DISSECTING THE DIGITAL DOLLAR Part Two

Full Report

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For updates on the Dissecting The Digital Dollar project follow the MMF and CMU on Twitter:

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Foreword

The Music Managers Forum has long campaigned for a fairer, more transparent music industry that operates in the interest of artists and fans. Our intention in publishing 'Dissecting The Digital Dollar – Part One' and this sequel has been to explore how the modern streaming ecosystem operates, what the issues are and what the potential solutions might be.

Throughout the first half of 2016 we organised roundtables with over 200 practitioners from across the industry in different territories to discuss the questions raised in Part One. In Part Two, we are presenting what we hope will be a major contribution to this debate as well as our manifesto for change.

We have identified a series of recommendations starting with specific actions for creators and their managers. We have added calls upon record labels, music publishers, collective management organisations and the digital service providers and support for regulatory change. All these elements we believe will make the industry more equitable for creators, rights owners and investors. Our aim is to restore much needed trust and help align our common interests throughout the entire value chain.

The MMF is committed to our role in educating and informing managers to enable them to join us in asking the tough questions to hold the entire value chain to account. There are a number of actions that we intend to take to ensure that our membership fully understands how streaming is licensed, how the market operates, what deal terms exist and how they can leverage the best deals

for their artists. We want managers and their artists to understand, analyse and challenge digital royalty accounting from user to creator. We can help raise the level of knowledge through our seminars and publications and better professional standards for managers. Managers also have a role in ensuring that the data that the industry relies on is correct so that the money flows where it should and we will support initiatives that aim to address this.

We want the wider industry to take on board the challenges this report raises and consider how they can help promote reform from within. Legacy contracts from the pre-digital age need urgent attention.

Where there are limits to voluntary action, we commit to leading advocacy for regulatory reform in the UK and EU, in fact to help design and implement principles that will work throughout the world (and of course the universe and as yet unknown worlds!). Even with Brexit, there is the potential to get issues of fairness and transparency onto the UK policy agenda and to push for change.

There are also several suggestions for further research in this paper that we will take forward as the MMF and with other industry partners.

We hope readers of this report will join us in helping the music industry work better in the interest of all creators, rights holders, investors and, of course, fans.

Annabella Coldrick, Chief Executive
Jon Webster, President

“It’s sometimes said there is no money in streaming, but that’s simply not true. Music makes good money from streaming. There is good revenue coming in. The issue is how that money gets shared.

Executive Summary

Following the publication of **'Dissecting The Digital Dollar Part One'**, the Music Managers Forum staged a series of roundtable discussions to debate the issues raised in the initial report.

Some of these sessions brought together representatives from specific groups within the music industry, such as managers; labels and publishers; lawyers and accountants; and artists and songwriters. Others brought together a cross-section of industry practitioners from within certain markets, including the UK, France, Canada and the US. In total we spoke with and heard from over 200 people.

'Dissecting The Digital Dollar Part Two' provides a summary of what was discussed, an overview of the opinions expressed, and recommendations for what the management community in particular might do to address key issues with the way digital services are licensed, and digital royalties processed and shared.

The roundtable discussions were structured around seven key themes: **Division Of Revenue, Performer Equitable Remuneration, Sharing The Value Of The Digital Deals, Transparency, The Role Of The CMOs, Copyright Data** and **Safe Harbours**.

1 | Division of Revenue

SUMMARY

▶ Participants from all the stakeholder groups represented at the roundtables agreed that it appears reasonable for the digital service providers (DSPs) to aim to keep approximately 30% of revenue, so that approximately 70% is paid to the music industry in total. Participants also noted that, because of the minimum guarantees and advances that the DSPs also commit to pay under their current deals, few services actually kept 30% of their revenue anyway.

▶ All but the representatives of the record companies felt that the way streaming income is currently split between the recording rights and the publishing rights – so that the owners of the former are paid four to five times more than the latter – feels inequitable. Few advocated a 50/50 split, with most people conceding that labels still took considerable risks when releasing new music, especially from new talent, though it was felt those risks were less significant than in the CD era. Label representatives argued that their risks were actually as high as ever, despite the fall in recording, manufacture and distribution costs.

▶ Both artists and their representatives felt that the split between labels and artists was also outdated. This obviously varies greatly across the industry, because every record deal is different, but the consensus was that labels should be paying artists a higher royalty on streaming than on CDs, and more than just a few per cent higher, again because of a feeling that the labels' risks are lower in digital than in physical.

▶ There was a particularly strong feeling that a higher rate should be paid to heritage artists – who are often still on lower rate legacy deals – in part recognising that digital has greatly reduced the labels' costs in exploiting catalogue. This is an issue Article 15 of the draft Copyright Directive recently published by the European Commission seeks to address through a 'contract adjustment mechanism'.

▶ Both artists and their representatives also raised the issue of deductions and discounts, the fees charged by labels before calculating the artist's share and reductions in the royalty rate paid resulting from certain exploitations of a recording. Some felt that this was actually the bigger issue, and that labels needed to be much more open about exactly what deductions and discounts are being applied to digital income. This would enable an informed debate between labels and managers about

what deductions and discounts are appropriate, especially for heritage artists where physical era deductions have sometimes been applied to digital.

MMF ACTIONS

▶ Artists and managers call on record companies to offer better royalty rates to artists on streaming income, especially heritage artists with pre-digital contracts. They will concurrently investigate if applying Performer Equitable Remuneration to streaming might provide a better minimum rate for performers.

▶ Managers support Article 15 of the draft European Copyright Directive, and seek further clarification on how a 'contract adjustment mechanism' might work in practical terms. Managers of British artists will also lobby for such a mechanism to be introduced into UK copyright law even if the proposed new Directive comes in to effect after the UK leaves the EU.

▶ The MMF will further explore the label services sector in order to compare and contrast current deals on the market and available to artists. Ensuring managers are informed on the variations in short term gains and long term debts in different deal types will be a key priority for the MMF. This may result in commercial pressures being put on labels to offer better contract terms.

▶ Managers will call on labels to declare what deductions and discounts are being made on digital income, especially on pre-digital contracts where these are wide-spread. This information could be used to inform a separate debate within the management community as to which deductions and discounts, if any, are reasonable in the digital age, and then put further moral pressure onto the record companies to address this issue.

▶ A stream is not a sale or radio and yet is akin to both. Artists and managers accept that song rights should expect a greater share of streaming income that could be somewhere between a sales royalty and a radio compensation. Further research is needed to provide guidance on one of the fundamental issues of the recorded music industry.

▶ Managers and creators could also investigate and take competition advice on whether the dominance of the three major music companies in both recordings and publishing distorts the market by influencing the retention of the status quo. This power over the relative income flows is to the detriment of creators.

▶ Organisations representing songwriters could commission further research into the specific issues facing full-time songwriters in the streaming domain, and assess whether a re-positioning of the split of income between the recording

and song rights would go some way to tackling these issues.

2 | Performer Equitable Remuneration

SUMMARY

▶ Artists and their representatives felt that Performer ER should perhaps be paid on streaming income, assuring featured artists a guaranteed minimum royalty on streaming revenue. This would also provide a new income stream for session musicians, who are set to lose out if the growth of streaming ultimately results in a decline in the royalties paid by radio stations, on which Performer ER is currently paid.

▶ Label representatives were against Performer ER being paid on streaming income. This was in part because of an assumption that Performer ER would mean a 50/50 split between labels and artists, would require collective licensing of all streaming income, and might equate to compulsory licensing in some countries. Some labels also again argued that their risks remain high and any system that resulted in increased artist royalties could destabilise their business.

▶ Most managers agreed that forcing collective licensing onto the streaming market would be risky, especially if it involved the more effective collecting societies relying on the less effective collecting societies in other markets. Some also pointed out that the law does not define 'equitable remuneration' and Performer ER need not be a 50/50 split between labels and artists.

▶ Despite recognising the issues, many managers felt that Performer ER on streaming was still something worth considering, especially if an alternative system could be created for collecting and distributing Performer ER, making it less reliant on collective licensing. This would almost certainly require a change to copyright law though, and what is possible would likely vary from country to country.

MMF ACTIONS

▶ Artists and managers will investigate the possible approaches to achieving Performer ER on streaming, and assess if and how that would be possible under different copyright systems.

▶ The MMF will then consult with other organisations representing artists and managers on whether this is something to campaign for, either by lobbying for a change in or clarification of copyright law, or by pursuing a test case in court

on whether a stream constitutes a straight communication or rental, rather than (or in addition to) making available.

▶ Artists and managers will seek confirmation from the labels that they agree Performer ER is due on online radio and personalised radio, and clarification as to how this is paid when such services are licensed directly rather than collectively, especially in the US and UK where the same CMO – ie SoundExchange and PPL respectively – represents both labels and (at least some) performers.

3 | Sharing the Value of Digital Deals

SUMMARY

▶ Artists and their representatives felt strongly that labels and publishers should share the profits of all elements of their DSP deals, including the profits that stem from equity, unallocated advances and set-up fees. While opinion was divided on the labels' legal obligations here, it was universally felt that there was an ethical obligation.

▶ Artists and their representatives recognised and welcomed those commitments that had already been made by both major and independent record companies to share any profits stemming from equity sales and unallocated advances.

▶ However, there remains much confusion as to how these commitments will actually be delivered, with some noting that – especially at the bigger record companies – specifics and sometimes even the basics about these commitments had generally not been communicated internally, let alone to artists and their representatives. There also remains the unknown as to whether the set-up fees charged by some record companies included a profit margin.

MMF ACTIONS

▶ Artists and managers call on those labels and publishers yet to fully commit publicly to share the value of equity and/or unallocated advances with their artists to do so, either individually, or by signing up to the Worldwide Independent Network's Fair Deals Declaration.

▶ Artists and managers call upon labels and publishers to explain in more detail to all contracted artists how previous commitments to share the value of digital deals will be delivered, and to be more specific about which equity and unallocated advances

the commitments relate to. In addition we will seek explanations as to what the upfront fees relate to and whether any profit is made on those fees.

4 | Digital Transparency

SUMMARY

▶ There are many questions about the deals done between the DSPs and the record companies and music publishers – and about the way digital revenues are processed – which remain unanswered.

▶ Artists and managers say that they need access to this information to properly audit the monies they receive from labels and publishers; to identify which streaming services best serve their interests and should therefore be most proactively supported; and to assess which labels, publishers and distributors they should seek to work with in the digital domain.

▶ Labels and publishers commonly cite NDAs and competition law as reasons for not sharing at least some of this information. Managers in the main are not convinced by the NDA explanation, though the competition law point likely requires more consideration.

▶ Other reasons that labels and publishers may not be actively sharing key information about digital deals and royalties might include a need-to-know culture, a lack of resource to communicate complex and ever-evolving deals, and ignorance at the top of some music companies that this information is even required. Some managers also felt that some labels and publishers may be benefiting from the lack of transparency financially.

▶ Article 14 of the draft Copyright Directive recently published by the European Commission acknowledges some of these transparency issues and states that: “Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due”.

MMF ACTIONS

▶ Artists and managers will agree what information is required, publish it and clearly state this to all labels and publishers.

> **“The single biggest issue is the total lack of transparency. How can we all work together to grow the streaming market when we are not allowed to know which services most benefit our artists?**

▶ Artist and managers support Article 14 of the proposed European Copyright Directive and its proposal to introduce a ‘transparency obligation’ incumbent upon rights owners. They will also seek more clarity on what that transparency obligation would cover and will promote the above mentioned list of what information is required by artists and managers to law-makers as well as labels and publishers. Clarity should also be sought on the proposed limitations of the ‘transparency obligation’, so as to ensure it will be enforceable in practical terms.

▶ Managers of British artists will also lobby for such an obligation to be introduced into UK copyright law even if the proposed new Directive comes in to effect after the UK leaves the European Union.

▶ Artists and managers will ask DSPs to publicly state that they would be happy for key deal information to be shared with artists and their representatives as some have already said this off-the-record.

▶ Managers will seek assurances from competition regulators in key countries that the sharing of key deal information with artists and their representatives would not result in action being taken on competition law grounds.

▶ Artists and managers will push for royalty as well as consumption data to be shared directly with artists and their representatives by the DSPs, so that managers can better audit digital royalties and what happens to income as it passes through a label or publisher.

▶ Managers could champion the most transparent labels and publishers which adopt best practice in sharing deal information and digital royalty reporting.

5 | The Role of the CMOs

SUMMARY

▶ The labels license most streaming services directly rather than through the collective licensing system, and in the main the record companies maintain that this is the best approach.

▶ The publishers primarily license streaming services through their collecting societies, though the big five often license Anglo-American repertoire directly. Many publishers seemed to think that, if anything, there would be more direct licensing of digital in the future.

▶ Artists and songwriters generally prefer collective licensing, and would like more digital services licensed this way.

Collective licensing can benefit artists and songwriters financially, though another reason for supporting the collective approach is a feeling that everyone should be paid the same for any one stream, rather than what you earn depending on what deal your label or publisher did with the DSP. Many artists and songwriters also trust their CMOs more than their labels and publishers.

▶ Managers recognise that, while their artists and songwriters may prefer collective licensing, there can be problems with the CMO model. While there are good collecting societies, there are also less efficient CMOs, and the latter may be relied upon to collect some international royalties. Some CMOs are slow decision makers, lack transparency and charge high commissions and fees. In some countries courts or statutory bodies can intervene, which can result in royalties being driven down.

MMF ACTIONS

▶ Artists and managers will put pressure on the CMOs to address the specific issues with collective licensing and highlight those who are following best practice. This includes applying many of the transparency recommendations above to the collecting societies too.

▶ In Europe, artist and managers could communicate the issues – especially

around transparency – to whichever government agency has been given an oversight role by the CRM Directive. In the UK this would be the Intellectual Property Office.

▶ Managers will consider which of the other issues raised in this report could be better addressed through a collective rather than direct licensing approach.

▶ Artists and managers call on labels, publishers and CMOs to be much more clear on which services are being licensed directly and with what rights and which ones are licensed collectively in which territories.

6 | Copyright Data

SUMMARY

▶ Everyone agrees that bad music rights data is making the processing of digital royalties inefficient, though there is less consensus on what the solution may be.

▶ Many managers feel that the CMOs are best equipped to tackle this challenge, and should therefore be encouraged to do so. In particular, record industry and publishing sector CMOs should be encouraged to collaborate to identify which songs appear in which recordings.

▶ But not everyone agrees that the CMOs should lead on this, some questioning whether rivalries between societies, or a fear that better data could further reduce the role of the collecting societies in digital licensing, will hinder their efforts.

MMF ACTIONS

▶ Artists and managers should debate whether to support specific data initiatives or embrace all credible projects.

▶ Managers should encourage all data projects to enable artists, songwriters and their representatives to easily input information about new works into any databases created where that is the best approach.

▶ Managers should ensure that they are aware of what data is required to enable efficient payment of digital royalties, and where to check and amend this data. Organisations like the MMF will provide guidance and training in this area.

7 | Safe Harbours

SUMMARY

▶ The wider music industry seems to have made reforming safe harbours – the protections that enable opt-out streaming

“For me, the issues of safe harbours and transparency are closely aligned.

Obviously we all want the paid-for services to grow - and we all want the best royalties we can get - and perhaps certain services exploiting the safe harbour are distorting the market.

But when all the deals are shrouded in so much secrecy, it’s hard for me to have an informed opinion on these issues and where our priorities should lie.

services like YouTube – its top priority. The hope is that by reforming safe harbours, the liabilities of services like YouTube would increase, forcing their hand in negotiations with music rights owners, who want opt-out services to agree to terms more in line with those accepted by opt-in services like Spotify and Apple Music.

