9 Key Points About Music Streaming

- William Genereux, October 6, 2014

Overview

Streaming music over the Internet can involve as many as six rights or sets of rights.[1] This paper examines those rights, in terms of whether the music industry is winning or losing its battle of survival – and what that means in a post-Napster world where file sharing and torrents have gutted traditional business models.

Navigating the challenges posed by new business models, is it possible to make money when music today is essentially free? Creative strategies are required to monetize or leverage digital music assets. Technology companies are increasingly shaping the future as we move forward. This is bringing new shape to familiar economic rivalries. Has overall gross revenue in the music industry gone down, or has it only been redistributed? Are consumers willing to pay more for music or do technology companies need music to be essentially free so consumers can afford the digital devices and infrastructures that bring them the music? Are consumers willing to pay more for music, regardless, and is revenue sharing from ad-supported models like YouTube and Spotify killing what is left of the music industry? Are music subscription services the right alternative given that they rely on tariffs? Are these tariffs regarded as being appropriate or out of touch? Music streaming is more than promotion for the sale of music – it is often the end use of the music by consumers – who increasingly are no longer buying digital downloads. This paper asks those questions and provides 9 tips for understanding the disruption caused by streaming.

1 – Streams Are Not Like Downloads

Rampant music sharing on the Internet enabled by the use of bit torrents on peer-to-peer file sharing platforms has changed the music business. It started in 1999 with MP3 file sharing over Napster, which quickly became labeled as a pirate site although in 2014 when talking about music streaming services I have heard people say that giving free access to music allows consumers more opportunity to "discover" new artists and that many consumers will then purchase a legal copy or an enhanced copy usually in the form of a download but maybe as a physical product or buy merchandise or tickets to a show. This seems odd because overall music sales are down, but maybe the market has changed permanently and is no longer able to sustain 1999 revenue numbers. There needs to be a debate built on solid evidence, whether legal streaming has stamped out the devil of illegal file sharing or become the new devil itself. The hope of streaming seems to be that by

[1] *Re:Sound Tariff No. 8 – Non-interactive and semi-interactive webcasts* (May 16, 2014) Copyright Board Canada Decision at para. 7; see also: *Commercial Radio Tariff (SOCAN: 2008-2010; Re-Sound: 2008-2011; CSI: 2008-2011; AVLA/SOPROQ: 2008-2011; ArtistI: 2009-2011)* (July 9, 2010) Copyright Board Canada Decision at para 8-13.

making music readily available, a sufficient number of consumers can be enticed to convert from piracy back to monetized usage either in the form of buying a monthly subscription for the music or by being counted as a set of eyeballs on free sites that generate revenue by selling ads on those sites.

The point here is that in large measure as a result of piracy the music industry has become tolerant of the idea – if not embraced – music streaming as a legal alternative. Therefore, to understand how the music industry has been changing at dizzying speed and perhaps hastening its own demise, one first needs to know the fundamental differences between a download and a stream.

According to the Copyright Board – and a key factor in the tariff rates it is setting currently – a sound recording is:

- downloaded – when a file that contains the recording is sent to and stored on a recipient's device; or

- streamed – when only enough data is transmitted or cached to allow the recipient to listen to the recording at the time of the transmission; in principle, the recipient is unable to store the recording onto a medium or device for later use.[2]

The problem, which the Copyright Board tacitly recognizes, is that technology is outpacing the ability of the music industry to keep up, in terms of setting usage prices that are fair and reasonable in all the circumstances – that sustain the industry. With streaming increasingly the user-experience is like owning all of the recordings in the world for free. Streams can be stored and listened-to offline. Downloads are becoming redundant.

2 – There Are Plenty of Revenue Sources in a Music Stream

The six rights or sets of rights in a music stream can be defined as follows:

1. The exclusive right of the owner of the copyright in a musical work (which I refer to here as a "song") to communicate it to the public by telecommunications and to authorize such as communication.[3] This is the communication of the song itself, not the communication of the performance of the song. Think of a recording artist doing a cover song. Just because the recording artist covers the song, he/she does not own the song. The song remains owned by the composer/ music publisher. This right is administered in Canada by SOCAN[4], pursuant to tariffs established under sections 67 to 68(2) of the *Copyright Act.* Major music publishing companies have vast

[2] Re:Sound Tariff No. 8 Decision, para 10.
[3] *Copyright Act*, R.S.C., 1985, c. C-42, s. 3(1)(f).
[4] Society of Composers, Authors and Music Publishers of Canada (SOCAN).

catalogues of music registered with SOCAN. "Unsigned" smaller or indie artists often only have a "publishing designee" which essentially is a business name registration allowing artists to collect for themselves the "publisher's" side of SOCAN royalties when they write music (i.e. SOCAN splits the money it collects between publishers and composers after deducting its operating costs). In short, this is money that goes to the people who wrote or published the song.

