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STRENGTH IN NUMBERS: NEGOTIATING TO MITIGATE DISPUTES BETWEEN MUSICIANS AND DIGITAL SERVICE PROVIDERS

Ryan Ashe

The music industry landscape was forever changed when it implemented the streaming model. While digital service providers (“DSP”) like Spotify or Apple Music essentially saved the industry from music piracy,¹ the royalty distribution method of these companies has been a major disappointment for songwriters and musicians. Despite providing consistent revenue, most of the revenue earned by DSPs is not shared with musicians.² For instance, Spotify retains 30% of every dollar it generates,³ paying the remaining 70% back to rightsholders as royalties, with 55% of revenue towards record labels and 15% to publishing companies.⁴ Despite songwriters and recording artists’ significant contributions and importance to the music industry, they have long suffered an inequitable royalty rate distribution system, which has spurred various hard-fought, costly legal battles between digital service providers, and musicians and their representation.

Up until recently, musicians have consistently received the “short end of the stick” and been unable to generate changes in royalty rate negotiations due to their lack of bargaining power. Power in bargaining is often defined as a lack of dependence on others, which

¹ 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> [<https://perma.cc/BS98-CBGV>].

² David Hesmondhalgh, *Is Music Streaming Bad for Musicians? Problems of Evidence and Argument*, 23 NEW MEDIA & SOC’Y 3593, 3595-96 (2021).

³ Murray Stassen, *Spotify Approaches \$40BN In All-Time Payouts to the Music Industry*, MUSIC BUS. WORLDWIDE (Mar. 8, 2023), <https://www.musicbusinessworldwide.com/spotify-approaches-40bn-in-all-time-payouts-to-the-music-industry/> [<https://perma.cc/SN3W-6H7W>].

⁴ Hugh McIntyre, *5 Important Numbers From Spotify’s Annual Music Royalties Report*, FORBES (Mar. 9, 2023), <https://www.forbes.com/sites/hughmcintyre/2023/03/09/5-important-numbers-from-spotifys-annual-music-royalties-report/> [<https://perma.cc/S3W9-WPXZ>].

corresponds to a negotiating partner's best alternative to a negotiated agreement ("BATNA").⁵ Those with less dependency on an opposing or third party to reach have a stronger BATNA than those with a weak alternative, or no alternative at all.⁶ Spotify holds substantial power in bargaining because it and other DSPs are not dependent on an individual artist. Most artists fail to make up even just one percent of all streaming revenue generated, so DSPs are not threatened by the removal of artist's catalog.⁷ There are obvious exceptions like Taylor Swift or Drake that have more sway due to their popularity⁸, yet many of the most successful current acts have historically been silent on royalty rate disputes.⁹ Conversely, individual artists are heavily dependent on opposing parties and third parties during negotiations. Not only do artists require the aid of other artists to generate their own work, but they also require the help of publishing companies, record labels, and digital service providers to distribute their works and generate profit from them. These realities lead to a severely weakened BATNA for musicians.

Musicians' BATNA was further weakened by the lack of support from the major labels—Sony, Universal, and Warner. In addition to a lack of dependence during negotiations, power can manifest from the power and authority one can exert over a wide range of important outcomes.¹⁰ The major labels wield such power in the music industry due to their vast copyright ownership of music catalogs.¹¹ Unfortunately, labels have been shamefully quiet regarding royalty disputes, primarily because of the underlying ties between labels and streamers. The major labels have

⁵ 3 *Types of Power in Negotiation*, HARV. L. SCH. (Aug. 22, 2023) <https://www.pon.harvard.edu/daily/negotiation-skills-daily/types-of-power-in-negotiation/> [<https://perma.cc/WP3L-7V6C>].

⁶ *Id.*

⁷ Emily Blake, *Data Shows 90 Percent of Streams Go to the Top 1 Percent of Artists*, ROLLING STONE (Sept. 9, 2020), <https://www.rollingstone.com/pro/news/top-1-percent-streaming-1055005/> [<https://perma.cc/WRU2-LUSL>].

⁸ *Most Streamed Artists on Spotify*, CHART MASTERS, <https://chartmasters.org/most-streamed-artists-ever-on-spotify/> (last visited Oct. 22, 2023) [<https://perma.cc/9BSQ-FCJU>].

⁹ See *supra* note 1.

¹⁰ *Supra* note 5.