▶ Most roundtable participants shared the concerns about safe harbours and the way opt-out streaming services are licensed, though some managers were pessimistic about the industry achieving tangible reform. Since the roundtables, the European Commission has published its draft Copyright Directive in which Article 13 addresses this issue. Those lobbying on safe harbours, whilst welcoming the development, have generally called it a "first step" and it is as yet unclear exactly what new obligations would be placed on a YouTube type service.

▶ At the roundtables, some managers also pointed out the benefits YouTube in particular delivers as a marketing channel and micro-licensing platform.

▶ Some managers also stressed that transparency issues made it hard for them to truly assess the merits, or not, of YouTube compared to services like Spotify and Apple Music.

MMF ACTIONS

▶ Artists and managers will continue to support the wider music industry's campaign on safe harbours – including further lobbying efforts around Article 13 of the proposed European Copyright Directive – and also continue to stress that a deal on transparency throughout the value chain is essential in reaching an agreement for the whole music industry.

▶ Managers may also want to take the lead and consider possible 'Plan B' initiatives to tackle the challenges around opt-out streaming services, including wider discussions on how content is monetised and value is shared, and possible PR and technology solutions that could drive consumers to those services that offer the best deal for the music community, and/or pressure opt-out streaming services to agree to a better deal.

Introduction

In October 2015, the UK's Music Managers Forum published 'Dissecting The Digital Dollar Part One'. The objective of the report was to explain how the music industry is licensing streaming services, and the technicalities of copyright law, recording and publishing contracts, collective licensing and other industry conventions that have influenced the approach record companies, music publishers, collective management organisations (CMOs) and the digital service providers (DSPs) themselves have taken.

Part One of the report did not set out to critique or criticise the business model that has been adopted by most of the on-demand audio streaming services, or the approach the music industry has taken in licensing such platforms. Rather, it sought to explain how things are working for the benefit of the many stakeholders in the music community who have not been party to the discussions, negotiations and deals through which the streaming music licensing model has evolved.

Issues

However, the report did summarise seven key issues that have emerged as a result of the shift within the recorded music market from physical to digital, and even more so with the shift from downloads to streams, which is to say from a sales-based business model to a consumption-based business model. The seven issues were as follows...

1 The way streaming income is divided between different stakeholders: ie DSPs, record companies, music publishers, artists and songwriters.

2 The lack of clarity regarding performer equitable remuneration and the making available right in the digital music domain.

3 The lack of clarity and transparency around the deals done between the DSPs and the record companies, music publishers and CMOs, and the way the various benefits of those deals are shared with artists and songwriters.

4 The existence of 'opt-out' streaming services enabled by the safe harbours in American and European copyright law.

5 Inefficiencies in the processing of digital royalties caused by bad copyright data.

6 Uncertainties, disagreements and/or confusion about the role of collecting societies in digital licensing.

7 The challenges associated with the shift from a sales and album-based business to a consumption and single-track-based business.

The roundtable discussions

The aim of the MMF in commissioning and publishing 'Dissecting The Digital Dollar Part One' was twofold: to educate artist managers so that they can better advise and inform the artists and songwriters they represent, and to instigate a debate within the management and artist communities, and the wider music industry, about the issues that the report raised.

In order to facilitate and learn from that subsequent debate, the MMF staged a series of roundtable discussions in Spring 2016. Some of these sessions brought together representatives from specific groups within the music industry, such as managers; labels and publishers; lawyers and accountants; and artists and songwriters. Others brought together a cross-section of industry practitioners from within certain markets, including the UK, France, Canada and the US. In total we spoke with and heard from over 200 people.

The roundtable discussions were split into seven sections, in part based on the seven issues raised in Part One of the report. They were as follows:

1. **Division Of Revenue**
2. **Performer Equitable Remuneration**
3. **Sharing The Value Of The Digital Deals**
4. **Transparency**
5. **The Role Of The CMOs**
6. **Copyright Data**
7. **Safe Harbours**

Introducing Part Two

In Part Two of 'Dissecting The Digital Dollar', we present an overview of the key themes, points and opinions that were raised during the roundtable sessions. We will then make a number of recommendations regarding how some of the issues raised in Part One could be addressed, in some cases by the management community specifically, and in other cases by the music industry at large.

These recommendations will include more clearly stating the management community's objectives and concerns, seeking reforms by industry agreement, providing new educational tools to managers, and, in some cases, campaigning for regulatory change where voluntary reforms cannot be achieved.

“Should the labels still be getting the largest slice of the pie, when they have no manufacturing costs, no distribution costs? You could argue the marketing costs have gone up, but it seems to me all the other costs on the record company’s side have essentially come down”

“OK, we are not manufacturing and we are not putting CDs on a truck. But those two elements were actually a tiny bit of the cost of putting out music anyway, probably less than 10%. The biggest costs when putting out music are A&R, marketing and the label’s overheads. Those haven’t changed”

1.

Division of Revenue

Most of the licensing deals done between on-demand streaming services and record companies, music publishers and CMOs are, at their heart, revenue share arrangements.

▶ Each month each DSP calculates total revenues (after any sales taxes have been paid) and the total number of streams recorded for each variant of its service in each territory.

▶ It then works out, of all the tracks streamed, what percentage was of recordings or songs controlled by any one label, publisher or CMO (actually, with songs, the publisher and CMO usually works this out).

▶ Each label, publisher or CMO is then allocated a percentage of the total revenues generated, based on the percentage of overall consumption their respective repertoires accounted for.

▶ The label, publisher or CMO is then paid a percentage of that sum based on the revenue share they agreed with the DSP.

That said, it is worth noting that most licensing deals also include various minimum guarantees to the rights owner's advantage. This will usually include a guaranteed minimum rate per stream. So, having completed the process above, the DSP will multiply the number of streams associated with the rights owner's repertoire by the per stream minimum. If that figure is higher than what is due under the revenue share arrangement, it will pay the higher rate to the rights owners.

In many cases DSPs are still paying rights owners at the minimum per-stream rate rather than based on the revenue share arrangement, because the former is more likely to exceed the latter until a streaming service reaches a certain scale.

This means that overall the DSP rarely keeps hold of anywhere near the share of income it would be due under its revenue share arrangements. This is one of the reasons why most (if not all) DSPs are currently loss-making, and for that reason, you have to assume that the minimum guarantees are ultimately unsustainable.

The digital pie debate

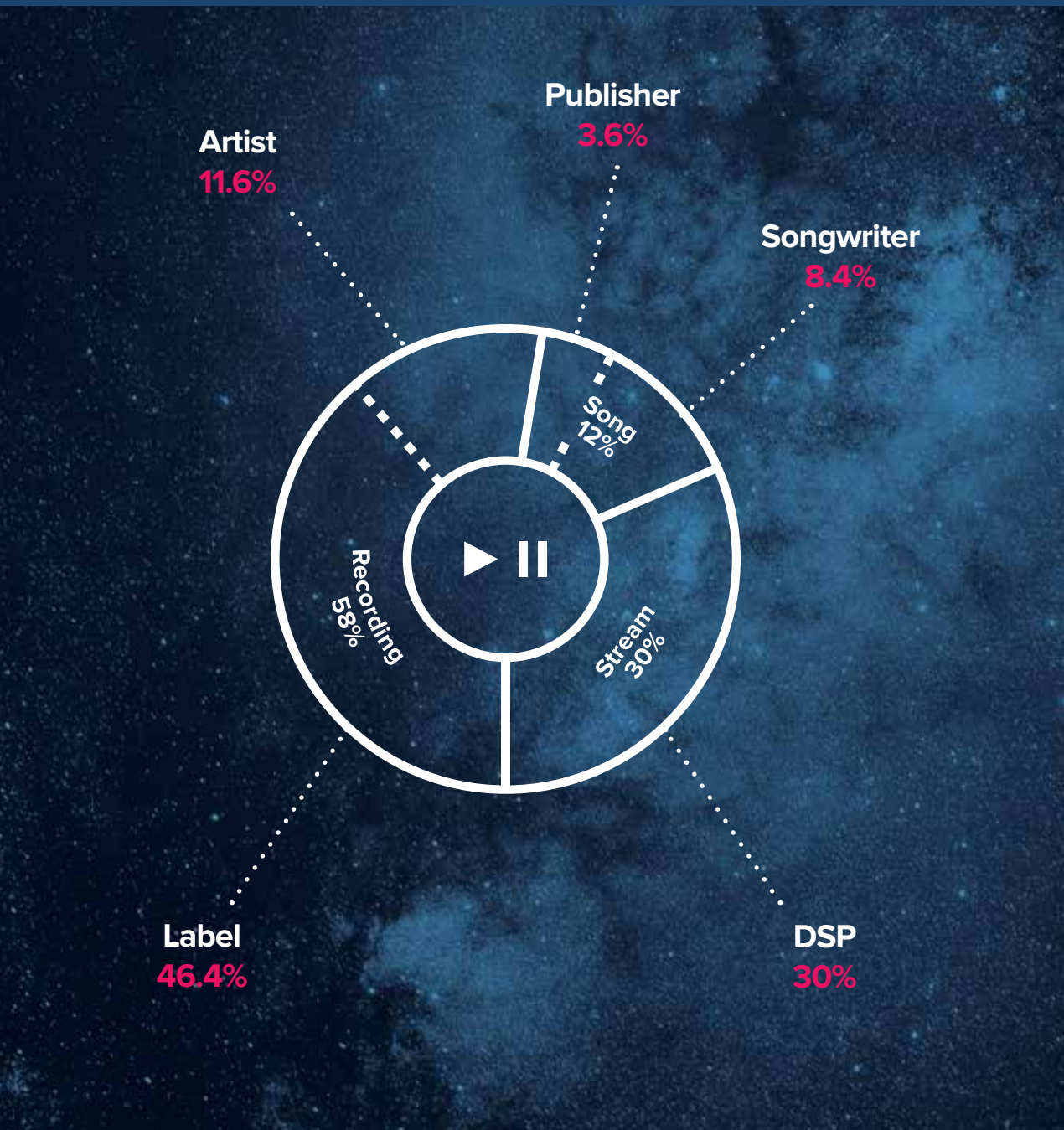
Either way, discussion around the division of streaming revenue – sometimes called the 'digital pie debate' – usually focuses on the rights owners' respective revenue share arrangements.

Partly because that is the core of the deal; partly because it is the part of the

The Digital Pie (right) ▶ Approximate guide to how streaming revenues are shared between stakeholders. Artist share based on a 20% royalty contract. Songwriter share based on the publisher taking 30% of revenue. Deductions and discounts, discussed later, could further reduce the artist's share.

The Digital Pie

HOW THE DIGITAL DOLLAR IS SHARED BETWEEN STAKEHOLDERS



How Revenues Are Calculated

THE EQUATION FOR EACH TIME PERIOD (APPROX 1 MONTH)

1 Calculate Revenue

Net revenue of DSP

÷

Total tracks streamed by DSP

X

Label's % of consumption

= £X

2 Calculate Share

£X

X

Share % agreed

= £Y

3 Final Payment

Is £Y greater than the minimum per play rate?

YES

Revenue share £Y paid

NO

Minimum per play rate paid

Flow of Money for Recording Rights

HOW MONEY FLOWS FROM DSP TO ARTIST

Flow of Money for Song Rights

HOW MONEY FLOWS FROM DSP TO SONGWRITER (IN EUROPE)

deal likely to exist in the long-term; partly because respective revenue shares influence what minimum guarantees are paid anyway; and partly because artists and songwriters are usually also on revenue share arrangements with their labels and publishers.

In terms of how the money is shared between the different stakeholders, we can only ever talk in approximate figures, because every rights owner has its own arrangement with every DSP. Each arrangement is different, and most are secret. However, in the main, labels will usually see 55-60% of revenue, publishers and their CMOs 10-15% of revenue and the DSP the 25-30% that is left.

The label then shares its streaming income with the artists it has signed. On what terms will depend on the artist's record contract or distribution agreement. For those artists signed to conventional record deals, the label will usually pay a similar – though often slightly higher – royalty on streaming income than it does on CD and download sales.

Again, every contract is different, and industry norms and CMO conventions vary from country to country, though the songwriter would expect to see at least 50% of income generated by their songs, some of it subject to the recoupment of any advance paid by the publisher.

1.1 The industry/DSP split

As we noted above, under the revenue share agreements it reached with each respective rights owner, the DSP would likely keep between 25-30% of the revenue it generated through subscriptions and/or advertising sales.

It's not that some DSPs are on 25% and others are on 30%, although some newer entrants to the market have claimed that they are offering slightly more favourable terms to rights owners than their competitors.

However, different revenue share arrangements are made with each rights owner, meaning the percentage of income shared varies depending on which rights owners control any one recording, and the song contained within that recording. So, for the DSP, some streams are more expensive to deliver than others.

Assessing the current industry/DSP split

Either way, on average a DSP – if it were paying out on its revenue share arrangements rather than on minimum guarantees – would be keeping somewhere between 25-30% of its income. Some in the music community, particularly in the US, have suggested that the music industry should be pushing to keep a higher share of streaming revenue long-term, maybe as high as 80%.

Presumably pre-empting such demands, the UK's Entertainment Retailers Association, which represents many streaming services, included a

quote from an anonymous executive at a DSP in a 2015 report it published that said: "70% is tough enough, but at 80%, we would have to shut up shop. Somebody should explain that 80% of nothing is... nothing".

It's a point that many in the music industry seem to accept. Certainly across our roundtables, opinion was almost unanimous that 30% was a perfectly fair cut for the DSPs to take. Which means growing streaming revenues across the board, while reviewing how income is then shared between stakeholders within the music industry, are the priorities, rather than trying to pressure the digital platforms to take a smaller cut.

Though many participants also actively noted that most DSPs are currently loss-making. A possible implication of that observation is that many feel it would be unfair to pressure the digital platforms on this point right now, when they are already haemorrhaging cash on minimum guarantees and aggressive growth strategies. But perhaps once the market matures and services, hopefully, go into profit, then there might be a case for reviewing the DSP's share.

That said, the fact most DSPs are currently loss-making might result in the streaming companies actually seeking a higher overall revenue share than 30% before the market matures, and indeed there have been rumours of certain services seeking a higher share in some recent licensing negotiations with the labels.

Managers generally felt that it was more likely the minimum guarantees rather than the DSPs' current revenue share that was, in fact, hindering the profitability of the streaming companies, and therefore the better time for reviewing revenue share arrangements was possibly further down the line. Though, because of the lack of transparency around these deals – more on which later – it is hard for managers to have informed opinions on such matters.

Two other interesting points were raised in relation to the DSP's cut:

- First, one artist manager stressed that up to 30% seemed like a fair cut for the DSP to take, provided some of that money isn't used to fund kick-backs to record companies over and above the royalty payments they receive each month, the latter of which is shared with artists. This, though, is basically a transparency point that we will come back to later.

- Second, the representative of one major rights owner observed that, with record companies and music publishers negotiating separate deals with the DSPs – and artist groups possibly seeking additional equitable remuneration payments in some countries – the digital platforms were possibly being subtly pushed closer to the lower end of the 25-30% bracket.

Which might be clever negotiating on the music industry's part, unless the difference between, say, a 26% revenue share and a 27% revenue share is the difference between success and failure for the DSPs. Which is to say, with streaming accounting for ever more significant percentages of the recorded music market, while rights owners are right to push for the best possible deals, no one wins if none of the DSPs can become profitable businesses in the medium-term.

1.2 The recording rights/song rights split

As we noted above, record companies are generally on a revenue share of 55-60%, while publishers and their CMOs are generally on a revenue share of 10-15%. Which means that generally the recording (or master) rights exploited by the streaming services generate four to six times more revenue that the concurrent publishing (or song) rights.