2. Remuneration right going to the performer of a song on a sound recording, when the song is communicated to the public by telecommunication.[5] In Canada this right is administered by Re:Sound[6], pursuant to the tariff regime under the *Copyright Act*. Think of the same song as in item 1 above – except, this is the remuneration going to the recording artist who performed the song.

3. Remuneration right going to the maker of a sound recording of a song. In Canada this also is administered by Re:Sound. It is treated as one payment with item 2 above, at source (i.e. Re:Sound divides the revenue between sound recording makers and performers for each song).[7] Typically, this is the remuneration that goes to the record company that recorded the song.

4. The exclusive right of the owner of the copyright in a musical work to reproduce it and to authorize such a reproduction – song mechanicals. In Francophone Canada, this repertoire is largely represented by SODRAC[8]. In the rest of Canada, by CMRRA[9]. Where they opt to use a tariff under the Copyright Act, by them jointly as CSI[10]. This is the right to make copies or permanently accessible platforms that embody the song, like vinyl records, cassettes, CDs, permanent downloads, on-demand streams and sound clouds, lockers or storage devices.

5. The exclusive right of the owner of the copyright in a sound recording to reproduce it and to authorize such a reproduction.[11] This has traditionally been the clearance that makes or breaks a deal (because the publishing clearance always tended to follow). It is the right to make copies of the masters - the yin to song mechanicals yang. It is the right to make copies or

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[5] *Copyright Act*, s. 19(1).
[6] Re:Sound is a not-for-profit music licensing collective.
[7] I could have lumped these two "Re:Sound" rights together (i.e. for makers and performers). However the Copyright Board chooses to treat them separately therefore I follow that convention here.
[8] SODRAC is an acronym for society for reproduction rights of authors, composers and publishers in Canada.
[9] CMRRA is an acronym for Canadian Musical Reproduction Rights Agency.
[10] CSI is a joint venture company owned by CMRRA and SODRAC.
[11] *Copyright Act*, s. 18(1)(b).

permanently accessible platforms that reproduce the masters, in formats that could be vinyl records, cassettes, CDs, permanent downloads, on-demand streams and sound clouds, lockers or storage devices. These rights are subject to the general regime of marketplace licensing. They are not tariffed. That is, the owner/ licensor (record label) negotiates directly with the buyer/ licensee (technology company).

6. The exclusive right of the owner of the copyright in a performer's performance, to reproduce any reproduction of an authorized fixation of the performance for a purpose other than that for which the authorization was given and to authorize such a reproduction.[12] This is an outlier right that is administered by ACTRA PRS[13], ArtistI[14] and AFM Canada[15]. Only ArtistI which is Francophone has filed a tariff, with the rest opting for the general marketplace licensing model.

3 – Streaming (As Marketplace Disruptor) Is Interactive

In its purest form, radio is non-interactive. You tune in, then listen to whatever is being broadcast. Streaming, on the other hand, tends to be interactive to varying degrees depending on the streaming service. Streaming can have very little functionality, such as simply the ability to pause or shuffle, or it can have more features such as the ability to skip songs, search for, and play songs on demand. When consumers are able to interact with the streams, this causes disruption in the music market. It changes where, when and how they consume music.

Disruption is to be expected, to the extent that consumers shift their listening habits away from non-interactive radio to streaming sites. For traditional radio broadcasters, this would result in a decrease in listeners and therefore a decrease in ad revenues. For the people who wrote or published the song, or recorded and performed the songs, theoretically this should be neutral if consumption levels stay the same and "if" the tariffs are fair[16] but for the owners of the masters who have been using radio to sell something else – copies of the recordings - this is a catastrophe when consumers can interact with streams to the point of satisfaction – where they do not need to buy a copy (e.g. a permanent copy, like a record, CD or downloaded music file).

4 – The People Who Wrote or Published the Song Tend to Get Paid

[12] *Copyright Act*, s. 15(1)(b)(ii).
[13] ACTRA PRS (Alliance of Canadian Cinema, Television and Radio Artists – Performing Rights Society) is the union of more than 22,000 professional performers working in English-language recorded media in Canada including TV, film, radio and digital media.
[14] A performing artist collective.
[15] The Canadian Federation of Musicians.
[16] Judicial review of tariffs is commonplace.

For the people who wrote or published the song, the Copyright Board already has certified a number of tariffs for Internet streaming, which are:

- *CSI Online Music Services Tariff, 2008-2010*, which deals with the reproduction of musical works in permanent downloads, limited downloads, and on-demand streams;

- *SOCAN Tariff 22.A (Online Music Services), 2007-2010*, which sets the royalties payable to communicate musical works for on-demand streams;

- *SOCAN-Re:Sound CBC Radio Tariff, 2006-2011*, which deals with simulcasting of CBC's over-the-air radio signals;

- *SOCAN Tariffs 22.B to G*, which sets streaming royalties for Commercial Radio, Commercial Television, Non-Broadcast Television, Pay Audio Services, Satellite Radio, Audio Websites, Game Sites, etc.

