

'Playola' and Fraud on Digital Music Platforms: Why Legislative Action is Required to Save the Music Streaming Market

Christine Smith Burton

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/jbtl>



Part of the [Internet Law Commons](#), and the [Science and Technology Law Commons](#)

Recommended Citation

Christine Smith Burton, *'Playola' and Fraud on Digital Music Platforms: Why Legislative Action is Required to Save the Music Streaming Market*, 16 J. Bus. & Tech. L. 387 (2021)

Available at: <https://digitalcommons.law.umaryland.edu/jbtl/vol16/iss2/9>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Journal of Business & Technology Law by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

'Playola' and Fraud on Digital Music Platforms: Why Legislative Action is Required to Save the Music Streaming Market

CHRISTINE SMITH BURTON*©

Music streaming fraud has become a prevalent evil within the music industry. Fake streams cost the industry an estimated \$300 million a year.¹ Unfortunately, the existence of music streaming fraud is hard to establish,² leaving insufficient proof to prosecute or file suit. In April of 2018, however, Focus Media, Inc. filed a complaint against Streamify in the United States District Court of the State of Maryland for Streamify's practice of music streaming fraud.³ The Court transferred the case to the Southern District of Texas due to jurisdictional issues.⁴ But, based on the analysis of the Maryland Court, the case will likely be removed from litigation and forced into arbitration.⁵ Neither the public nor the industry will have any further information on how a United States Court may interpret allegations of music streaming fraud or if Focus Media was able to produce enough evidence to establish a fraud claim against Streamify.⁶

© Christine Smith Burton, 2021.

* J.D. Candidate, 2021, University of Maryland Francis King Carey School of Law. The author would like to thank the editors and staff on the *Journal of Business & Technology Law*, specifically Michelle Sidle, Zachary Birnbaum and Nisha Jain, for their suggestions, feedback, and support during the writing process. The author would also like to thank Professor Nathan Robertson for his time, guidance, and suggestions throughout this process. Additionally, the author would like to thank Marc Jacobsen for his invaluable guidance, and Professor Patricia Campbell and Lucy Martin for their helpful final edits. Finally, the author would like to thank Lee Burton for his constant love and support.

1. See generally Elias Leight, *Fake Streams Could Be Costing Artists \$300 Million a Year: As Streaming Platforms Grow, Indie Labels Are Becoming Increasingly Concerned About How the Numbers Can Be Manipulated*, ROLLING STONE (Jun. 18, 2019, 5:25 PM), <https://www.rollingstone.com/music/music-features/fake-streams-indie-labels-spotify-tidal-846641/>.

2. See generally Amy X. Wang, *Music Streaming Has a Nearly Undetectable Fraud Problem*, QUARTZ (Mar. 15, 2016), <https://qz.com/615359/steady-chunks-of-money-are-being-quietly-illicitly-stolen-from-music-streaming/>.

3. See generally *Focus Music Entm't, LLC v. Streamify, LLC*, 2018 U.S. Dist. LEXIS 205912 (Dec. 5, 2018).

4. *Id.* at *44.

5. *Id.*

6. *Id.*

'Playola' and Fraud on Digital Music Platforms

Although it is unlikely there will be an official Court opinion in this case, the subject matter in the complaint's allegations, as well as other forms of music streaming fraud, are worth examining from a legal perspective. There are multiple types of fraud in music streaming. There are different types of third parties that have manipulated the system to obtain financial gain by defrauding the music streaming services and diluting the rightsholder royalty pool.⁷ Third party playlist pluggers have been accused of using fraudulent practices to boost streams to generate higher royalty revenue for their clients.⁸ In the *Focus Media* case, Streamify was accused of obtaining streams for artist clients by deceptive practices like stream farms.⁹ Other third parties have committed music streaming fraud by creating fake artists, songs and playlists as a means to defraud digital music platforms and obtain royalty revenue at the expense of legitimate artists and rightsholders.¹⁰ Further, users have been accused of downloading bots to loop particular artists' compositions manipulating the royalty pool toward a favored artist.¹¹