Origins of the recording rights/ song rights split

This discrepancy has come about because the starting point for negotiations around digital royalties was the way monies were traditionally shared when a compact disc was sold. By convention – and in some countries as a result of compulsory licences where rates are set by statute – when a CD is sold the owners of the publishing rights being exploited commonly see less than 10% of the money generated.

This split was generally accepted because of the investment made and risk taken by the record companies in releasing and distributing CDs, from the costs of recording new music to begin with, through the manufacturing and distribution of discs, and the costs of marketing both the artist and the release. These are particularly risky investments, of course, when working with new artists, where significant record sales are far from assured.

As recorded music sales started to shift from physical to download, the music publishers sought to increase their share of the income, arguing that without the need to manufacture and distribute physical discs, the record companies' costs and risks were lowered. A further push for a higher share was then made as the record industry started to move from downloads to streams.

In the main the publishers were successful in increasing their share, especially during the latter shift to steaming, albeit by a few percent. Quite how significant that increase is depends on what perspective you take. Some have argued that streaming is actually more like radio than it is a CD sale, and – while it varies from country to country – broadcasters often pay more or less the same royalty to the songwriters and publishers as they do to the artists and labels.

Assessing the current recording rights/song rights split

So is it fair that the recording rights receive such a bigger share of streaming income than the publishing rights? Opinion was divided at our roundtables, though normally according to the background of the participant.

Perhaps unsurprisingly, those representing record companies generally supported the status quo. They rejected the idea that streaming was a replacement of radio rather than CD sales, and stressed that they continued to spend much more heavily and take much greater risks with new music than the publishers, and that they therefore needed and/or deserved a bigger cut of the income generated.

And while label reps conceded that the shift to digital had removed some of the risks and costs that came with physical releases – because no (or less) physical product needs to be manufactured and distributed – they generally argued that, actually, in the relative scheme of things, those were never the most significant costs associated with releasing new music anyway. Meanwhile, they argued, in an increasingly crowded market place other costs such as marketing had actually gone up in the last decade.

Some of those coming from a legal background – including those representing artists and songwriters – were also supportive, to an extent, of the status quo. In that, while they reckoned there was a case for saying publishers should see a bigger cut of digital income compared to physical income, because the labels' costs and risks are lower, they felt that had, in fact, already been achieved. In some cases, they noted, the songwriter/publisher share of streaming income was double that of physical income in percentage terms.

However, the songwriters and publishers participating (again, perhaps unsurprisingly) – but also most of the artists and managers too – felt that the current split of streaming income between the two sets of music rights is unfair. Though, while the consensus amongst these participants was that the publishing rights should be getting more and the recording rights therefore less, people had less strong opinions about what the split should actually be, or how any rebalancing might be achieved.

That said, no one seemed to be advocating the 50/50 split that is common in radio in many countries (except the US, of course, where currently radio pays no royalties to the owners of recordings). Most people seemed to accept the argument put forward by the labels that they still invest more and take more risks, they just felt that those investments and risks were less in digital than in physical, and therefore – while the labels should still see more than the publishers – the difference shouldn't be as marked as it is now.

Rebalancing the recording rights/ song rights split

Achieving any significant rebalancing of the recording rights/song rights split would be a challenge because the record companies and the music publishers negotiate with and license the DSPs separately.

In the CD domain, the publisher licenses the label, which then provides the product 'rights ready' to the retailer. Therefore there is a negotiation between the labels and the publishers as to what cut the latter should receive (even if that rate is sometimes actually set by a compulsory licence or copyright court).

With streaming, the DSP usually does its deals with the labels first, and then negotiates with the publishers and their collecting societies second, having already committed up to 60% of its revenues to those who control the recording rights. Which means the labels and the publishers never directly discuss what would be a fair distribution of streaming income between the two sets of music rights. Rather the publishers push for a bigger cut from the DSP, which then has to either accept a lower share for itself, or go back and try and negotiate a discount from the labels.

One solution would be for the publishers to adopt a model more akin to CDs, which is to say to license the labels not the DSPs. This would provide the platform via which the division of streaming income between recording and publishing rights could be discussed and negotiated. The record companies would then provide content to the streaming platforms with all rights covered. The publishers call this 'pass through licensing', and downloads are licensed this way in the US and some emerging markets.

However, the publishers taking part in the roundtables were pretty much unanimous in rejecting this approach for streams, mainly because they don't trust the labels to pay publishing royalties in an accurate or timely manner.

Of course, many music rights companies – including all three major players – own both record labels and music publishers, so there is actually a forum for this debate to take place at the top of these businesses.

Though by convention, labels usually pay artists a minority share of income generated by their recordings, whereas publishers usually pay songwriters a majority share of income generated by their songs, therefore the status quo is to the benefit of these companies overall. Which is to say, those corporations with significant interests in both recordings and publishing will make a bigger margin overall if more streaming revenue is allocated to the former rather than the latter.

Any moves to rebalance the recordings rights/song rights split, therefore, would probably have to be driven by music rights firms who predominantly or

“For professional songwriters whose only income is on the publishing side – as it is set up now, it’s appalling. Their income is diminishing drastically – I know, because I see the royalty statements – that side of the business is being decimated.

exclusively own or control song rights and/or the songwriter community.

A campaign of this kind might want to start by considering whether the built-in bias of those companies who own large catalogues of both recording and song rights might be causing some kind of market distortion on this issue.

Justification for altering the recording rights/song rights split

Most of those who advocated a rebalancing of the recording rights/publishing rights split at the roundtables seemed to have one of two motivations.

The first group simply felt that the labels seeing four to six times more money than the publishers was unfair. This was mainly because of the aforementioned argument that “the labels may still take more risk than the publishers, but it’s less risk overall”.

Though one manager also floated the idea that in streaming, where repeat listening is so important, perhaps the song is a more important and therefore more valuable commodity. In that you could argue that while the label’s marketing secures the first few listens, it’s the quality of the song that assures sustained repeat listening over time.

The second group included the songwriters, and those managers and lawyers who represent full-time songwriters (as opposed to singer songwriters who also perform). This group’s thinking was more pragmatic,

which is to say it was more driven by necessity than any notion of what is fair: ie there is a widespread belief that the streaming business model simply isn't working for full-time songwriters.

The impact of streaming on songwriters

The songwriting community has become particularly vocal in recent years about streaming income, with many songwriters publicly bemoaning the royalties they are seeing from the streaming services, stating that they are unsustainable and will result in many full-time songwriters going out of business.

In the public domain, this is often positioned as the songwriters versus the DSPs, ie that the problem is that the streaming services are simply underpaying the songwriters. This narrative has been particularly prevalent in the US; though in America the compulsory licence covering mechanical rights and rate court interventions on performing rights do complicate matters further, and there may well be fault on the DSPs' part in that market.

However, given what we said above about the general consensus regarding the DSPs' share of streaming income – ie that up to 30% is fair – then the root of this problem is something else. Is it the recording rights/publishing rights split? Would rebalancing this split help overcome current issues within the songwriting business?

That said, arguably more in depth research is required about the issues that are specifically facing songwriters in the streaming age, because there are other factors.

For starters, there are the various extra complexities that apply to the way publishers and the CMOs deal with the DSPs...

- There is a complicated combination of both direct and collective licensing.

- Money can move through a number of entities between DSP and publisher/songwriter, meaning multiple commissions and fees may be charged.

- The lack of a central copyright database means rights owners must crunch usage data and then claim what they think they are due in retrospect.

- In the US – the biggest recorded music market – there are the widely documented problems with mechanical royalties.

Add to that, there is also the harsh truth that the streaming market favours hit writers and large catalogue owners. A songwriter gets their cut of an album sale oblivious of how many times a customer actually listens to their song. But in streaming, only the songs that are listened to again and again generate decent royalties for the songwriter, and even then

over a period of time, rather than predominantly around an album's release.

A more thorough review of these matters is probably required to address the issues that are facing songwriters, because simply allocating a few more percent of streaming income to the publishing rights rather than the recording rights may not actually fix the problems. And certainly just shouting at the DSPs that songwriters can't make a living in the streaming age won't achieve anything at all.

1.3 The artist/label split

What portion of the streaming revenues allocated to the recording rights is then paid to the recording artist depends on each artist's deal with their label or distributor.

The artist's cut can vary greatly, from a few percent for heritage artists still being paid royalties on 1960s contracts, to 100% for artists who basically self-release their recordings and use a digital distributor which charges a set fee per track or album uploaded rather than taking a cut of future income.

However, artists who sign a conventional record deal with a conventional record company – a deal that will usually involve the assignment of any sound recording copyrights to the label (or as close as the local copyright regime allows) – will usually receive a minority share of core revenue moving forward, with 15-20% being a common royalty paid by the majors and bigger independents.

Assessing the current recording rights/song rights split

Most of the artists and managers taking part in the roundtables felt that the artist cut was too low; to which you could respond "well they would say that, wouldn't they?" But, perhaps more importantly, most artists and managers felt that the artist's cut on streaming income was too low when compared to their cut on physical sales.

As noted above, most labels pay a similar royalty on digital income than on CD sales, maybe offering a few percent more on downloads than discs and a few percent more on streams, hence the royalty scale of 15-20%. But most of the artists and managers taking part in the roundtables felt that the artists' cut on streaming should be more than just a few percent higher than their cut on physical.

The arguments for this are pretty much the same as the arguments used by publishers as to why their cut should be higher, ie the labels costs and risks are lower in the digital domain compared to the physical domain. The labels counter these arguments in exactly the same way as they did with the publishers' claim for a higher cut above: that in the wider scheme of things CD manufacture and distribution was a small part of the budget, and marketing costs have gone up.

The distinction between heritage artists and new talent

In terms of artists pushing for a higher cut of streaming income, the case is arguably stronger for heritage artists than it is with new artists.

The record contracts of heritage artists don't specifically mention digital services, and there has been much debate over how the labels have applied royalty clauses in those contracts to digital income. Legacy contracts also won't mention the 'making available' control that was added to copyright in the 1990s, and which digital services arguably exploit, yet under performer right rules the label needs permission from the artist to monetise this element of the copyright. And beyond legalities, there is an argument that it is simply unfair to still be paying single figure royalties to some heritage artists when digital, and especially streaming, has made it so much simpler and cheaper for labels to exploit catalogue.

With that in mind, participants – except for those representing record companies – were pretty unanimous in their opinion that the labels should offer heritage artists a better deal on streaming income. Even some of those speaking for labels conceded that some goodwill gestures might be appropriate in this domain.

Though there remains the question on what basis a record company, especially a major music company, would make such a goodwill gesture. Would it be seen as primarily a PR initiative, to improve the corporate reputations of major players, or to encourage heritage artists to promote catalogue streaming through their own communication channels? If not, this raises the issue of whether major music companies have a greater obligation to shareholders than artists, or whether there is an equal duty of care to both stakeholders.

Either way, few of the artists, managers and lawyers advocating a better deal for heritage artists seemed to expect any such roster-wide goodwill gestures to be forthcoming, especially from the major record companies. High profile heritage acts could, and probably have negotiated better terms, but a better deal across the board would likely only be achieved by a landmark ruling in court over contractual interpretation or a change in copyright law. Both of which managers generally felt they should support.

In terms of a change to the law, this could be a statutory clarification on if and when performer equitable remuneration should apply to digital music, more on which in section two below. Or it could be some kind of 'contract adjustment mechanism', as is proposed in the draft European Copyright Directive recently published by the European Commission.

This states that "Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the

exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances". Which is a good starting point but probably needs more work, plus separate proposals may be required in the UK if it exits the European Union before this Directive comes into force.

When it comes to new artists, opinion was more divided. Although most artists and managers still felt that the artist royalty on streaming should be more than just a few percent higher than on physical, others – including some managers – asked why, if an artist and manager are so unhappy with the streaming royalty they are receiving, did they sign a contract in which that royalty rate was clearly stated.

This is especially true when there are distribution and label services companies – and distribution and label services divisions at the majors – which will distribute content and, in some cases, provide other services like marketing while allowing artists to keep a much higher portion of their streaming income.

Now, of course, if an artist is seeking a serious level of investment, in terms of advance, recording budget and marketing spend, then a conventional record deal with a conventional record label may be the only available option, especially for new talent. And while there have been some attractive label services deals on the table in the last few years, these arguably rely on strong artist management to truly work, and not all managers necessarily have the skills or resources to deliver that success.

That said, if more new artists, and their management teams, were able to make a success of the label services approach, that would increase the options of new talent looking to further their careers, build fanbase and grow their businesses. Not only would artists going this route benefit from a higher cut of streaming income, but more artists going this route might put pressure on record companies at large to offer more favourable terms on all contracts in a bid to secure new signings.

To this end, sharing knowledge and expertise on label services deals, and how to make them work, might be a priority for organisations like the MMF. Meanwhile, it might be worth further reviewing the emerging label services sector. Some of the best deals of this kind have been done with loss-leading new players who are seeking to build market share, which might mean these deals become less favourable as the market matures.

Deductions and discounts

Another issue relevant here that was raised by a number of the artists, managers and lawyers taking part in the roundtables was the various deductions made and discounts applied by some

labels on streaming income before an artist's royalty is calculated. To quote the legal cliché, "20% may be fine and fair, but 20% of what exactly?"

Record labels have traditionally had the right to deduct some of their ongoing costs from record sales income before an artist's royalty is calculated, or to reduce the royalty rate paid for certain exploitations of a recording. In many cases this has been continued across into digital.

Some managers feel that this is where the real inequities in artist royalties occur, with the potential for deductions to wipe out the majority of the monies the artist is due.

Again this is probably even more of an issue for heritage acts, where deductions designed for the physical age have sometimes been applied to downloads and streams, even when doing so seems ridiculous, such as applying deductions for breakages, which relates to the damaged discs and packaging that needed to be paid for with physical releases.

For some of the managers taking part in the roundtables, deductions are actually a bigger issue than what percentage royalty artists are paid on streams. Again, this crosses over into transparency, as there is much confusion about what deductions are charged and on what basis, even on newer artist contracts.

Indeed, you sense that even those working at the record companies – especially the majors – are not actually aware of all the deductions that are being made before artist royalties are calculated. Mainly because of the way deductions are managed and made by the business affairs and royalty departments where a culture of 'pay out as little as you can' sometimes pervades. Meanwhile, those with direct relations with artists – such as in A&R and marketing – are often ignorant of these charges.

If an audit of all the deductions routinely being applied across different artist contracts was conducted, a conversation could then be had between the label, artist and management communities as to which of these charges seems fair in the streaming age.

More clarity on this issue would also help lawyers and managers know what to look for when negotiating record deals, and to identify which labels have fairer and more transparent policies in this domain.

Deductions And Discounts (right) ▶
Many record contracts allow labels to apply deductions and discounts to monies being paid to artists, sometimes greatly reducing the final sum paid over.

While not all these elements are included in most modern record contracts they may still remain payable in legacy contracts and in some newer contracts too. Again, transparency is an issue here, as quite what deductions and discounts are applied is often not clear.

Deductions and Discounts

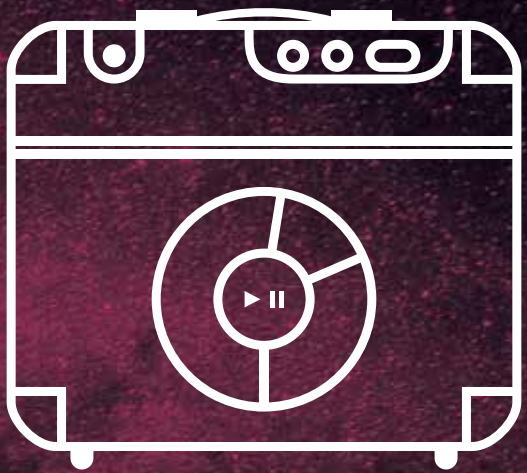
EXAMPLE OF PRE-DIGITAL CONTRACT APPLIED TO THE DIGITAL AGE

“It seems obvious to me that there should be equitable remuneration on streaming”

“If we had ER on streams, it would need to be a minimum rate, because artist deals vary so much. Artists with distribution deals – may be getting a higher rate already than what we are proposing they would get from equitable remuneration”

“It seems wrong to me that session musicians receive nothing from streams. If radio income does peak, that’s going to be a big issue for many session musicians”

2.