SOCAN and CSI are able to collect royalty payments for Internet usages under their Copyright Board tariffs and where tariffs have not yet been approved, by negotiation pending the rates being set by the Board (for example, SOCAN's agreement with YouTube, discussed below).

SOCAN originally filed Tariff 22 in 1995 and has proceeded to do so every year since then. An initial decision of the Copyright Board in 1999 confirmed Tariff 22. However, that decision was the subject of legal challenges in the Federal Court of Appeal and the Supreme Court of Canada. In 2007, the Copyright Board approved Tariff 22.A for online music streaming and downloading services. In 2008, the Board approved Tariffs 22.B to G. SOCAN had to overcome objections in respect of Tariff 22, culminating in the Supreme Court of Canada's "Fivefecta" decisions in July 2012. As a result SOCAN lost the ability to collect license fees for the transmission of songs in permanent downloads, but it was confirmed that SOCAN continued to have a right to collect for streaming uses. SOCAN and YouTube concluded an agreement in early 2013 by which YouTube agreed to pay fees to SOCAN for the period 2007-2013 inclusive. The YouTube agreement requires the approval of the Copyright Board, but the parties are confident that such approval will be forthcoming and for that reason the payments contemplated by the agreement are continuing.[17]

5 – Streaming is Repeating the Lessons of Radio

[17] As explained by SOCAN on its website, http://www.socan.ca/content/tariff-22-faqs

Commercial over-the-air radio stations pay royalties to SOCAN for the right to communicate musical works (songs) to the public. We think of this type of communication as "broadcasting" where broadcasters are paid by advertisers who pay based on rate cards calculated by the number of listeners. The royalty rates paid to SOCAN are calculated in accordance with tariffs set by the Copyright Board. Despite changes in technology and waves of fragmentation and consolidation in the radio station marketplace, the same payment regime has been around for decades: in exchange for the right to broadcast songs, radio stations pay a percentage of their gross revenue to SOCAN so the money can be redistributed to the people who wrote or published the songs.

However, these same radio stations historically have not paid royalties to the owners of sound recordings – typically, record companies, essentially because radio-play traditionally has been thought to be promotion or advertising: i.e. for the sale of something else, be it records, CDs or downloads, live concerts, etc. This has been a tradeoff, *quid pro quo*, source of frustration and cause for ethical concern (due to "payola") in the music business for decades, where record companies typically pay radio trackers to get their recordings onto radio in order to make them more popular so more copies can be sold. To be clear, radio-play itself has never been a source of revenue to the owners of the master recordings, *per se*. If anything, it has been an expense, like advertising.

Now, the same group who were shut out of royalties from radio play, i.e. record labels – who tend to be competitors of each other, who do not negotiate as one entity (i.e. not like SOCAN or CSI), and who rely on à la carte negotiated licenses (often with secret terms) with music services (or who try to run their own music services– more on that later) are finding it is hard to have sustaining revenue through streaming because customers tend to prefer "free". Already, many record labels use so-called 360-deals as a way of making ends meet, precisely in response to the decline in revenue from selling CDs or downloads. For record labels used to not getting anything from radio, lowered revenues due to microscopic royalty rates somehow fit the existing business culture. They can be handled as a loss-leader, leading to a sale of something else. The record industry still has a lot of optimists who think that the industry is stronger than ever in the sense that people are now listening to more music than ever – with the problem being, that the value is not being monetized. The recorded music industry is scrambling to find a way to monetize streaming but is waking up to the reality that the only way to fix the problem is to increase prices and to stop giving away music for free – or to find new ways to increase their share of royalties payable to artists. For at least some high profile recording artists who control their own masters, music streaming is a bad joke e.g. Thom Yorke of Radiohead who has a well-publicized dislike of Spotify. Yet again, Moby expresses a contrarian, survivalist – and perhaps ultimately an elitist point of view when he says:

> "Artists who are adaptable are doing fine. A musician who makes records, tours, DJs, remixes, does music for video games and films is doing fine. If you can learn how to

> adapt — it's really weird and unhealthy when people talk about restricting progress to accommodate the inability of people to adapt. Every industry has been impacted by [changes in technology] in both negative and positive ways, but I feel like to complain is pointless. I love Thom Yorke, but when I heard him complaining about Spotify, I'm like, 'You're just like an old guy yelling at fast trains.' I love anything that enables people to have more music in their lives."[18]

Meanwhile Thom Yorke lately has gone in a different direction with the September 26, 2014 release of his new solo album on the BitTorrent file sharing network. It was reported[19] that in the first three days album downloads had hit about 408,000. Yorke and his music publishers are not sharing data yet on how many of these users actually have paid the $6.00 fee to unlock the content distributed on the peer-to-peer network. That will be the real test because once the album has been released into the file sharing network it quickly could become a free file share among users – which has been the music industry's problem not salvation since Napster in 1999.

