerly-spotify/>; Ed Christman, *Swedish Label X5 Hires Ex-Amazon Employee Griff Morris for U.S. Operation*, BILLBOARD (Aug. 17, 2011), <https://www.billboard.com/music/music-news/swedish-label-x5-hires-ex-amazon-employee-griff-morris-for-us-operation-1174471/>; Aswad, *Shawn Holiday to Launch New Label, Publishing Company with Irving and Jeffrey Azoff*, VARIETY (Feb. 1, 2021), <https://variety.com/2021/music/news/shawn-holiday-columbia-irving-azoff-1234897291/> (all detailing executive moves between different levels of the supply chain).

³⁷⁷ See Birdthistle & Henderson, *supra* note 360, at 8.

³⁷⁸ See *id.* at 12.

³⁷⁹ *Id.* at 26.

³⁸⁰ Specifically, many artists advocate for the stream share calculation to be made at the individual subscriber level, not the whole service level. CMA REPORT, *supra* note 14, at 44; Stuart Dredge, *What are user-centric music streaming payouts? Start here...*, MUSICALLY (May 13, 2020), <https://musically.com/2020/05/13/what-are-user-centric-music-streaming-payouts/>.

(currently subject to the labels' discretion). The major labels' leverage at the negotiating table throughout the supply chain means that they dictate a lot of the terms—a reality that must be grappled with for any solution.

How much an artist earns from streaming depends on contract terms more than anything else: the royalty rates and recoupable funds in their own recording agreements and the economics and promotional terms in the streaming licenses. While forcing change to contracts to which they are not parties (the streaming licenses) will prove to be difficult, artists can band together and force change to those for which they are: their own record deals. Additionally, downstream benefits can flow from upstream change. Collective bargaining on record deals would eventually affect how labels license their catalogs to services and how the resulting license fees are accounted for.

CONCLUSION

Music soundtracks our lives,³⁸¹ but the industry behind that soundtrack is at a crossroads: copyright owners are reaping significant financial rewards while many artists struggle to earn a living. Copyright, as a solution, is imperfect at best. An examination of the entire supply chain—from artist to label to distributor—reveals that the strongest path to re-empowering artists to make money, find fans, and sustain a living runs through the contracts that comprise that supply chain, not through copyright. There are viable ways to leverage copyright systems to put more money in artists' hands, but taking a cue from other creative workers and collectively bargaining would yield more impactful results.

Thus far, studies have shown that this shift would have a nominal impact on most artists. Stuart Dredge, *French study offers new data on impact of user-centric payouts*, MUSICALLY (Jan. 28, 2021), <https://musically.com/2021/01/28/french-study-offers-new-data-on-impact-of-user-centric-payouts/>; Will Page & David Safir, 'User-centric' revisited: *The unintended consequences of royalty distribution*, OVUM, http://www.serci.org/congress_documents/2019/user_centric_revisited.pdf; Saeed Alaci, Ali Makhdoumi, Azarakhsh Malekian, & Saša Pekec, *Revenue-Sharing Allocation Strategies for Two-Sided Media Platforms: Pro-Rata versus User-Centric* (last revised June 11, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645521; see also Birdthistle & Henderson, *supra* note 360, at 382 (noting codes of conduct can often be incomplete and fail to address all known issues).

³⁸¹ See KELEFA SANNEH, MAJOR LABELS (1st ed. 2021) (describing the evolution of popular music as interacting with broader societal and cultural events).