Performer Equitable Remuneration

In Part One of 'Dissecting The Digital Dollar' we explained the concept of Performer Equitable Remuneration – or Performer ER – and asked whether or not this principle should apply to streaming income.

2.1 What is Performer ER?

In most countries, copyright law provides a number of 'performer rights' that co-exist with the rights of the copyright owner, where the performer and the copyright owner are not the same person or entity. The key performer right is Performer ER.

This principle basically says that when the 'performing rights' of the sound recording copyright are exploited – so to use the terminology we adopted in Part One, that is either the performance or the communication control of the copyright – then any performer who appears on a recording has a right to "equitable remuneration".

Copyright law doesn't usually define what "equitable remuneration" means, though in most cases revenue generated by the exploitation of the performing rights of a sound recording copyright is split 50/50 between the copyright owner and the performers. The performers receive their share direct from the licensee, usually via a collecting society, which is to say the money does not first pass through the copyright owner.

The existence of Performer ER has a number of effects...

▶ When an artist signs a record deal, usually giving the label ownership of any recording copyrights created, the contract sets out how any subsequent revenue is shared. Except with performing rights, where Performer ER means an industry standard rate will always be paid to the performers (the specific details of which varies from country to country).

▶ After an artist signs a record deal, usually the label won't share any income until it has recouped some or all of its upfront and ongoing costs, as agreed in the record contract. But because Performer ER is paid direct to the artist via their collecting society, this income is not subject to recoupment, deduction or other contract terms.

▶ Perhaps most importantly, Performer ER is due to any performer who appears on a recording, which means session musicians as well as featured artists. The former aren't usually due a contractual cut of any other future income generated by the recordings on which they appear, they being paid a set fee at the start. But when performing rights are exploited, they receive a share of Performer ER.

Performer ER is generally a non-waivable right, which means that artists cannot give up the right to receive equitable remuneration under the industry-standard system in their record contract. This

makers Performer ER a pretty powerful right for performers, as labels can't strong arm artists into giving up this revenue stream in their deals.

2.2 What about digital?

It is generally accepted that the digital delivery of music exploits both the reproduction and communication controls of the copyright, which has led some to argue that Performer ER should apply to digital income too.

But in the main this has not happened. Labels – while happy for Performer ER to apply to public performance and radio, even online radio – generally don't want the system to apply to downloads and on-demand streams. To that end, they argue that most digital platforms [a] exploit a specific sub-set of the communication control called 'making available', which was added to most copyright systems in the late 1990s or early 2000s and [b] that Performer ER does not apply when the making available right is exploited.

The World Intellectual Property Organisation treaty that introduced 'making available' defined it as applying to an electronic transmission "in such a way that members of the public may access the recording from a place and at a time individually chosen by them". The treaty did not state one way or the other whether Performer ER should apply when this control is exploited.

In the discussion of Performer ER at our roundtables, most label representatives maintained their position that the principle should not apply to digital, except to those online services that are much more like conventional radio (in some countries, and especially the US, this has extended to personalised radio services like Pandora).

However, the majority of artists, managers and lawyers taking part felt that there was both a case for Performer ER being due on streaming income, and that it could be desirable for that to happen.

2.3 The benefits for Performer ER on digital

From an artist's perspective there could be various potential benefits to Performer ER being applied to streaming.

First and foremost, it might increase the share of streaming income the artist receives, meaning Performer ER could be one way to secure a bigger slice of the digital pie for artists. Though this would, of course, depend on what any one artist currently receives from their label or distributor, and what Performer ER on streaming would mean in financial terms.

For featured artists who self-release – especially via a distributor that charges a set upfront fee and no commission – Performer ER may actually result in less streaming income, in that the administration of Performer ER would likely incur a commission somewhere along the lines, and some of the income would go to session musicians.

But either way, Performer ER on streams would mean that all artists would receive a minimum cut of streaming income irrespective of record contract, that would not be subject to recoupment or deductions. And, of course, from a session musician's perspective, it would unlock a revenue stream that does not currently exist.

2.4 The case for Performer ER on digital

In terms of the case for Performer ER applying to streaming, various arguments were put forward for why that should happen: including legal, ethical and practical points.

First, there is the simple argument that Performer ER is legally due when the performing rights are exploited, and it's a fudge on the part of the labels to claim that because streaming technically exploits the 'making available' rather than the conventional communication control that principle shouldn't apply. In many countries making available was implemented in such a way that there is actually legal ambiguity on this point. But even in the UK, where making available is explicitly excluded from Performer ER in statute, some argued that this was still a fudge, even if it had been made law through some astute lobbying on the part of the record industry.

Second, while there probably is a case for saying that Performer ER should not apply to downloads, which are a form of sale – even if a download technically also exploits the communication/making available control – it should apply to streaming – which is a new format that combines elements of two key previous music delivery channels: ie sales and radio.

And third, because streaming services in part compete with traditional radio as well as traditional retail, the growth of streaming could have a negative impact on the traditional radio market, which means that Performer ER income from those services may start to decline. This will be a particular problem for those artists, especially session musicians, who depend on this income. It is also worth noting that the extension of the sound recording copyright term in Europe from 50 to 70 years was in no small part won because of the benefits to aging session musicians through Performer ER. But this benefit will diminish if radio royalties do indeed peak and no ER is paid on streaming.

2.5 The case against Performer ER on digital

When asked why they objected to the idea of Performer ER applying to streaming, the label representatives also had a number of different arguments.

Firstly, many people equate Performer ER with performers seeing 50% of income, and most labels state that that would be unworkable, and put many labels out of business.

Secondly, Performer ER usually means collective licensing across the board, and labels have in the main not used their collecting societies to license digital platforms (and especially fully on-demand streaming services). Many labels feel licensing digital via their collecting societies would ultimately reduce the royalties streaming services pay, while some also question the ability of some CMOs around the world to efficiently handle such deals and royalty payments.

And thirdly, in many countries Performer ER tends to go hand in hand with compulsory licensing, where copyright law forces rights owners to license certain groups of licensees, often at rates set by government or the courts. The vast majority of labels do not want such compulsory licences to apply to streaming and, possibly rightly, argue that such compulsory licensing for streaming services would not be in the interests of artists either.

2.6 Common ground

When we raised the labels' objections with the artists, managers and lawyers who supported Performer ER being applied to streaming, there was some sympathy for most of the points that had been raised.

While most artists would like – and think they deserve – a bigger share of the money paid to record labels by the streaming services, it doesn't necessarily mean they are pushing for a 50/50 split (except where the label deal is an indie-style 50/50 revenue share arrangement anyway, with lower upfront investment on the label's part).

We discussed in Part One that, for heritage artists, one aspect of the digital pie debate centres on contractual interpretation. Traditional record contracts often had one royalty rate for 'sales', which would be a lower rate, commonly 15% or less, and another for 'licence', which would often be a 50/50 split.

Labels have usually applied the sales royalty rate to digital, even though that income clearly stems from licensing deals with download stores and streaming platforms. Many heritage artists have objected to this, arguing streaming is a licence and therefore the higher royalty rate should be paid, which is commonly 50%.

For artists with pre-digital contracts, this is a position that is probably worth maintaining, even though legal efforts in the US to force labels to pay a licence rate on downloads didn't generally result in a huge increase in artist royalties. An ongoing legal dispute between 19 Recordings and Sony Music in America is currently exploring this issue in regards to streaming.

But with newer deals, artists and their representatives are not necessarily arguing that there should be a 50/50 split between artist and label, even if Performer ER was applied to streaming.

Most managers recognise that labels do still make sizable upfront investments, especially in new artists, and the wider industry relies on that investment, so that it's in no one's interest to advocate a revenue share that puts labels out of business.

And while pretty much all the artists and songwriters taking part in the roundtables were fans of collective licensing – for reasons we'll discuss later – many of the managers conceded that a collective licensing approach isn't necessarily the right way to go. A common line from the managers was that UK artists should be aware that not all CMOs around the world are as good as the ones they are direct members of, and that a move to collective licensing in streaming might mean labels and artists relying on less effective societies to collect income in certain key and emerging markets.

In the main managers also agreed with the labels that compulsory licensing in the streaming domain probably wasn't an ideal route either; though – while not necessarily endorsing that approach – some did argue that a compulsory licence might provide some of the clarity that is currently lacking in digital licensing.

2.7 Possible solutions

Although there is some common ground on the possible issues with applying Performer ER to streaming, the general feeling at the sessions with artists and managers was that it is still something worth pursuing – either as a lesser of two evils, or by finding an approach that could apply Performer ER in a way that would overcome the down sides.

A number of different ways have been proposed for how Performer ER might be applied to streaming, some working within current legal frameworks, others requiring either a change to copyright law or considerable (and probably unlikely) consensus across the music industry. These are as follows...

a. Performer ER is applied on top of current deals

In most countries, it is the responsibly of the licensee to ensure that performers receive equitable remuneration when the performing rights of sound recordings are exploited. Though because in most cases – such as radio and public performance – a collective licensing system is in place to collect for both labels and performers, it is not something that licensees usually have to worry about.

However, if performers believe they are due ER on streaming – either by arguing that a stream exploits the conventional communication control, or that ER is also due on making available – then one route is to simply demand payment from the streaming platforms. It is then for the streaming platforms to worry about whether to take a hit on ER pay-outs or whether to demand an equivalent discount from the labels (this will depend on how their deals with the labels are worded).

This is the route that has been taken in a small number of European countries. Aside from creating a squabble between the labels and the DSP as to who should pay for this, this approach also raises the question of what, exactly, equitable remuneration should be because, remember, copyright law does not normally say, and existing Performer ER systems run by the industry do not apply here.

In countries where this has been pursued, different figures have been proposed, sometimes just a few percent of the DSP's overall revenue, sometimes more.

From a featured artists' perspective, if the former was adopted – once any collecting society has taken its commission and the session musicians have been paid their cut – this might equate to a sum of money that frankly isn't worth fighting for. If a more significant percentage is pursued – and if a DSP is then unable to secure a concurrent reduction in what it pays the label – it could threaten the DSP's ability to operate.

In the UK there would be two further problems with this approach. Firstly, as mentioned above, making available is explicitly exempt from Performer ER in UK copyright law. So to make a demand for equitable remuneration, performers would have to either argue that streams in fact exploit the conventional communication control instead of (or possibly as well as) making available, or get a change to the law.

Secondly, under UK law it is the obligation of the copyright owner, rather than the licensee, to ensure performers receive equitable remuneration. Therefore performers would have to demand payment from the labels rather than the DSPs. This would save the squabbling between the labels and DSPs as to who should take the hit to allow Performer ER to be paid, but would require artists to take on the record companies. And then there is the added complication that UK artists use the labels' collecting society – PPL – to manage and collect Performer ER.

b. Streaming is treated as rental

Although previously in 'Dissecting The Digital Dollar' we have only talked about Performer ER in the context of performing rights, the concept often also applies when the separate rental control of the copyright is exploited.

We discussed earlier the opinion that streaming is not a straight replacement for music retail, but rather it is a new format. Some people have noted that a simpler definition of streaming is that it is digital version of rental – subscribers are basically renting the music in the DSP's library for a period of time, ie until their subscription expires.

Copyright law doesn't define which controls of the copyright a stream exploits, and it is simply the industry that

has decided that both the reproduction and communication – probably making available – controls are exploited. The music publishers have generally given this matter much more consideration because of the traditional split of reproduction and performing rights in the way songs are licensed.

But what if streaming was to be simply defined as 'rental'? Then whatever performer ER system already exists for rental could be applied to streaming. Artists would almost certainly see a significantly better slice of the digital pie this way.

Though there are probably issues with this approach too. First, it would be a radical departure that the labels would likely strongly oppose. Second, it could force the music industry into collective licensing for streaming, the possible issues of which were outlined above. And third, presumably such a definition would need to be applied across the board, meaning the move would impact on the way the publishers license DSPs as well.

And beyond the problems, there is the question as to whether streaming would actually comply with the specific legal definition of 'rental' in any one body of copyright law, beyond the more general definition of 'rental' as it is understood in the wider world. Some copyright systems define rental pretty narrowly in a way that may well block any distribution platform that did not involve physical copies.

c. Performer ER is applied to the 'performing rights' portion of current deals

As mentioned above, it is generally accepted that a stream exploits both the reproduction rights and the performing rights of the copyright (more specifically the reproduction control and the communication and/or making available control respectively).

In music publishing, where these two elements of the copyright have traditionally been licensed separately, this has created a challenge that has been met differently in different countries, according to local industry conventions.

But in the UK, streaming income is split so that some is allocated to the reproduction – or 'mechanical' – rights and some is allocated to the performing rights (ie the communicaton and/or making available control).

The former is then paid entirely to the publisher, which then pays the songwriter a royalty subject to contract, while the latter is collected by the collecting society – PRS – which pays 50% direct to songwriter and 50% direct to the publisher.

One proposal being backed by the Musicians Union in the UK and FIM (the International Federation Of Musicians) globally is that a similar model be applied to the recordings side of the business. Streaming income would be split so that some is allocated to reproduction rights and some is allocated to the performing rights. The former is then paid entirely to

the label, which then pays the featured artist a royalty subject to contract, while the latter is collected by the collecting society – PPL in the UK – which pays 50% direct to the performers (featured artist and session musicians) and 50% direct to the label.

This system obviously relies on labels conceding – willingly or by law – that Performer ER is due on the performing rights element of the stream. But this approach would overcome many of the problems raised by the labels regarding applying Performer ER to streaming. Firstly, we are not talking about a 50/50 split, because performers would only automatically receive 50% of that income allocated to the performing rights.

If, for example, the reproduction rights/performing rights split for a stream was also 50/50, then ultimately 25% of income would be paid as Performer ER. Though the 50/50 split is presented here simply as an example, not a proposal. On the publishing side the reproduction rights/performing rights split for a stream has often been set at 25/75.

Featured artists would also arguably be due a share of the money allocated to the reproduction rights as well under contract. That, combined with a 25/75 split, might mean that the performers were due a royalty in the region of 42.5% – which the labels would likely say is still too high to be viable – especially as the first 37.5% of that royalty is not subject to recoupment or deductions.

But either way, this approach could also overcome concerns about Performer ER requiring collective or compulsory licensing. Because the labels, like the big publishers in the UK, would be able to negotiate deals with the DSPs as normal, it's just that a portion of subsequent income would then pass through the collective licensing system so that artists can be paid their Performer ER directly. Or, if artists felt that they shouldn't rely on the collecting societies for even the final part of the process, perhaps artists could appoint commercial agents to collect this income on their behalf.

Not that this approach is a panacea. For starters, streaming services don't negotiate and pay publishing royalties in this way in Continental Europe, so there isn't a direct parallel there. And combining direct licensing and Performer ER could be alien to the concept of equitable remuneration as it is understood under some copyright systems, especially in civil law jurisdictions.

And, depending on how the system was set up, there is the question of just how much artists would benefit in terms of increased and guaranteed income. Sessions musicians would benefit the most, followed by those heritage artists still earning tiny royalties from legacy contracts.