There have also been allegations that music industry insiders, at both the artist and label levels, have committed music streaming fraud.¹² Artist managers have been accused of using shady third-party playlist pluggers and bot farms to boost streams to generate greater revenue in favor of their clients.¹³ Record labels ("labels") and artists have been accused of the same practice.¹⁴ Artists have also been accused of requesting fans to download bots to stream songs on a loop to drive more royalty

7. Cherie Hu, *Fraud Has Become the Latest Hurdle for Music Streaming*, VARIETY (Aug. 16, 2018, 9:45 AM), <https://variety.com/2018/music/news/music-streaming-sites-fraud-1202905665/>; Glenn Peoples, *How 'Playola' Is Infiltrating Streaming Services: Pay for Play Is 'Definitely Happening'*, BILLBOARD (Aug. 19, 2015), <https://www.billboard.com/articles/business/6670475/playola-promotion-streaming-services>.

8. Peoples, *supra* note 7.

9. *Focus*, 2018 U.S. Dist. LEXIS 205912 at *7-9. Tim Ingham, *Forget About Fake Artists – It's Time to Talk About Fake Streams*, MUSIC BUS. WORLDWIDE (Jul. 20, 2017), <https://www.musicbusinessworldwide.com/forget-about-fake-artists-its-time-to-talk-about-fake-streams/>.

10. Wang, *supra* note 2.

11. Matt Clinch, *How the Music Industry Is Fighting Online Fraud*, CNBC (Dec. 28, 2015, 8:55 AM), <https://www.cnbc.com/2015/12/28/how-the-music-industry-is-fighting-online-fraud.html>; Lisa Respers France, *Fans Stream Nelly to Help Him Pay Off \$2.4 Million Debt*, CNN (Sept. 13, 2016, 2:47 PM), <https://money.cnn.com/2016/09/13/media/nelly-debt-streaming/>.

12. Peoples, *supra* note 7.

13. Tim Ingham, *How the Music Business Can Actually Crack Down on Streaming Fraud: The Music Business Is Fighting Streaming Fraud with a Pointless New "Code." It Won't Work – but These Ideas Will*, ROLLING STONE (Jun. 21, 2019, 12:04 PM), <https://www.rollingstone.com/music/music-features/how-to-fight-spotify-streaming-fraud-850990/>.

14. Roderick Thomas, *Rolling Stone Charts – The End of Payola?*, STAR REVUE (Oct. 1, 2019), <http://www.star-revue.com/rolling-stone-charts-the-end-of-payola/#sthash.4MibWjs0.dpbs>.

CHRISTINE SMITH BURTON

income to a particular artist.¹⁵ When insiders within the industry manipulate streams (or have been accused of), the practice has been coined ‘playola.’¹⁶

There have also been music streaming fraud allegations directly against the digital music platforms. Digital music services have been accused of diluting the royalty pool for their own benefit by creating their own songs and placing those songs on popular playlists.¹⁷ Other digital music platforms have been accused of manipulating streaming data in favor of certain artists.¹⁸

Unfortunately, in many instances of music streaming fraud, the fraudulent practice may not be considered illegal. In fact, where fraud has been alleged against the digital music services or a music industry insider, the practice may fall into a legal grey area that is not necessarily in violation of any statute.¹⁹ However, these practices may substantially decrease royalty payouts to legitimate artists and rightsholders and, in turn, harm the consumer.²⁰ This comment examines how music streaming fraud may be prevented in the future and attempts to present the best course of action that can be taken to protect the intellectual property rights of rightsholders from music streaming fraud.