6 – A Closer Look is Needed at the Tariff Regime for Performances Embodied in Streams (Neighbouring Rights)

As discussed earlier in this paper there are remuneration rights going to the performer of a song on a sound recording when the song is communicated to the public by telecommunication and to the maker of the sound recording of the song. These tariffs are collected in Canada by Re:Sound – which is still a relatively young entity only dating back to 1997. Re-Sound describes its origin as follows:

> With the passage of Bill C32 in 1997 the *Copyright Act of Canada* was amended to acknowledge the essential contribution of artists and record companies in the creation of sound recordings.
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> A right of remuneration for the performance in public or communication to the public by telecommunication was established in section 19 of the *Canadian Copyright Act*. This amendment brought Canada in sync with over 85 countries and established the right for artists and record companies to be fairly compensated for the broadcast and public performance of their works.
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> Previously only composers and music publishers received royalties (from SOCAN) for airplay and the public performance of their works in Canada – the people who created the recordings (artists, background musicians, record companies) did not. This resulted in many decades of inequality, which was only corrected in Canada in 1997.
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> In August of 1997, the Neighbouring Rights Collective of Canada (NRCC) was established. The founding member organisations were ACTRA PRS (The ACTRA

[18] http://www.nme.com/news/radiohead/74080

[19] http://variety.com/2014/digital/news/thom-yorke-solo-album-tomorrows-modern-boxes-downloaded-400000-times-over-weekend-1201316230/

> Performers' Rights Society), American Federation of Musicians (AFM), ArtistI (La Société de gestion collective de l'Union des artistes), AVLA (Audio-Video Licensing Agency) and SOPROQ (La société de gestion collective des droits des producteurs de phonogrammes et de vidéogrammes du Québec).
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> The first NRCC tariff was certified in August of 1999 for Commercial Radio. This was followed in 2000 by a tariff for CBC radio and in 2002 for Pay Audio Services. In 2006, the Copyright Board of Canada certified the first of NRCC's public performance tariffs: Tariff 3 – Use and Supply of Background Music. The most recent certified tariff was in 2009 for Satellite Radio Services.
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> On March 1, 2010, NRCC became Re:Sound, and re-launched its website.[20]

In countries (such as Canada) that have signed and implemented the Rome Convention, 1961, Re:Sound payments are known generally as "neighbouring rights" royalties. In my own experience reviewing royalty statements forwarded by recording artist clients, it is noticeable that over about the last dozen years as royalties from the sale of records, CDs and downloads have declined, neighbouring rights royalties have increased, are strong, and at least somewhat have offset the losses of physical sales.

Notably, the United States has not signed the Rome Convention (despite lobbying from the recording industry) and therefore does not have neighbouring rights *per se*, but instead has an entity called Sound Exchange which collects royalties for online performances of "noninteractive" digital streams. As described by Sound Exchange its mandate covers some but not all of the emergent market of digital streaming:

> Noninteractive services are very generally defined as those in which the user experience mimics a radio broadcast. That is, the users may not choose the specific track or artist they wish to hear, but are provided a pre-programmed or semi-random combination of tracks, the specific selection and order of which remain unknown to the listener (i.e. no pre-published playlist). For services which provide an interactive service or on-demand access to certain tracks or artists (e.g., YouTube), the statutory license does not apply, and a direct license must be obtained from the copyright holder.[21]

Readers of U.S. based legal and business commentary in this area therefore should be careful to note that this is not payment under a fully-formed performance royalty regime but rather payment under a specific piece of legislation called the Digital Performance Right in Sound Recordings Act of 1995 ("DPRA") (modified by the

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[20] http://www.resound.ca/en/about_us/history.htm. Re:Sound's website currently is a little out of date because in fact, the most recent certified tariff was in 2014, directed at streaming online – to be discussed below.

[21] http://www.soundexchange.com/service-provider/licensing-101/

Digital Millennium Copyright Act in 1998). The noteworthy aspect for this paper however is that the DPRA was enacted by Bill Clinton – a saxophone player - in response to the absence of a stand-alone performance right in the US for sound recordings and performers on them and significantly, a fear that digital technology would destroy sales of physical records – which is exactly what has happened since the DPRA was enacted.[22] Therefore despite the dissimilarities between Sound Exchange and Re:Sound, it is worth noting that the U.S. perspective is more than just the arcane setting of a regulatory fee structure to comply with international copyright treaty obligations. Sound Exchange emerged out of a well-oiled politically and indeed culturally-driven imperative: that a focused effort was needed to save the music industry as it transformed into a digital world with music available anywhere, anytime, on-demand.

The neighbouring rights revenue stream needs special attention in my view because the money is split 50/50 between the performer and the record label (similar by analogy to how SOCAN splits the money it collects between the composers' side and music publishers' side). That is, a significant aspect of neighbouring rights money is that it goes to the same group who otherwise would be paid for the making of copies of the sound recordings: to the record labels and their recording artists – the group that seem mostly likely disenfranchised by the reduction of traditional revenue sources (copies) in favour of the unknown (whether streaming revenue can rise to offset that loss).