Featured artists with newer but traditional record contracts may not be much better off in terms of revenue share, though most of the artists and managers

earning off these kinds of deals were still pro a Performer ER approach, in no small part because it would mean at least some streaming royalties would not be subject to recoupment or deductions.

d. A new streaming control is added to copyright with Performer ER applied

A final much simpler approach – though this would definitely require a change in copyright law, so would not necessarily be so simple to achieve – would be the addition of a new separate control within the copyright to cover streaming.

If there was a new 'stream' control added to the copyright, Performer ER could be applied to this new control, but in a bespoke way. So perhaps performers would automatically receive 25-30% of the income allocated to the sound recording, either through a CMO collecting all royalties associated with this new control, or with the ER royalty being applied to whatever a DSP is due to pay under its deal with the label.

This wouldn't necessarily hugely increase the percentage share a featured artist receives, though income would not be subject to recoupment or deductions, and heritage artists and session musicians would definitely be better off.

But what about those artists who are already seeing more than 25-30% of streaming income from their label or distributor? Well, Performer ER would have to be a minimum but not total payment. Again, there is a parallel in publishing here, where the songwriter receives a set share of performing rights income from their collecting society, but may then be due more from their publisher subject to contract (and therefore recoupment).

Of course whichever entity was administering the Performer ER would presumably take a commission, so artists self-releasing via a distributor that just charges upfront fees would probably be worse off if the industry went this route.

And there are other challenges with introducing a new control under the copyright. Aside from the lobbying efforts that would be required – especially if this was to be achieved internationally – there is the issue of what such a new control would mean for the owners of song and other copyrights, assuming the new control couldn't just be applied to sound recordings.

The 'Sharing The Revenue' chart included in this report shows the approximate impact five manifestations of the Performer ER approaches described above would have on the respective monies received by labels, featured artists and session musicians. Although only an approximate guide, it demonstrates the impact different approaches might have.

2.8 Online and personalised radio

A final point on equitable remuneration relates to online radio services as

opposed to on-demand streaming services, which would include simulcasts of AM/FM radio, live and on-demand online-only radio programmes, and personalised radio services like Pandora.

As it currently stands, ER is generally paid on royalties generated by at least some and in many cases all of these kinds of digital services, with exact rules varying from country to country. Where ER is paid, this is sometimes the result of specific laws and/or court rulings (for example, regarding the payment of ER by SoundExchange, and which services qualify for a Sound Exchange licence) or simply because the record industry has chosen to license these services in the same way as they license radio, and ER systems have carried over.

However there remain some ambiguities here, especially where services are licensed by the labels directly rather than via the collective licensing system, as with the Apple Music radio service Beats One and, increasingly, the Pandora personalised radio service. In the latter case, to date artists have generally continued to receive ER even where direct licences are employed instead of the Sound Exchange licence, but more clarity on this from both collecting societies and those labels licensing such services directly is required.

Approximate Revenue Share With Different Royalty Models (overleaf) ▶ This chart demonstrates the impact different royalty models can have on the streaming income received by different stakeholders. They are based on a number of assumptions and are intended as an approximate guide. Assumptions include: Total CMO commissions of 15% (recordings) and 10% (songs); songwriter on a 30/70 split with publisher (ER is split between featured artists and session musicians 66%/34%); artist payments do not account for any discounts or deductions as previously discussed:

1. Based on a contractual royalty of 5%
2. Based on a contractual royalty of 15%
3. Based on a contractual royalty of 20%
4. Based on a contractual royalty of 30%
5. If an ER royalty of 3% was paid direct to artists via CMO, deducted from the label's payment from the DSP.
6. If a rental model was adopted and ER royalty of 50% was paid direct to artists via CMO.
7. If streaming income was split between reproduction and performing rights 50/50, with reproduction right income shared with the artist on a contractual royalty of 20% and a 50/50 ER arrangement applied to performing right income.
8. As 7, but if streaming income was split between reproduction and performing rights 25/75.
9. If a new streaming control was introduced and an ER royalty of 30% was paid direct to artists via CMO.

Sharing the Revenue

HOW REVENUE WOULD BE APPROXIMATELY SHARED IF ER WAS APPLIED TO STREAMING COMPARED TO THE CURRENT SYSTEM*

	5% royalty 1	15% royalty 2	20% royalty 3
Label	78.9p	70.6p	66.4p
Featured Artist	4.2p	12.5p	16.6p
Session Musician	0.0p	0.0p	0.0p
Recording CMO(s) eg PPL	0.0p	0.0p	0.0p
Publisher	4.6p	4.6p	4.6p
Songwriter	10.7p	10.7p	10.7p
Songs CMO(s) eg PRS	1.7p	1.7p	1.7p

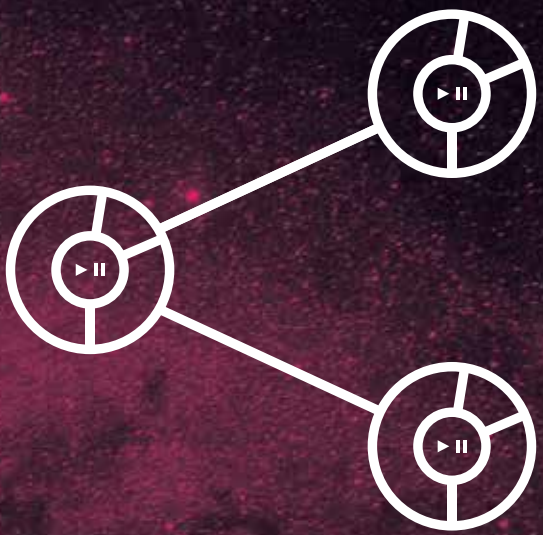
30% royalty	3% ER (add on)	50% ER (rental)	Reproduction/ Performing Split 1	Reproduction/ Performing Split 2	30% ER (new right)
4	5	6	7	8	9
58.1p	63.4p	35.3p	50.8p	43.1p	49.4p
24.9p	18.3p	23.3p	19.9p	21.6p	14p
0.0p	0.9p	12p	6p	9p	7.2p
0.0p	0.5p	12.5p	6.2p	9.3p	12.5p
4.6p	4.6p	4.6p	4.6p	4.6p	4.6p
10.7p	10.7p	10.7p	10.7p	10.7p	10.7p
1.7p	1.7p	1.7p	1.7p	1.7p	1.7p

*FOR EVERY ONE POUND PAID TO THE MUSIC INDUSTRY BY DSPS

“There have been commitments on sharing the value which is great, but we need a lot more clarity. For example, with one of my artists, I look for the breakage payments on the royalty statements and they’re not there. So I go back to the label, and people there don’t seem sure. Then they confirm it should be paid”

“Everyone thinks of our Spotify equity as a massive windfall, but if we take Spotify’s current valuation, it’s about the equivalent of one month of digital royalties – which is nice to have, and we will share it with our artists – but it’s not quite the treasure chest many people assume”

3.



Sharing the Value of the Digital Deals

In Part One we explained that – in addition to the revenue share arrangement and minimum guarantees discussed above – there could be up to three other key elements to the licensing deals done between music companies and DSPs.

The other three elements would involve the music company receiving:

- An equity share in the DSP's business.

- An upfront advance, usually recouped by the DSP from subsequent royalty payments, though not returned by the music company if total royalty payments for an agreed time period do not exceed the advance paid.

- Other set-up fees charged by the music company to the DSP.

Part One asked whether or not the music companies would and should share any profits generated by these other elements of the deal with their artists – ie the profits generated by selling any shareholdings, of unallocated advances (often called 'breakage'), and of any profit margin on the set-up fees that are charged.

3.1 The case for sharing the value of the digital deals

Many managers and artist lawyers have expressed concerns since the earliest streaming deals were done that record companies benefiting from these elements of their streaming deals would utilise a common clause in artist contracts, that says they are only obliged to pay royalties to artists on income "directly and identifiably attributable to a specific recording", in order to not share these extra revenues.

The Elements Of The Deal (right) ▶
The music industry's deals with the streaming services are revenue share arrangements at their heart, but there will be multiple elements to the deal.

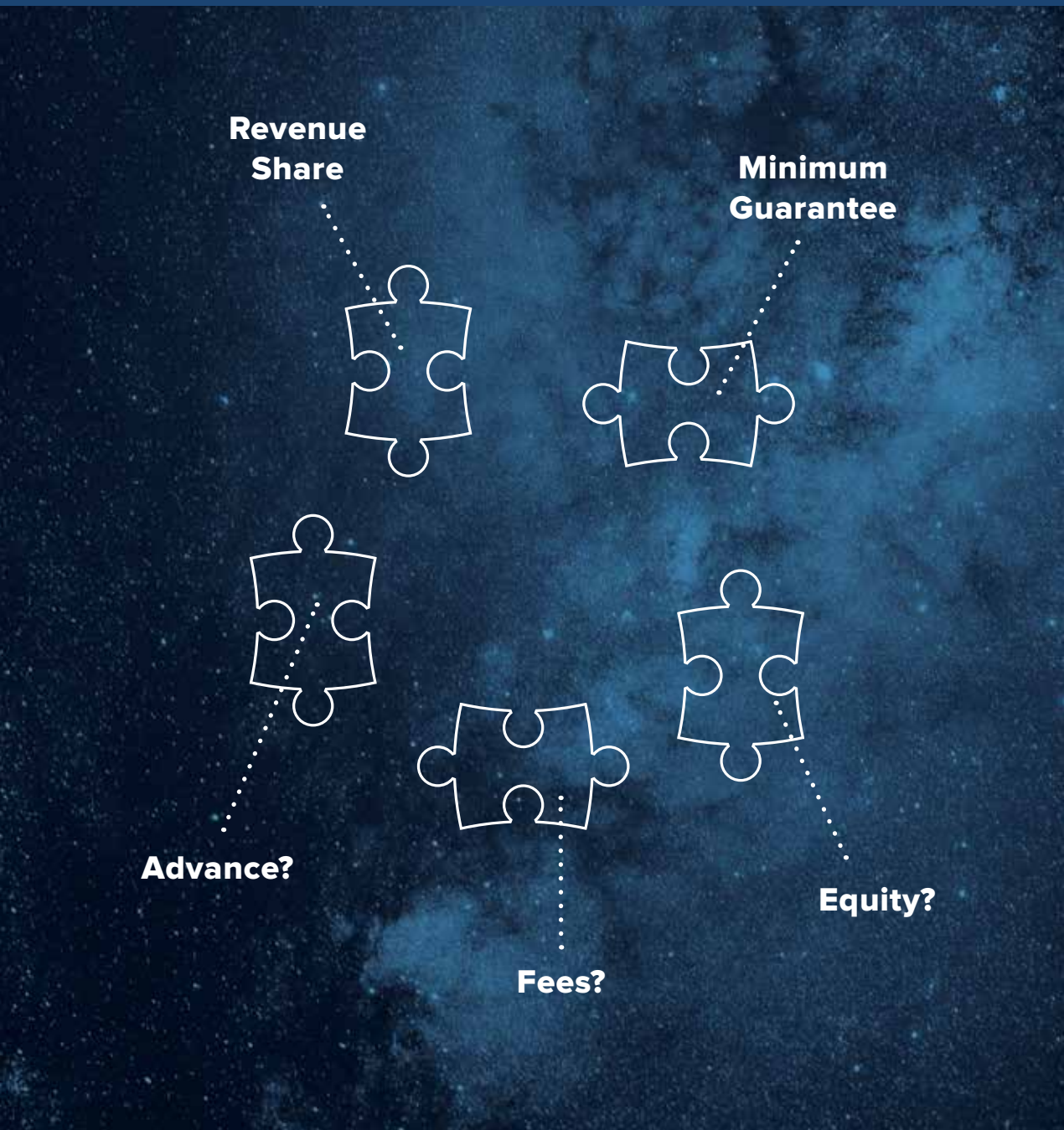
Managers have generally argued – and at our roundtables pretty much universally agreed – that to not share the profits of these other elements of the deal would be unacceptable. There is both a legal and an ethical component to this debate.

In the main managers seem uncertain about the legal obligations of the labels to share the profits of equity sales, breakage and other fees, with some conceding that the "directly and identifiably attributable" clause in artist contracts could be problematic if artists sought a cut of this income through the courts. Though the lawyers at our roundtables seemed to think this was not a foregone conclusion, and that there was a sufficient case for artists to fight for a portion of this income if necessary.

However, on an ethical level, managers remain resolute that labels have a duty to share the value of these other elements of the streaming deals, often noting two

The Elements of the Deal

THE MUSIC INDUSTRY'S STREAMING DEALS HAVE MANY ELEMENTS TO THEM



things. First, that labels could only demand equity and advances because of the collected value of the creative output of the artists they have signed over the years. Second, if record companies can avoid sharing these other revenue streams, it could incentivise labels to accept less favourable revenue share arrangements and minimum guarantees in return for a better deal on equity, advances and fees.

3.2 Concessions from the labels

As we noted in Part One, the labels have made some commitments in order to allay these fears. Many independent record companies have signed up to the World Independent Network's Fair Digital Deals Declaration that states labels will "account to artists a good-faith pro-rata share of any revenues and other compensation from digital services that stem from the monetisation of recordings but are not attributed to specific recordings or performances".

Meanwhile, all three majors have now committed to share 'breakage' with artists and, since Part One was published, both Warner Music and Sony Music – though to date not Universal Music – have publicly committed to share the profits of any equity sale the first big pay day on that front expected to come when Spotify finally goes through with its Initial Public Offering.

In addition to Universal being yet to publicly commit on the equity point, the one area that all three majors are yet to make any commitment on is the other fees charged by labels to the DSPs as part of their deals.

Most of the label representatives taking part in our roundtables insisted that these fees were a genuine cost of sale, relating to the administrative and IT costs of providing DSPs with content, especially for the first time, and therefore there wasn't any profit margin to be shared. Not all managers seemed convinced by this argument.

3.3 The devil is in the detail

Artists and managers taking part in the roundtables generally welcomed the commitments made by the labels on sharing the value of equity and advances, though most stressed that "the devil is in the detail", and that to date there has been very little detail about any of these commitments.

Managers in the main said that they heard about these commitments as they were made through the trade press rather than from the labels themselves. And when they questioned their immediate contacts at the labels (especially the majors), there was often little information available about what these commitments actually involved, and in some cases little awareness that the commitment had even been made.

Given the ambiguities around the legal obligations of the labels to share the value of equity, advances and fees, most

of the record companies who have committed to do so position such commitments as “the right thing to do”.

Which is possibly admirable. Though the lack of clarity on what the commitments mean, and the lack of communication about how the commitments will be realised, possibly means that these goodwill gestures actually add to the tensions between artists and labels, rather than improving relations between the two groups.

The record companies, especially the majors, might argue that – in the wider scheme of things – the monies to be shared from equity and breakage are relatively modest and therefore it would be inefficient to invest too heavily in setting up systems to communicate and deliver on any of the commitments made.

Though by failing to do so, many artists and managers will start to question the sincerity of the labels in sharing the total value of the streaming deals, especially as – in the case of the majors – previous commitments seem to have been made primarily as a PR move when the issues of breakage and equity have become a particularly vocal talking point within the industry and its trade press.

3.4 Possible solutions

To conclude, there are three priorities for the management community here.

1 To secure commitments from all three majors on the broad principle of sharing equity with artists across all services.

2 To better understand what other fees labels charge the DSPs, and whether or not these are, indeed, a cost of sale.

3 To encourage labels which have made commitments to share all the value of their streaming deals to explain how these commitments are being realised, how monies are being shared, and which specific monies the commitments relate to.

“Because of the total lack of transparency, you often don’t know the question you need to ask – and that’s the big problem. If you don’t know what’s going on you can’t properly assess how the label arrived at x, y or z.”