This comment addresses this problem in ten parts. The first section discusses the basics of how the music streaming playlist operates.²¹ The second section explains the music streaming royalty pool.²² The third,²³ fourth²⁴ and fifth²⁵ sections discuss the different forms of accused fraud allegedly committed by third parties, music industry insiders, and the digital music services, respectively. The sixth section examines current music streaming fraud prevention methods and industry speculation of why little has been done to prevent music streaming fraud.²⁶ The seventh section explores

15. Clinch, *supra* note 11.

16. Peoples, *supra* note 7; Glenn Peoples, *Modern Promotion & Playlisting: Beyond the Playola*, BILLBOARD (Aug. 28, 2015), <https://www.billboard.com/articles/business/6678562/modern-promotion-playlists-handshakes>.

17. See generally Tim Ingham, *Spotify Is Making Its Own Records...and Putting Them on Playlists*, MUSIC BUS. WORLDWIDE (Aug. 31, 2016), <https://www.musicbusinessworldwide.com/spotify-is-creating-its-own-recordings-and-putting-them-on-playlists/>.

18. Murray Stassen, *TIDAL Now Officially a Suspect in Norwegian Data Fraud Investigation*, MUSIC BUS. WORLDWIDE, (Jun. 10, 2020), [https://www.musicbusinessworldwide.com/tidal-now-officially-a-suspect-in-norwegian-data-fraud-investigation/#:~:text=DN%20reported%20yesterday%20\(June%20,2019,since%20June%2021%20last%20year](https://www.musicbusinessworldwide.com/tidal-now-officially-a-suspect-in-norwegian-data-fraud-investigation/#:~:text=DN%20reported%20yesterday%20(June%20,2019,since%20June%2021%20last%20year).

19. Peoples, *supra* note 16.

20. See Hu, *supra* note 7; Ingham, *supra* note 13.

21. See *infra* Section I.

22. See *infra* Section II.

23. See *infra* Section III.

24. See *infra* Section IV.

25. See *infra* Section V.

26. See *infra* Section VI.

'Playola' and Fraud on Digital Music Platforms

why liability in the case of music streaming fraud is almost impossible to prove.²⁷ The eighth section discusses the current industry solutions.²⁸ In the last sections, current legislation and possible solutions are examined and proposed.²⁹

I. WHY THE PLAYLIST IS IMPORTANT AND THE IMPACT OF FRAUD

The music streaming playlist has become a prominent source of royalty revenue for rightsholders.³⁰ The music streaming playlist is a powerful promotional tool in the music industry,³¹ as when a song is placed on a popular playlist, this placement can almost guarantee that the song will become a hit.³² There are multiple types of playlists including playlists curated by digital music platforms, playlists curated by labels and playlists curated by independent parties (both commercial entities and individuals).³³ Top playlists can have millions of followers.³⁴ These followers may use these playlists to listen to music during the entirety of the day or use popular playlists in conjunction with specific activities, like working out, relaxing, and partying.³⁵ Followers may also turn to playlists to listen to new music or music of a specific genre.³⁶

These playlists become especially important when a playlist has millions of followers.³⁷ Spotify's playlist entitled Today's Top Hits has over 25 million followers and over 20 billion streams.³⁸ Top playlists with millions of followers can

27. See *infra* Section VII.

28. See *infra* Section VIII.

29. See *infra* Section IX, X.

30. See Peoples, *supra* note 16.

31. *Id.*; See Peoples, *supra* note 7.

32. See David Pierce, *The Secret Hit-Making Power of the Spotify Playlist*, WIRED (May 3, 2017, 7:30 AM), <https://www.wired.com/2017/05/secret-hit-making-power-spotify-playlist/>.

33. Simon Owens, *How Artists Illegally Pay Their Way onto Spotify's Playlists*, MEDIUM (May 7, 2018), <https://medium.com/the-business-of-content/how-artists-illegally-pay-their-way-onto-spotifys-playlists-6b85ce0865c5>; Robert Cookson, *Spotify Bans 'Payola' on Playlists*, FINANCIAL TIMES (Aug. 20, 2015), <https://www.ft.com/content/af1728ca-4740-11e5-af2f-4d6e0e5eda22>.