That said the tariffed neighbouring rights money going to these same folks is paid to them on a different percentage split than in their commercial relations. With a typical record deal the artist might be getting 20% of the net revenue, with the label retaining 80%. With neighbouring rights the split is 50% - 50%. Therefore, over the longer term in respect to the development of digital policy in the industry, record labels might be inclined to try to boost revenues through the licensing of their catalogues to streaming platforms, rather than advocating for substantial increases in neighbouring rights payouts since the money all has to come from the same user pocket (i.e. the proprietor of the streaming site). As well, this could give rise to thorny issues about the hyper-collection of neighbouring rights revenue in Canada ultimately destined for sister societies overseas who reciprocally pay less, which might be unpalatable politically in Canada. Still, a hard look needs to be taken on the rates currently set and the major labels need to be on board. This is a chance for the industry to speak with one voice, rather than to be divided and conquered by technology companies seeking to hasten the race to the bottom with free music available everywhere all the time. Look, if the record companies want to re-adjust

[22] See: Martin, Rebecca (1996), "The Digital Performance Right in the Sound Recordings Act of 1995: Can it Protect U.S. Sound Recording Copyright Owners in a Global Market?" *Cardozo Arts and Entertainment Law Journal* 14: 733. http://cardozoaelj.com/wpcontent/uploads/Journal%20Issues/Volume%2014/Issue%203/Martin1.pdf

the 50% - 50% revenue stream back to 80% - 20% overall in their dealings with artists, they will find a way. The main problem faced by the industry right now is a failure to extract the value out of the digital music proposition, not how to divide the money amongst itself.

When the Copyright Board released its decision in *Re:Sound Tariff No. 8 – Non-interactive and semi-interactive webcasts* (May 16, 2014), it set off a chorus of disapproval in the music industry.[23] No wonder, because this was seen as the chance to bring some balance back to the situation where revenues from the exploitation of sound recordings were being gutted. Reading the decision I wonder how hard the major record labels participated in the fight for higher neighbouring rights rates, if it were to come at the expense of being able to charge these sites more for the direct-license of their entire catalogue where they could then control the amounts going back to the performers by adjusting royalty rates rather than living under a 50/50 regime where half goes automatically to the performers. This is an extremely nuanced situation where self-interest needs to be put into perspective, so that revenue enhancement opportunities can be maximized, not squandered.

In a nutshell, the Board ordered that the neighbouring rights royalties - for those who perform or record the song - should be treated essentially like they are derived from radio play which is promoting the sale of copies when essentially for performers and labels this is no longer how the market works.

This is a troubling situation on several fronts. The Board set rates on what it considered to be "fair" as opposed to using market rates as benchmarks. According to Re:Sound, the rates set by the Board are "less than 10%" of both Canadian market rates and the rates payable for the same rights internationally.[24] The streaming services already in Canada and those like Spotify who were waiting to enter the market no doubt would applaud the Tariff 8 decision as bringing clarity to the market – and it has, which was needed – but much work remains from a macroeconomic point of view. In my view the Copyright Board did a competent job of sorting out the already-outdated evidence it had before it given the regulatory regime that it operates within but the issues continue to morph and Re:Sound justifiably has filed an application for judicial review directly to the Federal Court of Appeal where it is seeking an order quashing the decision and sending the matter back for re-determination. Re:Sound's position essentially is that the Copyright board certified royalties in "complete isolation of economic and market-place realities". In fairness to everyone, those realities have been changing throughout the process and are continuing to change.

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[23] This was spearheaded by the Canadian Independent Music Association with a social media campaign called "I Stand For Music"; see: http://www.cimamusic.ca/unhappy-with-the-tariff-8-decision-like-our-i-stand-for-music-facebook-page/

[24] Re:Sound, Tariff 8 Fact Sheet.

7 – Streaming Does Pay, Just Not as Much as "The Good Old Days" of Selling Copies

Things change. Technology is disruptive. The bottom fell out of the horse buggy market when the automobile came along. We get it. However, it demeans the discussion to cast it in terms of being for or against innovation. Some people may relish being considered a Luddite but most people would find it hard to disagree with having all the music of the world being available, on demand, everywhere, any time. As for price I would venture that given the chance, most people would opt to pay a "fair" price for it rather than steal it. The problem is that people also love a bargain, and when it is offered to them for "free" they accept.

The problem is that streaming sites are legal and free. Sure, some of them have enhanced versions where you can buy a subscription and avoid ads. But who is kidding who? Mostly, streaming sites are free. This is not a good thing for the folks who make the music because sites that give away the music do not have solid revenues to tap-into for royalties.[25]

Some cynics have drawn a conclusion about the proliferation of new streaming sites that draws parallels with the technology sector over about the last dozen years – that is, for venture capitalists to contribute just enough money on a burn rate that allows the site to sign up millions of customers giving them cheap access to something (in this case, music), burning as few royalty dollars as possible along the way, then when a critical mass has been achieved, to sell the money-losing (but highly popular with millions of customers getting something for free) company for megabucks. Thus, to the extent that the value of the music is leveraged to attract all the customers who then become the reason why the company is so "valuable" it could be said that there is a sudden and unfair wealth transfer away from the owners of the music. I say no more on that topic, beyond that it is something to ponder.