“It’s not necessarily that there shouldn’t be NDAs, but artist representatives should be brought into them.”

4.

Transparency

For many of the artists and managers taking part in our roundtables, this was the single biggest issue about the way streaming services are being licensed. And even most of the representatives of labels and publishers were willing to concede that there are transparency issues that need to be addressed.

Though, as one lawyer taking part pointed out, 'transparency' is actually a catch-all term that covers a number of different issues, and that to tackle this problem we need to be more specific about what those different issues are. The key question is this: who needs to be more transparent about what, exactly?

4.1 The unanswered questions

The basic problem, though, is that there are a number of questions about digital deals and digital royalties that artists and managers often do not know the answers to, and in many cases are not allowed to know the answers to.

Some of these relate to the deals done with the DSPs, including:

▶ What is the precise revenue share arrangement between the DSP and the label or publisher?

▶ What are the precise minimum guarantee arrangements between the DSP and the label or publisher?

Recording Royalties: What You Need To Know (right) ▶
For an artist to fully understand how their digital royalties are calculated they need to know the answers to these questions. But some of the information is missing.

▶ What equity stake did each label or publisher receive in any one DSP, and on what terms?

▶ What advances did each label and publisher receive from any one DSP, and how much of those advances were not subsequently allocated to specific consumption (ie was 'breakage')?

▶ What fees did each label or publisher charge to any one DSP, and was there are profit margin on those fees?

Others relate to digital royalties on a day-to-day basis, including:

▶ How does each DSP report monthly consumption and payments to each label or publisher, and what does that label or publisher do with that information?

▶ What deductions and discounts does any one label or publisher apply to streaming income before calculating what an artist or songwriter is due?

▶ What did each DSP actually pay the label or publisher for any one recording or song in any one month, and how does

Recording Royalties

WHAT AN ARTIST NEEDS TO KNOW

Streaming service streams your music

- [ ] How often was your music consumed?
- [ ] What share of overall consumption did you account for?
- [ ] What is your label's revenue share rate for this service?
- [ ] What is your label's minima for this service?
- [ ] What did your label recieve?
- [ ] What deductions does the label make to this income (according to contract)?
- [ ] What percentage royalty does your label pay on streaming?
- [ ] Where is there information missing?

that compare with the royalties that were subsequently paid to the artist or songwriter?

▶ How are things like breakage being allocated to artists?

Song Royalties: What You Need To Know (right) ▶
For an artist to fully understand how their song royalties are calculated they need to know the answers to these questions. But some of the information is missing.

4.2 The right to know

Artists and managers taking part in the roundtables pretty much universally agreed that they should have access to all of this information.

First and foremost, without that information artists are unable to properly audit the income they receive from any labels and publishers they are signed to, despite record and publishing contracts commonly providing audit rights. Accountants taking part in the roundtable all agreed that properly auditing digital income is all but impossible given the current lack of information available about digital deals.

Second, without this information, it is impossible for artists and their representatives to properly assess the relative merits of different streaming services and streaming business models. Arguably artists should be playing a more proactive role in encouraging fans to sign up to those streaming services that are most beneficial to themselves and the wider music industry, but it is difficult for artists and their representatives to know which services those are.

Third, without this information, it is impossible for artists and their representatives to properly assess the relative merits of working with different labels, distributors and publishers on monetising their recordings and songs in the digital domain. And while some labels argued that the differences between the deals done with DSPs are nominal and therefore not likely to be a consideration when artists choose which label to sign to, managers felt this was information they should be party to when advising artists on which business partners to do deals with.

Fourth, again there is an ethical argument here. Artists and managers feel it is simply wrong that the beneficiaries of copyright are not allowed to know how the copyrights from which they benefit are being monetised.

And fifth, the music industry has long suffered from the lack of trust between different stakeholders, and especially between artists and labels. This lack of trust is particularly problematic when an industry is in flux, when artist/label relationships need to evolve, and when artists and labels need to tackle various challenges together. Yet the lack of transparency around the digital deals is simply increasing this lack of trust.

Song Royalties

WHAT A SONGWRITER NEEDS TO KNOW

Streaming service streams your music

- [ ] Your publisher and/or society works out what streams are of your work.
- [ ] What is your publisher/society's revenue share rate for this service?
- [ ] What is your publisher/society's revenue label's minima for this service?
- [ ] What was the service involved? Did it pay up?
- [ ] How is the revenue split between mechanical and performance rights?
- [ ] What fees does your society charge?
- [ ] What is your royalty share under your publishing deal?

- [ ] Where is there information missing?

4.3 Justification for secrecy

When it comes to the specifics of the streaming deals, generally two arguments are put forward by the labels and publishers as to why artists and managers cannot receive answers to all their questions.

▶ First, Non-Disclosure Agreements in the streaming deals prevent labels and publishers from sharing this information.

▶ Second, there would be competition law issues around sharing this information, because many managers represent artists that are signed to multiple labels, and so would have knowledge of how different deals compare.

Both these arguments were put forward by those representing labels and publishers at our roundtables. Even though many of the independents represented said that – actually – on a case-by-case basis they would share information about their digital deals with managers when asked, even though NDAs and competition law issues meant they couldn't make this information available to artist representatives as a matter of course.

In the main, managers remain unimpressed by the NDA argument, for various reasons:

▶ First, many managers said that they were increasingly told by the DSPs that it was the labels that were demanding the NDAs, and not the DSPs themselves (though some of the label representatives strongly denied this).

▶ Second, that the NDAs contained within leaked label/DSP contracts were flexible enough to allow labels to share deal specifics with artist representatives.

▶ Third, without access to this information it is impossible for artists to audit their royalties, and therefore labels should ensure that NDAs preventing the sharing of this information are not included in DSP deals as they come up for renewal.

The competition law point is more complicated, though a cynic might argue that that is convenient for labels that, say, didn't want to share too much information about their digital deals, but which recognised that the NDA argument had been weakened.

Which might be unfair, but the general viewpoint amongst artists and managers is that labels and publishers could share much more information with artists, songwriters and their representatives if they really wanted to.

4.4 Why the mystery?

If we assume – as most artists and managers taking part in the roundtables do – that labels and publishers could share more information if they really wanted to, it's interesting to ask why there

seems to be a reluctance to share this information.

Various different explanations were proposed at the roundtables:

- First, that there was a 'need to know' culture at many labels and publishers – especially the major music groups – and this means the default position is not to share information unless absolutely necessary.

- Second, that labels and publishers would be happy to share more information with artists and managers, but there isn't resource available for such education or communication initiatives, especially when digital deals and royalties are complicated to explain and constantly evolving.

- Third, that labels and publishers feel they should shield artists from the complexities of digital deals and royalties.

- Fourth, that senior management at labels and publishers are not actually aware that artists and their representatives even want access to this information.

- Fifth, that it is to the advantage of labels and publishers to keep artists and their representatives in the dark about digital deals and royalties, because doing so enables them to keep hold of more money.

- Sixth, there is a fear within the music companies that providing access to too much information will result in legal action from some artists, that will be damaging to the company in general, and to the careers of the individuals who provide that information.

Those representing labels and publishers in the main argued that – where information was not being shared that could – it was usually due to resource issues, or the complexities and evolving nature of the digital deals, or because managers simply didn't request that information.

Managers generally accepted that those issues may be part of the problem, though most felt that – especially at the majors – there was also an actual unwillingness to share information, for the various reasons explained above.

4.5 European Copyright Directive

Article 14 of the draft Copyright Directive recently published by the European Commission acknowledges some of the transparency issues raised at the roundtables and proposes introducing a 'transparency obligation' for rights owners.

The Article states that: "Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to

whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due".

It's a decent start, though the draft Directive is not entirely clear about what, exactly, rights owners would be obliged to be more transparent about. Though that is a refinement that could be informed by managers simply being more precise about what information they require.

Another issue with the draft article is that there are subsequent limitations to the effect that the 'transparency obligation' would need to be "proportionate and effective" so to ensure "an appropriate level of transparency", ambiguities that could render the new obligation worthless in practical terms, depending how rights owners, the courts and/or a proposed new arbitrator chose to interpret them. Another limitation also says that the "significance" of the "contribution of the author or performer" would be a factor.

4.6 Possible solutions

Given that for many managers this was the single most important issue – and the issue that needs to be tackled in order to properly form a viewpoint on many of the other issues – it is worth considering what actions managers might want to take in a bid to achieve more transparency.

These are some of the actions worth considering:

1 First, the management community should agree precisely what information it feels artists should have access to, and on what terms. Most managers aren't arguing that all the information discussed above should be public domain, but that it should be available to artists and their representatives, who themselves could be subject to NDA. That said, in some cases, so many people would need to be given access to this information, arguably it is inevitable it would become public domain. Managers need to consider whether this – as far as they are concerned – is a problem.

2 Given some labels and publishers claim that they are not aware managers even want access to this information, an important starting point would be for managers to go on the record as requiring answers to these questions, and to start formally requesting it from those companies they have direct relations with as a matter of course.

3 Given NDAs will likely be cited as a reason for withholding this information, managers could put pressure on the DSPs – some of which have informally told managers they are happy for artists to know the fundamentals of their deals – to go public with this position.

4 Given competition law will likely be cited as another reason for withholding this information, managers could seek

reassurances from competition regulators in key countries that the sharing of information about the digital deals would not result in action against the music industry on competition law grounds.

5 Information could be shared between the management community regarding how transparent individual labels and publishers are over their digital deals and digital royalties. Given the importance many managers now place on transparency, this could become a factor in artists deciding which labels and publishers to work with, which would in turn put more pressure on music companies to become more transparent.

6 The management community could also seek to champion best practice amongst labels and publishers. In particular, standards could be formed on how information about digital deals – and especially digital royalties – should be communicated to artists and their representatives, giving companies something to aim for, and making it easier for managers to digest and analyse information that they receive.

7 Some DSPs are now providing consumption data directly to artists and managers, as well as labels and publishers. Managers could push to receive royalty data from the DSPs as well – ie so that they know what income a label or publisher received in relation to their catalogue, and can then compare this to what royalties their artists receive. This would enable artists to audit royalties without necessarily needing to know all the specifics of the DSP's deal with the label. A small number of managers had actually gained access to this information from certain DSPs off the record. In one case they found their label had processed that income correctly and paid the right royalty. But in another case they found their label had paid them fraction of what they were due under contract.

8 If there remains an unwillingness on the part of labels and publishers to become more transparent, artists and managers might want to consider possibly statutory solutions. Indeed, managers should definitely support Article 14 of the European Copyright Directive and seek clarity and amendments to deal with the above mention concerns. But managers may also want to consider other possible measures, especially in the UK where the European Copyright Directive may or may not apply depending on the timing and nature of the country's exit from the European Union. Either way, as noted above, it seems ethically wrong that the beneficiaries of a copyright are not allowed to know how copyrights they benefit form are being monetised. With this in mind, there seems a strong argument that copyright law could and should provide performers and creators with some kind of right to information and/or an audit right.

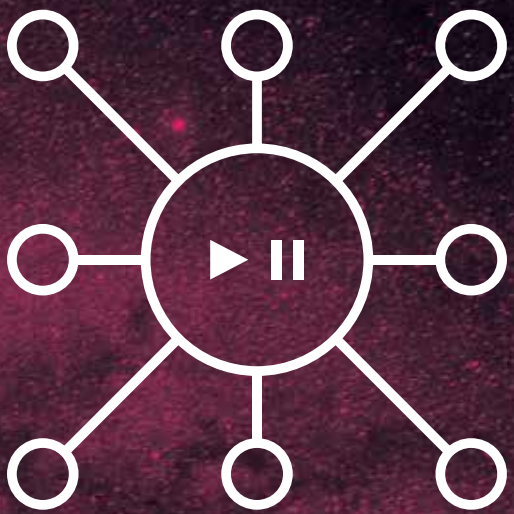
- 1 LINE

“It just seems more logical – and fair – to me if everyone gets paid the same per stream; so how much you earn is based on how often you get played. And that’s what collective licensing allows”

“I believe in collective licensing, I prefer it. But if you were starting over – and didn’t have any legacy infrastructure in music publishing – I don’t think you’d use the collecting societies to license digital. They’d possibly still process the data, but not be the deal makers”.

“The CMOs are membership organisations, yet members aren’t allowed to know the fundamentals of the streaming deals. This seems bizarre to me”.

5.



The Role of the CMOs

In Part One we explained how, in certain scenarios, the music industry opts to license collectively. This means that, rather than each rights owner negotiating bespoke deals with each licensee, all the rights owners (pretty much) appoint one organisation – commonly called a collecting society, collective management organisation (CMO) or performing rights organisation (PRO) – to license on their behalf.

The record industry and the music publishing sector generally have separate CMOs. And in most countries, on the recorded music side, there will be at least one society representing the interests of labels and at least one separate society representing the interests of artists (mainly collecting Performer ER). Meanwhile, in some countries on the publishing side there will be separate collecting societies respectively representing the reproduction (or mechanical) rights and the performing rights in songs.

The CMO then commonly negotiates deals with groups of licensees, creating a portfolio of off-the-shelf licences that new and smaller licensees can choose from. Most of these are blanket licences, which means the licensee can make use of all and any songs or recordings represented by the society, paying the same rate oblivious of which specific works are exploited. Licensees pay royalties to the CMO which then passes the money onto the relevant rights owner and beneficiaries, usually charging a commission (and possibly other fees or deductions) as the money passes through the system.

Sometimes copyright law forces the music industry to license collectively, usually through compulsory licences, which oblige music rights owners to license in certain set scenarios. Other times the music industry chooses to license collectively for logistical and pragmatic reasons. When digital music services first emerged, the music industry had to decide whether to license these services directly or collectively.

In the main, the record industry chose to license digital directly, except where a digital platform was more akin to radio, where collective licensing may be used (sometimes because of a compulsory licence, other times voluntarily).

The publishers generally opted to license digital services through their collecting societies, though the big five publishers subsequently started licensing their Anglo-American repertoires directly – in Europe at least – via so called 'special purpose vehicles', or SPVs, in which the publishers work in conjunction with the Anglo-American CMOs. The result is a slightly complicated combination of direct and collective licensing.

5.1 Why artists and songwriters like collective licensing

The vast majority of the artists and songwriters who took part in the

roundtables were supportive of collective licensing, and were often of the opinion that more – and possibly all – digital services should be licensed through the collective licensing system, on both the recordings and publishing side.

There are various reasons why collective licensing is popular with these groups:

▶ On the recordings side, the scenarios where collective licensing is used often correlates with the scenarios when Performer ER is paid, so artists often equate collective licensing with equitable remuneration. Artists like Performer ER – which usually means a higher royalty that is not subject to deductions and recoupment – so they like collective licensing.

▶ On the publishing side, by convention those collecting societies representing performing rights (and in some countries, reproduction rights too) pay 50% of the money they collect directly to the songwriter, ie not via the songwriter's publisher. Again, this means these payments are not subject to recoupment. Which means for songwriters yet to recoup their advance, there are advantages to monies being paid through the collective licensing system.

▶ Beyond the personal benefits, another reason collective licensing is popular amongst artists and songwriters is that everyone is paid the same per usage of their music. As discussed above, where DSPs are licensed directly, each rights owner negotiates its own terms with the streaming platform. But there was a strong feeling amongst artists and songwriters – and many managers too, especially younger managers – that a fairer systems would be for everyone to earn the same amount of money every time a song or recording is streamed, so that what you earn is linked to how often your music is played, not what rate your label, distributor or publisher has negotiated with the service. Such industry standard rates are only really possible where collective (or compulsory) licensing is involved.