34. See *Spotify's Biggest Playlist, Today's Top Hits, Celebrates 25 Million Followers*, SPOTIFY (Dec. 16, 2019) [hereinafter SPOTIFY], <https://newsroom.spotify.com/2019-12-16/spotify-biggest-playlist-todays-top-hits-celebrates-25-million-followers/>; Owens, *supra* note 33; Cookson, *supra* note 33.

35. See Pierce, *supra* note 32; Eric R. Danton, *Streaming Success? How Some Artists Are Building Their Careers Through Spotify Playlists*, FORTUNE (Dec. 12, 2019, 12:30 PM), <https://fortune.com/2019/12/12/spotify-artists-success-streaming-playlists/>.

36. SPOTIFY, *supra* note 34; See generally Glenn Peoples, *Consumers Now Favor Streaming Services for Music Discovery over All Other Sources*, BILLBOARD (Sept. 30, 2020), <https://www.billboard.com/articles/business/streaming/9457753/consumers-streaming-music-discovery-music-360>.

37. Owens, *supra* note 33.

38. SPOTIFY, *supra* note 34; Stuart Dredge, *Spotify's Today's Top Hits Playlist Now Has 25 Million Followers*, MUSICALLY (Dec. 17, 2019), <https://musically.com/2019/12/17/spotify-todays-top-hits-playlist>.

CHRISTINE SMITH BURTON

increase the number of streams, which in turn significantly increases royalty revenue for rightsholders.³⁹ As millions of followers listen to their favorite playlists every day, the streams for the songs contained on that playlist continue to increase.⁴⁰ Currently, a third of all Spotify user listening time is spent listening to Spotify-curated playlists and another third of this time is spent listening to user-created playlists.⁴¹ These listening habits give playlists incredible importance as new music or artists may never be discovered if their compositions cannot gain inclusion on these playlists.⁴² Some major labels have claimed an artist a failure because that artist, despite traditional terrestrial radio and tour success, was not “playlisted.”⁴³

Many curators, whether through human or artificial interaction, depend on general streaming numbers to determine whether songs are placed on some of the most popular music playlists.⁴⁴ In other words, music with demonstrated popularity is selected for playlists, which then further increases its popularity. Companies, like Spotify, have been accused as being more data driven, even in human selections, than musically driven⁴⁵ and have become increasingly reliant on algorithms to make, or dwindle, musical selections down for later human selection.⁴⁶ In contrast, other digital platforms, like Apple Music, claim that playlists are, first, hand-selected by a human curator.⁴⁷ Apple Music will then use an algorithm to distribute songs to a

now-has-25m-

followers/#:-:text=Spotify%20is%20finishing%202019%20by,since%20its%20launch%20in%202014.

39. Jacob Passy, *How Spotify Influences What Songs Become Popular (or Not)*, MARKETWATCH (Jun. 18, 2018, 2:38 PM), <https://www.marketwatch.com/story/how-spotify-influences-what-songs-become-popular-or-not-2018-06-18?ns=prod/accounts-mw>.

40. *Id.*; Mansoor Iqbal, *Spotify Usage and Revenue Statistics (2020)*, BUSINESSOFAPPS (Oct. 30, 2020), <https://www.businessofapps.com/data/spotify-statistics/>.

41. Iqbal, *supra* note 40.

42. See Passy, *supra* note 39.

43. Nosheen Iqbal, *Forget the DJs: Spotify Playlists Are the New Musical Starmakers*, THE GUARDIAN (Apr. 28, 2019, 4:00 PM), <https://www.theguardian.com/music/2019/apr/28/streaming-music-algorithms-spotify>.

44. Andy Gensler & Ed Christman, *How Spotify's 'Fake Artist' Controversy Has Increased Tensions with Label Partners, Could Hurt Its Bottom Line*, BILLBOARD (Jul. 19, 2017), <https://www.billboard.com/articles/business/7872889/spotify-fake-artist-playlist-controversy-record-label-tensions-ipo>; Owens, *supra* note 33.