An economist in the U.K. by the name of Krzysztof Wiszniewski who has done some careful and original research into this area concludes that the music industry is leaving a lot of money on the table with music streaming – basically, that the industry overall is underpricing the value of music streams and that after all is said and done even factoring in piracy, people would pay more – a lot more and that prices should be pushed up. [26] How the industry can push up prices as a concerted

[25] Note, "free" to users is distinct from "unlicensed". In the United States District Court Southern District of New York on September 29, 2014, the streaming site Grooveshark was found liable for massive copyright infringement by participating in the uploading to its site of thousands of hit records and was not allowed the "safe harbor" protection of the Digital Millennium Copyright Act where it had argued the uploads were from users.

[26] http://thecynicalmusician.com/2014/07/the-problem-with-streaming-in-one-simple-chart/

effort however is problematic because of competition laws. If it is to happen it has to happen organically over time as artists and labels push back on pricing and through regulation by way of tariff adjustments that can be passed along to consumers especially if all the streaming services pay the same rates.

In its desperation to find a way to save itself from piracy, the music industry has jumped onto streaming with the (some would say) irrational hope that massive numbers of new users will be drawn into the market to stream massive numbers of streams – enough to replicate the "Good Old Days" of $16.99 CD albums or even $0.99 downloads, at rates such as $0.00012 per stream. The last time I checked the leaders of micro decimal math were Amazon Cloud and Beats Music (sold by Interscope (UMG) to Apple only a few months ago as part of a $3 billion deal but already being re-evaluated by Apple which might shut it down or move it over to iTunes[27]) who are reported in the U.S. to be paying about $0.00012 per stream, which means that at a ratio of $0.70 net for a download the label would have to achieve 5,862 streams to earn the same as for 1 download.[28] The Internet is flooded with similar examples as disgruntled recording artists are increasingly posting their royalty statements for all the ugliness to be seen.[29]

The situation becomes even more murky when royalties are calculated, not on the basis of "per stream" or "percentage of business' revenue" but on a percentage that is tied to the ad revenue that the particular stream generates. Enter, YouTube, owned by Google. On YouTube, if a new piece of music is posted and it gets very little attention then nothing happens. However if the page with the music starts getting traffic then it gets flagged for rights management, so it can be monetized. That is, YouTube will put ads beside anything that is getting traffic (not just music). The music industry is going along with it, but it poses a price conundrum for the music industry with low rates being paid. This especially painful because at present YouTube is probably the main way that teenagers listen to music. Recently YouTube has been criticized for trying to ram through a standard form of take-it-or-leave-our-site agreement covering indie music streams on its site.[30]

YouTube does not publish how much it pays. However, Helienne Lindvall of the Guardian has reported some interesting examples:

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[27] http://www.rollingstone.com/music/news/apple-denies-beats-music-shutdown-yet-future-is-unclear-20140923

[28] http://thetrichordist.com/2014/02/20/streaming-price-index-updated-2014-per-stream-pay-rates/

[29] This is an exceptionally detailed site: https://docs.google.com/spreadsheet/ccc?key=0Aqe2P9sYhZ2ndE9iZHhWc0pMcDlCdmxNdmFRQXRPY3c&hl=en_GB#gid=7

[30] http://www.digitalmusicnews.com/permalink/2014/06/23/fk-heres-entire-youtube-contract-indies

> Martin Goldschmidt, founder and managing director of Cooking Vinyl – whose roster includes the Prodigy, the Enemy and Ron Sexsmith – says the record label can make an average of $5,000 per million views, under certain circumstances. The highest rate being paid is for non-skippable pre-roll ads, but even that rate varies and can be higher, depending on how badly the advertiser wants its ads to be used. Conversely, not all YouTube streams are monetized, as it depends on where the viewer is based. YouTube exists in 120 countries, but is only monetized in 26 of them. Often this is due to local songwriters' collection societies being dissatisfied with the much lower rate they're offered.
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> Some indie labels say about 30% of YouTube ad revenue goes to it and owner Google (though the site told the Dead Kennedys that it takes 45%) and 40% goes to the owner of the recording (usually the record label). The label gets another 20% of the ad revenue if it can claim ownership of the video, that is it's an "official video" and not a video of someone dancing to the track. And last – and least – the songwriters/publishers get to share the remaining 10% between them.
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> The 10% figure may seem puzzling to many songwriters. As I have written previously their royalty statements are telling a different story, with a million views resulting in around $40 in royalties.[31]

Yet, other reports have YouTube paying considerably less, at $1,750 per million views. [32]

In terms of sheer volume of streams there are glimmers of hope, at the top. Billboard reports for the first 6 months of 2014, for example:

2014 MOST-STREAMED SONGS, according to Nielsen BDS (YTD)

1. Katy Perry Feat. Juicy J Dark Horse Capitol 188,236,000 streams

2. John Legend All Of Me Columbia 144,669,000 streams

3. Jason Derulo Feat. 2 Chainz Talk Dirty Beluga Heights/Warner Bros. 142,478,000 streams

4. Pharrell Williams Happy Back Lot/Columbia 135,197,000 streams

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[31] http://www.theguardian.com/media/2013/jan/04/record-labels-making-money-youtube

[32] http://thetrichordist.com/2014/03/11/streaming-price-index-now-with-youtube-pay-rates-sxsw-sxsw/

5. Idina Menzel Let It Go Walt Disney 129,128,000 streams

6. Iggy Azalea Feat. Charlie XCX Fancy Def Jam 111,911,000 streams

7. Pitbull Feat. Ke$ha Timber Mr. 305/Polo Grounds/RCA 106,081,000 streams

8. DJ Snake & Lil Jon Turn Down For What Columbia 102,340,000 streams

9. Beyonce Feat. Jay Z Drunk In Love Parkwood/Columbia 92,694,000 streams

10. OneRepublic Counting Stars Mosley/Interscope 91,494,000 streams[33]

Doing the math on these numbers gives wildly different results depending on the stream and whether it was part of a promotion. Very few people seem privy to the whole picture. Most are left scratching their heads doing their own math when they receive their royalty statements. For example, if the number 1 streaming hit in the U.S. in the first 6 months of 2014 achieved 188 million streams on YouTube alone, and YouTube pays about $5,000 for a million streams, then the gross revenue from that would be about $900,000. That is not bad money, but if that is the biggest hit, and sales of copies are greatly diminished, then it can be seen that the music industry is in trouble. If the rate is $1,750 per million, then this is really not so good – with streams seeming only to make financial sense for hits.

8 – Relationships Created by Streams Can Be Leveraged

Streaming does have its fans; for example, Budi Voogt, founder of electronic dance music label Heroic Recordings. As he points out, streaming is well-suited for his world. It seems to be a good fit. He is a newcomer to the music industry who has never seen the days when copies of music were controlled and valuable and everything was more tightly controlled in terms of licensing. He is happy with the rates paid to his label. His empire includes pages or channels on Facebook, Twitter, Soundcloud, YouTube, Bandcamp, and Beatport. His strategy is described below:

> The solution we've found is to make all of our content available via Bandcamp, charging fans just $0.50 for a track – but allowing them to pay more if they want. And we get to keep their email addresses. It's where we direct all our traffic, and is a platform which fans experience to be closer to the 'source' than when shopping from an intermediary like Beatport or iTunes. Still, we're also distributing to all the online stores, as it's all about being easily accessible. There is just little reason for us to send traffic there, as besides being overpriced, they're all about chart positioning – and competing against the majors and bigger indies, whom can much better

[33] http://www.billboard.com/biz/articles/news/chart-alert/6150204/katy-perry-john-legend-lead-2014-mid-year-streaming-chart

> facilitate high rankings (via big existing fanbases, marketing budgets and sometimes even illegal chart-pushing activities) is time not spent best.
>
> To come back to the point, when rounding off our latest quarter's royalty statements, we found the following; 42% of income came in via Bandcamp, 29% via iTunes, 14% via Beatport and 13% via Spotify.
>
> With no efforts to direct traffic to anywhere else than Bandcamp, they all generated revenue. But the most interesting here is Spotify, which made as much as Beatport did for us – while we're a label focused on electronic music, and Beatport is the primary marketplace for DJs and electronic styles.[34]

The thing to remember about streams is that the music likely is getting a much wider audience than through previous channels of distribution. Reaching a much larger audience creates tremendous potential for cross-selling. Obviously, the other ways to leverage the relationships created by streaming are unlimited. There is everything from finding a date, to getting paid for live shows, to getting donations from fans, to getting into writing or producing music for film and television, to selling a line of clothing, to selling electronics like Beats headphones, etc.

9 – The More Things Change The More They Stay The Same

In terms of marketing "windowing" is an old film distribution concept that developed when it became necessary to protect theatre box office receipts from being cannibalized by VHS, pay-tv and free over-the-air tv. Windowing ensures that overall revenue is maximized by having an orderly roll-out of a new film. Typically the film is first released to movie theatres then it is released for DVDs and downloads, then after a while longer it is released to pay-tv, then eventually to free over-the-air tv. In the past in the music industry, windowing also has been used to sell singles from an album before the entire album dropped. It also was a way for record labels to build a campaign at radio, by introducing a new artist or a new album one step at a time – to build awareness and excitement through anticipation.

Windowing has become an important topic in music streaming because it represents one of the few ways in which labels can squeeze more value out of the distribution process where music made available for streaming does not generate nearly the same level of revenue as the good old days of selling CDs and downloads. Windowing strategies mean that before making the entire album available to be streamed, only a couple of singles (or 30 second or 60 second teasers) are put into the window – this is intended to drive fans to buy a download of the entire album for example either from iTunes, Beatport or perhaps from the artist's own website. It is not a perfect system because some fans will find illegal downloads and some fans will simply wait or will lose interest if the music is not instantaneously

[34] http://www.digitalmusicnews.com/permalink/2014/09/25/run-independent-edm-label-heres-streaming-isnt-enemy

accessible. But, the thinking is that after being teased with a single or two then at least some fans will be driven to buy something - and that some additional sales are better than none. Windowing is about controlling the distribution process to maximize revenues.