▶ Finally, you sense that many artists and songwriters trust their collecting societies more than they trust their label or publisher. There is a slight contradiction here though, in that artists and songwriters tend to innately trust their collecting societies more than their labels and publishers, but when asked to discuss those same societies, they often express as many concerns and complaints about them as they do the labels and publishers they are signed to. Though it is possible that, despite the issues they have with their collecting societies, artists and songwriters feel that at least everyone is on a level playing field with the CMOs (so, "were all in this together"), whereas with labels and

publishers, it depends very much on who any one artist or songwriter chooses to sign to, who is currently working at that label or publisher, and the current state of the artist's business relationships.

5.2 The shift to direct licensing in digital

As discussed above, most labels advocate direct licensing in digital, and the label representatives at the roundtables generally defended this position.

Meanwhile, those representing publishing companies in the main felt that, where the big five publishers had chosen to license Anglo-American repertoire directly (via the above described SPVs), doing so had achieved the primary aim, which was to increase the overall royalties DSPs pay to the owners of song rights.

To that end, you sensed that other music publishers – so the independents and those representing non-Anglo-American repertoire – were also persuaded that the direct licensing of digital services was a route now worth considering in one way or another. Indeed, some participants explicitly stated this.

The key factor stopping many publishers from unilaterally withdrawing from the collective licensing system for digital is the way songwriters have traditionally assigned their rights – so that the societies rather than the publishers ultimately control some aspects of the song copyright, and especially the performing rights.

There are various reasons why those representing labels and publishers advocate direct licensing for digital, despite the popularity of collective licensing amongst artists and songwriters, some of which we have already discussed in the context of Performer ER above.

Managers seemed to have more mixed views on whether direct or collective licensing was the more desirable option in the digital domain, recognising some of the positives of collective licensing for their artists, but also accepting some of the arguments put forward by the labels and publishers as to why direct licensing is a better approach.

5.3 The problems with collective licensing

There were a number of reasons given for why direct licensing is better in the digital domain, some of which apply more in specific territories, others across the board. These include:

a. Bad collecting societies

This is the issue we alluded to while discussing Performer ER above. Each country usually has its own collecting societies. It is no secret that, around the world, there are more effective collecting societies and less effective collecting societies, and in some cases there are CMOs that are widely recognised as being incompetent and possibly corrupt.

This is principally a problem because of the way collective licensing has traditionally worked on an international level. Conventionally collecting societies only licensed licensees in their home country. They would then form reciprocal agreements with their counterparts around the world – so, for example PRS would represent GEMA's catalogue in the UK, and GEMA would represent PRS's catalogue in Germany.

This was a good system in many ways, because it meant each society only needed to build a licensing and enforcement infrastructure in its home territory, and licensees could get access to something nearing a global repertoire while only dealing with their local CMOs. Also, most licensees were only ever looking for a licence to exploit songs or recordings in one country anyway, so it didn't matter that the licences offered only applied in their home territory.

However, the down side is that each society is reliant on its counterparts in each other country to effectively negotiate licences, collect royalties, report usage and distribute income to the right people, and on those other societies' administrative decisions and technology. And a society's members have no direct control over the other societies around the world on which they are relying to collect international income. Plus, when money moves through multiple societies, it can take longer to reach the rights owner and beneficiaries, and two or more commissions (and other fees) may be charged.

The issues with this system have arguably increased in recent years. Firstly, for some artists, songwriters, labels and publishers, international as opposed to domestic income is becoming more important. Secondly, certain emerging markets are becoming ever more crucial, and the collective licensing systems there may not yet be up to speed. And thirdly, digital licensees often want multi-territory licences, which the old system was often slow to accommodate.

These are all reasons why the labels and the bigger publishers have advocated the direct licensing of digital. That said, international collective licensing doesn't necessarily need to entirely rely on reciprocal agreements. Some societies are now able to issue multi-territory licences, and indeed some are obliged to do so under European law.

There are complications however. Firstly, artists, songwriters, labels and publishers don't always give a society the right to represent their music globally, because they may be members of multiple societies around the world. This means that when a society provides a multi-territory licence, the exact repertoire it is providing often varies from country to country, complicating data management responsibilities and accounting.

Secondly, on the publishing side, some societies only control either the performing rights or the reproduction

rights, when digital services need to exploit both. Performing rights and reproduction rights societies have often licensed digital services together, to reduce the number of deals a DSP needs to do, though such joined up licensing can be harder to achieve once you go global.

And thirdly, there is also the issue that, while it is relatively easy for societies to do deals with bigger DSPs operating in multiple territories, they don't necessarily want to have to license smaller services operating in just one foreign market.

But nevertheless, having a two tier collective licensing system, where by societies continue to license traditional licensees (broadcasters, concert promoters etc) on a territory by territory basis utilising the reciprocal agreements, but license digital services directly worldwide circumventing those reciprocal agreements, arguably overcomes the 'bad societies' issue to an extent.

b. Regulation and the rate courts

As we also explained in Part One, where collective licensing is employed it is common for copyright law to apply extra regulation of the licensing process.

This is because collective licensing can raise competition law concerns, in that if one organisation represents basically every recording copyright or every song copyright, that creates a monopoly situation that can be exploited. Collective licensing regulation varies greatly from country to country, but can result in a statutory body or court of law ultimately setting the rates a licensee, or set of licensees, should pay.

The general consensus amongst record companies and music publishers is that where statutory bodies or copyright courts get involved, the end result is that copyright owners are paid lower royalties.

This opinion is in part based on what has actually happened in the US, where personalised radio services have the option to operate under a compulsory licence on the recordings side with rates set by the Copyright Royalty Board, while all digital services have the option to license the performing rights in songs via the collecting societies BMI and ASCAP, which are subject to the rate courts. Some digital services have exploited this system to drive royalty rates down.

The US faces some specific issues when it comes to collective licensing, especially on the publishing side. The 'consent decrees' that regulate BMI and ASCAP are particularly draconian, and recent attempts by the American music publishers to reform them were unsuccessful. Though the same consent decrees also prevent the publishers from pulling digital out of the PROs without bailing on the collective licensing system in its entirety.

Outside the US, the regulation of collective licensing has generally had less of a tangible impact on the way CMOs license streaming services. Though in theory it still could, which is

> **It's all very well talking about PPL collecting income here in the UK, but what about the equivalent of PPL in every other country around there world? Do you trust them to collect streaming income and pass it through the system? We need to remember PPL is one of the best in the world.**

why some rights owners prefer the direct licensing approach, or at least believe that direct licensing will generally result in a better deal for the rights owners and the beneficiaries of their copyrights.

c. Slow decision making

A common complaint the DSPs make about the collecting societies is that it can take a very long time to reach agreement over a new deal, which is one of the excuses digital services often use for going live without all their CMO licences on the publishing side actually in place.

Many labels and publishers agree that negotiating with a collecting society is a more time consuming task than negotiating directly with a rights owner. This is in part because most CMOs are not-for-profit membership organisations that need to at least be seen to be acting in the interests of all their members, who often, between them, have very different priorities and agendas, and this inevitably makes the deal-making process more cumbersome.

As a result, many labels and publishers argue that direct licensing is more attractive to DSPs, even if it ultimately means more deals must be done. Especially as the total number of deals required can be reduced through the establishment of organisations like the globally-focused Merlin on the recordings side and UK-based IMPEL on the publishing side.

d. Transparency

Given, as we said, CMOs tend to be not-for-profit organisations ultimately answerable to their membership, you might think that they would be more transparent than commercial record companies and music publishers. Yet many of the transparency issues discussed in relation to labels and publishers in Section Four above equally apply to the CMOs, including – with just a few exceptions – the secrecy that surrounds key elements of the deals done with the DSPs.

Some of those participating in the roundtables said that some collecting societies had got better with regards to some aspects of transparency in recent years. In the European Union, this might be in part as a result of the CRM Directive that came into effect earlier this year.

Though it may also be the result of increased competition, either from commercial players offering rights administration services, or because the aforementioned shift to multi-territory licensing has resulted in a little more competition between the collecting societies themselves, especially within the European Union.

However, a majority of those participating in the roundtables felt that a lack of transparency was still a significant problem at many collecting societies; not least because of the secrecy of many of the digital deals being done, With regards why that might be the case, many of the same points raised about the lack of transparency at record companies and music publishers were suggested as reasons for the transparency issues at the CMOs as well.

Of course, given what we said about transparency across the board in Section Four, the fact there may be transparency issues with the CMOs is not in itself a reason to advocate direct over collective licensing. Though it does mean transparency issues are not necessarily overcome by going the collective licensing route either.

e. Commissions

Finally, there is the issue of the commissions that the CMOs charge on the monies they collect and distribute, which vary greatly around the world for various reasons, including the scale of the society, and any educational, lobbying, anti-piracy, cultural or other initiatives which the CMOs sometimes fund.

Perhaps unsurprisingly, many of those participating either felt that the commissions being charged were too high or – even if they didn't have a strong opinion on the actual commission rate – many felt that many societies had far too high overheads, especially in the context of a music rights industry that has seen revenues decline so significantly over the last fifteen years.

Societies would likely argue that they often provide unseen services for their members, that the shift to digital has

required significant investment in data processing, and some costs have actually been cut in recent years.

Nevertheless, many artists, songwriters and managers seemed to feel further efficiencies could and should be made, though at the same time they were calling for better data and communication systems to be developed too, which might actually increase costs. But there is possibly a conversation to be had between CMOs and their members about how many of the services provided beyond simple rights administration are actually wanted by the wider membership.

5.4 Possible solutions

Many managers seem to be of two minds regarding the pros and cons of collective licensing in the digital domain, and there certainly didn't seem to be a consensus across the board.

Though a fair conclusion might be that managers would be more prone to advocate the collective licensing approach if some of the issues raised in this section could be addressed by the CMOs themselves. Meanwhile, on the transparency front, most of the options discussed in Section Four could be applied to the collecting societies as well.

One other issue that was frequently raised was that decisions regarding direct and collective licensing in the digital domain were not generally well communicated across the artist, songwriter and management communities. This was true even with societies where artists or songwriters sit on the board that is the ultimate decision maker.

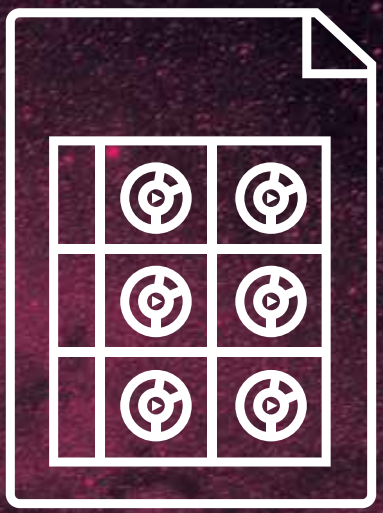
As a result, there is much confusion regarding which services are being licensed in what way, and – on the songs side in particular – what royalties are coming to songwriters via their CMOs and what royalties are coming via their publishers.

This would suggest that there is some work to be done on the part of the CMOs to better communicate to their members about what digital deals they are involved in, and how digital licences and royalties are working.

“As an industry, we have to rise to the challenge on music rights data. It’s crazy to blame the streaming services for our poor data.”

“Certain collecting societies are already working on the data challenge and are making great progress. I really think that’s where the solution is going to come from.”

6.



Copyright Data

There has been much discussion in recent years about the problems caused by a lack of decent music rights data, with various proposals put forward to address this issue.

In most countries copyright is automatic, which is to say there is no formal registration required. Copyright exists in a piece of work as soon as it is created providing it fulfils certain criteria set out in copyright law. The law will also tell us who the default or presumed owner of the copyright is, and how ownership can (or can't, depending on the jurisdiction) be transferred via contract.

The lack of registration means there is no central database of copyright ownership – no one stop shop that tells us, for each song or recording, who wrote the song or performed on the record, and who owns or controls each different element of the copyright in each territory. This despite the fact copyright ownership can be complicated, in that copyrights can be co-owned, different elements of copyright can be owned by different people, and ownership can vary from country to country.

This causes particular problems in the digital domain, because it means there is no way (or, at least, no simple way) for DSPs to independently verify who controls any one song or recording, and therefore who should be paid when that song or recording is streamed.

This is a greater issue on the publishing side. On the recordings side, DSPs assume that whoever provides them with a track controls the recording copyright in it, and therefore should be paid each time that track is streamed.

But on the songs side, no one is actually providing the song to the DSP, the song being contained within the recording supplied by the label. Labels do not state (and possibly do not know) who controls the song copyright. Therefore, in the main, the DSP relies on the publishers and the CMOs to work out when their song rights have been exploited, by crunching a list of every track streamed in any one month, and then calculating which of those tracks contain songs they control, and billing for royalties accordingly.

People generally agree that this is not an ideal way to do business, and that it would be more efficient if there was a definitive database of music rights information that DSPs could use to work out who is due payment for each song and recording streamed. However, there is less agreement on what that definitive database might look like, who should build it, what data it should contain, who should manage it, who should have access to it, who should have the power to rule when two people claim ownership of the same work, and who should ultimately own any database that is created.

However music right databases are already available. Most CMOs are sitting on sizable databases of music rights information. And on the publishing side,

> **It would be great if there was a list of all the data we need to provide to ensure our artists get paid what they are due – and to know what data I as the manager need to be responsible for.**

CISAC – or the International Confederation Of Societies Of Authors And Composers – operates CISNet, powered by FastTrack technology, which is a hub and spoke system joining the databases of societies around the world; though knowledge and use of this resource is probably not as widespread as it possibly should be. In addition, various commercial entities – including the DSPs themselves, middle-men content providers and rights administration firms – have sizable music rights databases, and there are not-for-profit projects like MusicBrainz.

But no one database is universal, and many of the good databases are not available in the public domain, either at all or at least in their entirety. Even the good databases often focus on either recordings or songs, and don't link the two, which is the crucial connection most DSPs require. And some question whether databases based on titles and other metadata alone – rather than musical notation and/or actual recordings – are fully effective, even though that is what the majority of music databases consist of.

6.1 Music data initiatives

There are various initiatives under-way to try and tackle the music data problem. Some are led by the collecting societies, others by start-ups or other organisations. Some propose building a database that

would then be distributed over the internet using the blockchain. Some also propose a new file-format for music that would include basic copyright data, or a code that could pull such data from a central database.

One point raised by some of the people pursuing music data projects is that a key problem is poor data from the outset, in that too often no one fully documents who was involved in writing a song or recording a track at the point of creation.

Which means that when a label releases the recording and gives it a unique ISRC code, and a publisher logs the song with a collecting society which gives it a unique ISWC code, sometimes information is already lacking about which artists and songwriters are beneficiaries of the work and any royalties that may be generated.

Therefore artists and songwriters – and producers and sound engineers – should perhaps be logging information about their recordings and songs before even a label or publisher is releasing or registering their work.

6.2 Possible solutions

Pretty much everyone taking part in the roundtables agreed that bad music data was a problem that needed to be addressed, and there was some awareness of some initiatives trying to tackle this problem.

Amongst managers, many seemed to think that the collecting societies were actually in the best position to lead on this, because they are sitting on the best data to begin with, and are generally trusted more by artists and songwriters than commercial entities. Some also questioned how committed the big music companies were in making good music data publicly available, as they could possibly be benefiting from poor data, in that inefficient royalty processing possibly results in more money going to big rights owners.

For a CMO-led data initiative to be successful, though, different societies probably need to collaborate, bringing together their respective databases. This is already happening through so called 'hub' initiatives on the songs side in Europe, in addition to the aforementioned CISNet system, though possibly the holy grail is having record industry CMOs like PPL and publishing sector CMOs like PRS collaborate, because that would bring together data about both recordings and songs.

Not everyone agreed that the CMOs should lead on solving the music data problem though.