45. Marc Hogan, *Up Next: How Playlists Are Curating the Future of Music*, PITCHFORK (Jul. 16, 2018), <https://pitchfork.com/features/article/9686-up-next-how-playlists-are-curating-the-future-of-music/>; Ben Popper, *How Spotify's Discover Weekly Cracked Human Curation at Internet Scale*, THE VERGE (Jul. 16, 2018), <https://www.theverge.com/2015/9/30/9416579/spotify-discover-weekly-online-music-curation-interview>; Pierce, *supra* note 32; Cherie Hu, *Why Spotify Thinks Its 'Self Driving Music' Strategy Will Benefit Creators*, BILLBOARD (Mar. 19, 2018), <https://www.billboard.com/articles/business/8249695/why-spotify-thinks-self-driving-music-strategy-will-benefit-creators>; Owens, *supra* note 33.

46. Hogan, *supra* note 45.

47. *Id.*; See generally *The Art (and Science) of Music Playlists*, HEWLETT PACKARD (Nov. 11, 2018) [hereinafter *Hewlett Packard*], <https://store.hp.com/us/en/tech-takes/the-art-of-music-playlists>.

'Playola' and Fraud on Digital Music Platforms

playlist after that initial hand selection.⁴⁸ Here, the artificial intervention only occurs when the playlist is distributed to the consumer, but not in the actual creation of that playlist.⁴⁹

In both of these situations, instances of music streaming fraud can significantly impact the chances of commercial success for legitimate artists.⁵⁰ In cases of playola, industry insiders may tip the playlist scales in favor of represented artists while sacrificing the chances of independent artists or even upcoming or new artists.⁵¹ In cases of music streaming fraud, a song that received fraudulent streams may be placed on a music streaming playlist, appropriating commercial and financial success that belonged to a legitimate artist.⁵²

Additionally, playlist promotion has become a very important part of the current music industry framework.⁵³ Music streaming now accounts for about eighty percent of the total revenue generated by recorded music.⁵⁴ Labels have included playlist promotion in their marketing plans and budgets.⁵⁵ A song placed on the right playlist can lead to greater opportunities for that song, such as placements in film, television and commercials.⁵⁶ A song's streams spike after that song is added to a popular playlist.⁵⁷ Once a song is added to that popular playlist, listeners will then add that song to their own playlists.⁵⁸ Increased streams increase chart position.⁵⁹ Radio stations now use streaming data to make radio programming choices.⁶⁰ Needless to say, the playlist has gained all of the power of making or breaking an artist's single.⁶¹

48. Hogan, *supra* note 45; *see generally* Hewlett Packard, *supra* note 47.

49. Hogan, *supra* note 45; *see generally* Hewlett Packard, *supra* note 47.

50. Owens, *supra* note 33.

51. *See generally* Peoples, *supra* note 7; Owens, *supra* note 33.

52. *See* Ingham, *supra* note 9; Gensler & Christman, *supra* note 44; Owens, *supra* note 33.

53. Peoples, *supra* note 7; *See* Ingham, *supra* note 9; *See generally* Peoples, *supra* note 16.

54. Rob Arcand, *Streaming Now Accounts for 80 Percent of the Music Industry's Overall Revenue*, SPIN (Sept. 6, 2019, 12:49 PM), <https://www.spin.com/2019/09/music-streaming-80-percent-of-music-industry-overall-revenue/>.

55. Peoples, *supra* note 7; *see generally* Peoples, *supra* note 16.

56. Peoples, *supra* note 7.

57. *Id.*; Peoples, *supra* note 16.