There has been controversy over windowing with YouTube, because YouTube operates under a different set of rules. Whatever has been uploaded can become monetized with ads immediately using YouTube's content ID system. For streaming services like Spotify the practice of windowing is seen as discriminatory against streaming and likely to make the streaming site viewed as a second tier platform by not having a full catalogue and therefore not worthy of paying for if high profile acts like Adele refuse to allow their music – or at lease full versions of songs – to be put onto the streaming service.

As for the contracts between artists and record labels, conceptually we often still have the same issues and the same business practices – which is paradoxical to the extent that distribution has been simplified by technology. Before streaming or even downloading were invented, a standard exclusive agreement between an artist and a label essentially stated that the label would manufacture and sell the records, and in addition the label had the right to license that right to one or more third parties. For example, the label could license a track to anther label for a compilation album; or, the label could license the track to a label in another territory.

In third party license situations however, it was normal that the net revenue from the license would be shared usually 50-50 between the label and the artist (subject to advances, recording costs and other recoupable expenses). The third party license was not paid to the artist at the normal royalty rate because the royalty was calculated on the basis of the published price to dealer (PPD – usually about 20%) or the suggested retail list price (SRLP – usually about 12%).

Further, revenue from the third party license was not paid on the basis of the normal royalty because the sale of records involved breakage[35] (vinyl records tended to shatter sometimes), shrinkage (stock would go missing due to being handled by so many underpaid music fans working in shops and warehouses), and returns (stores, chains or rack jobbers would over-buy, often at the urging of record labels who were looking for chart numbers, knowing they could return as much as they wanted whenever they wanted - returns were a big part of the business).

[35] Breakage has taken on a new meaning now with streaming, being the difference between what a record company may have been promised by a streaming service as a guarantee for the use of the record company's entire catalogue versus a lower number being actual streaming revenue during the term. Breakage is controversial to the extent that the breakage fee might not always be shared with artists since it is not the number of royalty-bearing streams reportable to any specific artist yet represents monetization of the overall catalogue of artists.

Records needed to be packaged in sleeves or jewel cases so packaging deductions were used.

When record companies started selling digital copies, some of them opted to treat the sale as a license. After all, there was nothing physical changing hands. There were no warehouse costs, no packaging costs, no returns, no shrinkage, no breakage, there was no marginal cost for making additional sales. It was a license.

This did not last long. Most record companies today, to my knowledge, have reverted to paying for downloads and streams at the same rate paid for physical copies of records. There has been a lot of litigation especially in the U.S. over the interpretation of old record agreements in the face of digital technology. Those cases all tend to revolve around the wording of the agreements in question. In my view, they are not useful to move forward as a precedent. The fact is, that today a record label will straight-up admit that it has no warehouse cost, no packaging cost, no returns, etc. and at the same time will require the artist to sign-off on an agreement that gives the label the equivalent of some or all of those phantom deductions to pay at the same rate as a physical record. The rationale now is that, there is not enough money in it for the label otherwise, and that the sale of the music is only a loss-leader so the artist can collect songwriting revenue, perform at shows, sponsor products, sell merchandize, etc. Then, it is up to the artist to make a judgment call: to sign with a facilitator, middleman, manager, production studio, indie label, indie with major distribution, or major – or, go it alone. Often the artist will cave-in. There are many reasons why. However, more and more, it is necessary to go it alone. This is in turn explained firstly because there are fewer deals being offered, so one has to make one's own opportunity. Secondly, there are so many people trying to make a living in the music business there is not enough room for them all.

It is Darwinian but truly – some will succeed and most will fail. For the same reason, by and large a label will want to know that an act is successful before it signs-up the act. That is why successful acts must think like they are running a business, and successful labels big or small have to be continually reinventing themselves.

And that is why the music streaming issue is so distressing to the music industry as a whole. It is an existential fight now, about who we are, whether we can get through this, and whether we deserve to survive – after lapsing into the utter failure of not acting in a businesslike manner by embracing change when it came knocking with all the promise of the Internet.

Instead the industry became parochial, insular and narrow-minded. It tried to outlaw the sharing of music and sought to criminalize its customers for doing so. When that did not work it got spooked by what it saw as pirates around every corner. So in desperation to save itself, it gave away the keys to its jewels by letting streaming rights be sold off cheaply, and now it is struggling for survival. I am confident the industry will survive in some form or another because music will

always be with us – good music – because there will never be a shortage of newcomers who are eager to risk everything for fame and fortune. However, when the shakeout comes the survivors will be the ones who have kept their business hats on – not just blindly thinking that streaming alone is going to magically pay all the bills.