First, as noted, the CMOs are starting to more aggressively compete, which on one level is a good thing, but on another level may make some societies nervous about collaborating, especially as they seek to compete in the market on the back of having better data.

And second, while it may be in the interest of CMOs to have better

databases internally, to better service members and to compete with other societies, if they were to make that data available publicly, they might ultimately render themselves redundant.

We discussed in Section Five the possible further shift towards direct licensing in the digital domain. However, as it currently stands, even where publishers license DSPs directly, they usually rely on the CMOs to process consumption data and work out what is owed. However, if a good publicly accessible music rights database was available, the DSPs themselves could possibly take over that work, reducing the music industry's reliance on their societies in the digital domain even further.

It's also interesting that, in the US, where the lack of a central music database has led to litigation, the publishers do not seem to presenting their CMOs as the solution. In America there is no direct counterpart to the mechanical rights societies found in other countries, like MCPS in the UK. The closest the US has to such a society – The Harry Fox Agency – does not represent all rights owners.

This means that, when it comes to paying publishers the mechanical royalties due on streams, the DSPs need to identify who needs to be paid, rather than just relying on the CMOs to work out who is due what. With no central database to consult, many DSPs have failed to distribute some of the mechanical royalties due, resulting in lawsuits. Spotify and the National Music Publishers Association have now committed to build a database so that it can start more efficiently paying mechanical royalties, though it's not entirely clear how that will work, or what other DSPs will do.

The publishers have not, however, proposed to use CMOs BMI and ASCAP to collect mechanical royalties, even though they are already collecting and distributing performing right royalties from the same DSPs for the same songs that have been streamed.

This is partly because of the aforementioned consent decrees, though some of the publishing representatives taking part in the roundtables said that it was also because they believe that they can build a better system for distributing streaming income than that currently being employed by their CMOs.

If the CMOs are not to lead on addressing the music industry's data problems, then who? Some participants in the roundtables thought that the solution would ultimately come from a start-up or not-for-profit initiative, though whether such a project would be able to gather required data organically is debatable. But it's possible an initial database could be acquired from one source or another.

As for the need for artists and songwriters to begin gathering better data at the outset, most managers accepted that this was probably true,

though many added that that would actually require managers to play a more proactive role too to ensure accurate data was consistently logged.

In the main, managers seemed hesitant about taking on too big an extra responsibility with regards to data provision, reckoning that ensuring good data should really be the responsibility of labels, publishers and CMOs. Though at the same time, they recognised that good data was now key to their artists getting paid, and if simple systems could be developed via which artists and songwriters, and their managers, could feed in initial data about new works, then that task might need to become part of what the manager does.

Perhaps more importantly, given bad data can result in lost or delayed royalties for artists and songwriters, managers probably do need to understand better what information is required where to ensure an efficient flow of digital income.

This would enable them to monitor their artists' labels, publishers and societies, and put pressure on those partners to apply good data practices, from simple measures like ensuring the existing ISRC and ISWC standards are always complied with, to providing all the data required to ensure the prompt payment of digital income, to committing to clean-up legacy data. This is another area where organisations like the MMF could seek to educate.

The Data We Need (right) ▶

What information should a music rights database include? These are some of the things we arguably need to know to ensure the efficient processing of royalties.

The Data We Need

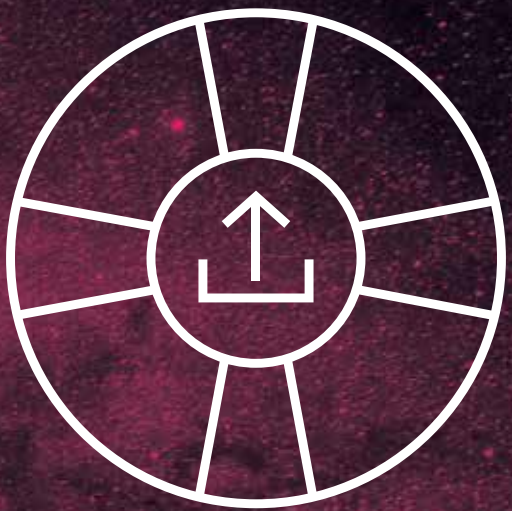
OUR CHECKLIST

- [ ] What is the ISRC of the recording?
- [ ] What song is this a recording of?
- [ ] What is the ISWC of that song?
- [ ] Who is the featured artist?
- [ ] What other performers appear on the recording?
- [ ] Who wrote the song?
- [ ] Who owns the copyright in the recording in this country?
- [ ] Who owns the copyright in the song in this country?
- [ ] If there are multiple owners, what are the splits?
- [ ] Which CMO or CMOs represent the copyright owners in the recording?
- [ ] Which CMO or CMOs represent the performer's ER rights?
- [ ] Which CMO or CMOs represent the songwriters?
- [ ] Are the mechanical rights in this song controlled by the publisher or the CMO?

“We know many fans use YouTube as it if was a streaming platform like Spotify – they minimise the browser and use it as an audio service – but we earn so much less, that’s the problem.”

“YouTube is such a great marketing channel … such a great discovery platform … it’s difficult to see how new artists could work without it.”

7.



Safe Harbours

Since Part One was published, the music industry has really stepped up its campaign against the safe harbours of copyright law – principally in the US and Europe – that enable 'opt-out' streaming services, the most prominent of which is YouTube.

The safe harbours basically say that the providers of internet services – including ISPs, server hosting companies and social media – cannot be held liable for copyright infringement if their customers use their services to distribute content without licence, providing they offer rights owners tools via which they can request that infringing content be removed.

The safe harbours mean that a service like YouTube can allow content uploaded by its which may contain unlicensed music to remain on its server without the risk of being sued for copyright infringement, providing they have a system to remove infringing content when made aware of it, which they do in the form of Content ID.

Of course, YouTube's content management system is different to most in that it also gives a rights owner the option to monetise user-uploaded content by taking a cut of ad revenue, rather than just having the unlicensed music removed.

Trade bodies for the record companies and music publishers have claimed that this gives YouTube an unofficial source of content that strengthens its negotiating hand when agreeing licensing deals with music companies.

This means YouTube enjoys much more favourable deals than the opt-in streaming services, particularly when it comes to the payment of minimum guarantees, which means that the income received by the music industry is not linked to the number of streams, but the number of ads served.

Unhappy with this situation, the record companies and music publishers have argued that services like YouTube should never have been allowed to benefit from the safe harbours, which, they feel, were designed for ISPs and server hosting companies, rather than publicly accessible websites that compete with media and content-on-demand platforms.

To that end, the music industry wants the American law and European directive from which the safe harbours stem rewritten, so as to exclude services like YouTube. And following extensive lobbying, the recently published draft European Copyright Directive does include an Article that seeks to tackle this issue.

7.1 Assessing the official position

The vast majority of those taking part in the roundtables supported the position put forward by various music industry trade organisations on this issue: that the safe harbours were not designed for services like YouTube, that the exploitation of safe harbours by services like YouTube is damaging the growth of

the streaming market, and the laws from which the safe harbours stem should be rewritten.

A number of participants, including artists and managers as well as label executives and publishers, felt that this was the single biggest issue facing the music industry in 2016. However, while no one outright opposed the music industry's official position on safe harbours, some other interesting points were raised.

First, while most of the labels and publishers represented seemed confident some tangible change could be achieved at a legislative level, in Europe at least, some lawyers and managers were less optimistic and felt the industry needed a plan B. Since the roundtables, the European Commission has published the aforementioned Copyright Directive including an Article on safe harbours. Though even those lobbying on this issue, while welcoming that development, have generally called it a "first step" and it is as yet unclear exactly what new obligations the Article as written would place on a YouTube type service.

Second, some – especially younger – managers felt that, while no one is happy with the royalties YouTube pays, it is now such an important fan engagement platform for new talent that in the wider scheme of things the lower royalties should perhaps be written off as a marketing expense. Though that does not apply to established and especially heritage acts, who also struggle to keep their content off YouTube, even with the assistance of the Content ID system.

Third, many acknowledged that in building Content ID, YouTube had created a micro-licensing platform that was enabling music rights owners to generate revenue from user-generated content that would not otherwise be accessible. The industry has not built such a platform for itself, and would lose this new income stream if reformed safe harbours actually resulted in YouTube reducing music content on its platform.

Fourth, one issue with YouTube that is rarely discussed is that the service is simply not selling enough advertising and that, just as importantly, the advertising industry arguably isn't creating the right kind of content for a short-form video platform, meaning many channel owners feel ad-skip functionality must be offered to the user, but no one earns when adverts are immediately skipped. This is an issue for YouTube and/or content owners to take up with the advertising industry in first instance.

Fifth, some artists and managers stated that, while they share the concerns of labels and publishers over the way YouTube is licensed, the various transparency issues discussed above make it hard to reach an truly informed opinion about the relative merits, or not, of the platform.

Sixth, some artists and managers expressed a concern that reforming safe

harbours had now become such a big issue within the music community, that there were overly high expectations as to what safe harbour reform would actually deliver, even if such reforms could be achieved.

7.2 Possible solutions

It was generally agreed that managers should continue to support wider industry efforts to reform safe harbours, which would include further lobbying to refine Article 13 of the European Copyright Directive.

However, if we are to accept the somewhat more pessimistic viewpoint expressed by some lawyers and managers with regards whether or not the music industry will secure safe harbour reform, we need a plan B. Three ideas were raised during the roundtables.

a. A negative PR approach

First, some hoped that the music industry's high profile campaign against the use of safe harbours by services like YouTube – even if it didn't result in favourable changes in Washington or Brussels – might pressure YouTube itself, and other opt-out streaming services, into compromising with the music industry in some way. This was particularly the view held in the US, where a number of high profile artists were speaking out against YouTube at the time of our roundtables.

Though, while it is true that the recent industry-led safe harbour campaign resulted in YouTube responding through the media in a way it has not done in the past, it is debatable whether bad press alone will actually result in a change of policy at the Google company, unless public criticism actually hits usage or advertising income, which it does not seem to have done to date. And unlike start-up streaming services, YouTube doesn't have to worry about high profile artist-led criticism impacting on share price or a future IPO.

Though the fact YouTube did feel the need to respond to recent criticism might suggest that there are some sensitivities amongst management there, or higher up within Google, so more sustained criticism might successfully force some compromise, especially if younger rather than heritage artists lead the charge.

b. A positive PR approach

An alternative PR approach might be to instead encourage high profile artists to speak out in support of those streaming platforms that the industry favours, which is generally paid-for subscription services.

The music industry has in the main relied on the streaming platforms themselves to market the new digital product – ie paid for subscription streaming – and many of them have in turn relied on business partners like mobile networks to put the product in front of a more mainstream audience.

Perhaps it is time for artists and labels to adopt more consistent messaging

themselves, encouraging music fans to sign up to paid-for streaming, with some sort of initiative that promotes all premium subscription platforms, but not those that are primarily seen as a loss-leaders, marketing channels or a mere necessary evil to the music industry, such as the opt-out streaming services. And perhaps this messaging could be included at the end of every official music video posted to sites like YouTube.

Whereas labels and artists have generally been good at directing fans to iTunes and Amazon (and, for that matter, YouTube and SoundCloud) through their marketing activity, they have often been less proactive in directing fans to premium subscription services.

This is possibly because the messaging is confusing. Or possibly because they are wary of losing the quicker hit of download and physical sales by driving fans to subscription services. Or possibly because the revenue share and transparency issues raised above mean artists are not entirely certain as to which streaming models are in their best interest.

But a more concerted effort across the industry to promote paid-for streaming might help overcome the impact of free services like YouTube on premium sign-ups, while also putting pressure on the opt-out streaming platforms to compromise with the industry on the way they provide music content.

c. A technology solution

One final solution put forward to the safe harbour problem was a technology approach. A platform only receives safe harbour protection while it is ignorant of unlicensed content on its platform, which is why it must block (or license) content as soon as a rights owner issues a takedown notice.

Could the music industry therefore develop a technology whereby content somehow automatically alerts a platform of its presence whenever it is uploaded to a server?

Indeed, some participants in the roundtables speculated that, while some of the content management systems built by opt-out platforms were good, it wasn't necessarily in the interest of such platforms to develop such systems to their fullest potential, because doing so might increase their liabilities, or require them to more proactively remove content.

If this was the case, could the music industry lead on a project that achieved the fullest potential of such technology itself? Though if so, who would lead, and who would pay for it?

What do we do?

The Music Managers Forum (MMF) is the world's largest professional community of music managers in the world.

Since our inception in 1992 we have worked hard to educate, inform and represent our managers as well as offering a network through which managers can share experiences, opportunities and information. We are a community of 500 managers based in the UK with global businesses and a wider network of over 2000 managers globally. Our membership manages over 1,000 artists including Arctic Monkeys, Elton John, Lily Allen, Mumford & Sons, Robbie Williams, Ella Eyre, Paul McCartney, Royal Blood, Kaiser Chiefs and many more. We engage, advise and lobby industry associates and provide a professional voice for wider industry issues relevant to managers. The MMF runs training programmes, courses and events designed to educate and inform artist managers as well as regular seminars, open meetings, roundtables, discounts, workshops and the Artist & Manager Awards.

"I've been in the business for forty years and being a member of the MMF has given me access to information that I otherwise might never have come across. I recently attended an MMF seminar which has led to me obtaining substantial new revenue for my clients"
Paul Crockford, Crockford Management

"Being a member of the MMF offers a great support network for managers of all levels, opportunities to expand knowledge, courses and great networking opportunities too. Having this community is a very valuable asset to the industry – and not to mention that they are a friendly bunch too so don't be afraid to ask questions or ask for help!"
Julie Weir, Visible Noise/Sony Music UK

Why Join? SIGN UP AT THEMMF.NET

We provide real, meaningful value for our members and their artists – helping to unlock investment, open up new markets, and create opportunities to develop and grow artist businesses.

All of our members are encouraged to play an active role in the governance of our community. Membership benefits include:

- Priority access to MMF seminars and networking events
- Half price discounts on our MMF Induction Day, professional development programme and training courses
- Discounts on a wide range of industry conferences and events
- Weekly members email newsletter including the latest MMF offers, events and exclusive opportunities
- Access to the members-only area of the website which includes useful resources, how-to guides, templates and links plus a discounts directory and events calendar
- Access to an individual mentoring programme benefitting from the skills and experiences of top managers
- Access to MMF Associates which includes over 40 top music, technology, legal, insurance and accountancy companies
- Members only events including socials, networking evenings, roundtables and workshops
- Priority access to the annual Artist & Manager Awards
- Ability to participate through relevant Committees
- International links to 18 affiliate manager bodies

US managers can sign up to our 'In Case You Missed It' emails to stay up to date with global music news, as well as details of our American networking events. Just email fiona@themmf.net.

The MMF also runs an associate programme to help and support businesses to engage with the music management community. For more information contact annabella@themmf.net

CMU

COMPLETE MUSIC UPDATE is a news and information provider to the music industry, covering music, music people and the music business, and championing great new artists and releases. CMU provides seriously good news and analysis that never gets too serious, with both freemium and premium content available.

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CMU:DIY is our music industry education programme, providing tips and advice for aspiring artists and songwriters, and future music business talent, through a range of online resources and educational events.

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Dissecting The Digital Dollar' is a report commissioned by the Music Managers Forum to document in one place how streaming services are licensed by the music industry, to explain why they are licensed that way, and to inform the debate around the evolving streaming sector.

Part Two of the report summarises a series of roundtable debates organised by the MMF involving artists, managers, labels, publishers and other experts to discuss the issues raised. Dissecting The Digital Dollar was produced by CMU Insights, the training and consultancy division of Complete Music Update.

Part One of this report and the digital version of Part Two is available for free from themmf.net/digitaldollar

www.themmf.net