¹¹ Ron Knox, *Big Music Needs to Be Broken Up to Save the Music Industry*, WIRED (Mar. 16, 2021), <https://www.wired.com/story/opinion-big-music-needs-to-be-broken-up-to-save-the-industry/> [<https://perma.cc/ZC6C-3DPH>].

ownership in Spotify,¹² and Spotify also pays labels yearly advances to keep their music on its platform.¹³

In a position of desperation, without the support from major artists and labels, smaller-scale songwriters were forced to team up to boost their bargaining power. In collective bargaining agreements, which are quite analogous to the current disputes between DSPs and musicians, it is imperative for employees, songwriters in this case, to cooperate and negotiate collectively to enact change and avoid competition.¹⁴ Such competition is an inherent reality of the music industry, as our favorite artists’ “fifteen minutes of fame” typically pass by, and another artist quickly moves in to replace them. Therefore, many individual small-scale artists and their interests become expendable and immaterial. However, as a collective, songwriters’ bargaining power was realized because without them, streaming services’ business would not exist.¹⁵

Such a team-up of songwriters proved successful through the recent efforts of the National Music Publishers’ Association, which represents all American music publishers and their songwriter partners on legislative, litigation, and regulatory fronts.¹⁶ The National Music Publishers’ Association (“NMPA”) and Nashville Songwriters Associations reached an agreement with the Digital Media Association (“DiMA”). In August 2022, the Copyright Royalty Board (“CRB”) accepted a music industry-wide settlement—known as ‘Phonorecords

¹² Mark Dent, *The Economics of Spotify*, THE HUSTLE (Feb. 5, 2022), <https://thehustle.co/the-economics-of-spotify/> [https://perma.cc/LQ89-9GQ3].

¹³ Sisario, *supra* note 5 at 690.

¹⁴ *Find Strength in Numbers*, HARV. L. SCH. (Sept. 13, 2010) <https://www.pon.harvard.edu/daily/negotiation-skills-daily/find-strength-in-numbers/> [https://perma.cc/S2UP-CHJ6].

¹⁵ Tim Ingham, *Copyright Royalty Board Officially Accepts New Rates That Will See Songwriters Paid More in the US Over the Next Five Years*, MUSIC BUS. WORLDWIDE (Dec. 30, 2022), <https://www.musicbusinessworldwide.com/crb-officially-accepts-settlement-that-will-see-songwriters-paid-more-in-the-us-over-the-next-5-years/> [https://perma.cc/2946-SKHP].

¹⁶ *Our Mission*, NAT’L MUSIC PUBLISHERS ASS’N, <https://www.nmpa.org/mission/> [https://perma.cc/D4W8-FYCL] (last visited Oct. 20, 2023).

IV’—which improved songwriters’ streaming royalty rates in the U.S. from January 1, 2023 through 2027.¹⁷ This agreement prevented a major “legal battle royale,” in which the NMPA and major streamers—Spotify, Amazon, Pandora—disputed the proposed U.S. mechanical rate.¹⁸ In this dispute, streamers advocated for the royalty rate for songwriters to be set at a measly 10.5% of revenue, while the NMPA pushed for the rate to be set at 20%.¹⁹ The stage was set for costly litigation, yet in a turn of events, the NMPA and digital services submitted a joint proposal to the CRB, setting the mechanical streaming rate in the US at 15.35%.

This settlement was an especially important win for songwriters and composers, as the settlement brings “greater certainty over the next five years because unlike a trial, there is no chance of an appeal.”²⁰ Unlike previous legal disputes where Spotify did not feel compelled to negotiate, this agreement was reached by “the result of all songwriters making their voice heard.”²¹ Now, rather than “going to trial and continuing years of conflict, [songwriters and DSP’s] move forward in collaboration with the highest rates ever, guaranteed.”²² Instances such as these point to how small-scale songwriters used solidarity, and their organized influence to effect a negotiated agreement. The NMPA demonstrated to the streamers that the songwriter and the song are the most important components in the music industry,²³ effectively swaying DSPs to

¹⁷ Ingham, *supra* note 15.

¹⁸ Tim Ingham, *Can You Feel the Love Tonight? Spotify and Fellow Music Streamers Strike Agreement with Publishers for 15.35% Go-Forward Royalty Rate in the US*, MUSIC BUS. WORLDWIDE (Aug. 31, 2022), <https://www.musicbusinessworldwide.com/can-you-feel-the-love-tonight-spotify-and-fellow-music-streamers-strike-agreement-with-publishers-for-15-35/> [https://perma.cc/L7ZX-EKF4].

¹⁹ *Id.*

²⁰ Ingham, *supra* note 15.

²¹ NMPA, NSAI, and DiMA Announce Landmark Agreement for Phonorecords IV Proceeding, NAT’L MUSIC PUBL’G ASS’N. (Aug. 31, 2022), <https://www.nmpa.org/nmpa-nsai-and-dima-announce-landmark-agreement-for-phonorecords-iv-proceeding/> [https://perma.cc/F5EC-6YY9].

²² *Id.*

²³ Ingham, *supra* note 15.

agree to properly compensate them. Stepping away from litigation to have proper free market negotiations, songwriters were able to get the payment they deserved.²⁴

²⁴ *Id.*