58. Peoples, *supra* note 16.

59. Leight, *supra* note 1; Noah Yoo, *How Artist Imposters and Fake Songs Sneak onto Streaming Services: When Songs Leak on Spotify and Apple Music, Illegal Uploads Can Generate Substantial Royalty Payments – But for Whom?*, PITCHFORK (Aug. 21, 2019), <https://pitchfork.com/features/article/how-artist-imposters-and-fake-songs-sneak-onto-streaming-services/>; Cookson, *supra* note 33; Owens, *supra* note 33; *See* Adam K. Raymond, *The Streaming Problem: How Spammers, Superstars and Tech Giants Gamed the Music Industry*, VULTURE (Jul. 5, 2017), <https://www.vulture.com/2017/07/streaming-music-cheat-codes.html>.

60. Peoples, *supra* note 7.

61. *Id.*; Owens, *supra* note 33.

CHRISTINE SMITH BURTON

II. THE ROYALTY POOL

Before analyzing the implications of fraud on the royalty pool, the royalty pool must be explained more generally. There are two different royalty rates that pertain to the royalty pool and require calculation: rates that apply to labels and artists, and rates that apply to music publishers and songwriters.⁶²

The pro-rated percentage allocated to the labels and artists are freely negotiated between the streaming service and labels at a percentage of subscriber fees.⁶³ Unfortunately, because these agreements are confidential the details of any current agreements are not publicly available.⁶⁴

The pro-rated percentage for music publishers and songwriters is determined by statute.⁶⁵ The standard royalty rate to be paid by digital music services to music publishers and songwriters is 10.5% of revenue, less the amount of license fees paid for the public performance per subscriber (“Payable Royalty Pool”).⁶⁶ Fees paid for public performances are those fees paid to the public performance societies like the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and the Society of European Stage Authors and Composers (SESAC).⁶⁷ However, the 10.5% rate may not apply to all digital music services.⁶⁸

The All-In Royalty Pool⁶⁹ has multiple components for payments made to music publishers and songwriters and is established as statute by the Copyright

62. See generally *U.S. Music Streaming Royalties Explained*, MANATT, PHELPS & PHILLIPS, LLP n.3, [hereinafter *Manatt*] <https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf> (last visited Dec. 5, 2020).

63. BOB KOHN, *KOHN ON MUSIC LICENSING* 847 (5th ed. 2019).

64. Although current agreements are confidential, in 2015, the details of an agreement between Sony and Spotify. The agreement is no longer valid, but provided Sony a \$42.5 million in advance payments, \$9 million in advertising credits, a complex formula for royalty payments each year, and a most favored nation’s clause that requires that Spotify pay Sony any higher rate that another label may negotiate. With these contract details, it is impossible to know how much of these monies were received by the artist and this agreement applied only to labels and represented artists. The contract did not include music publishers and songwriters. The contract was once displayed online but has since been taken down out of respect for Sony. Further, without additional contract details, it is impossible to know what other clauses may have affected monetary distributions. See Micah Singleton, *This Was Sony’s Music Contract with Spotify*, THE VERGE (May 19, 2015, 10:05 AM), <https://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract>; see generally Ben Sisario, *Sony Terms Uncovered in Contract*, N.Y. TIMES (May 24, 2015), <https://www.nytimes.com/2015/05/25/business/media/sony-terms-with-spotify-uncovered-in-contract.html>.

65. See generally 37 C.F.R. § 385 (2019); 84 FR § 1918 (2019).

66. Kohn, *supra* note 63, at 845.

67. *Id.* at 1217.

68. *Manatt*, *supra* note 62; see also Kohn, *supra* note 63, at 846-850.

69. 37 C.F.R. § 385 (2019); 84 FR § 1918 (2019). In the “first step of the calculation, the parties determine the All-In royalty pool; that is, the royalty that would be payable based on a formula balancing the greater of a percent-of-service revenue and a percentage of one of two other expense measures. One expense measure if a percent-of-royalties services pay to record companies for sound recording performance rights, differing

'Playola' and Fraud on Digital Music Platforms

Royalty Board.⁷⁰ Manatt, Phelps & Phillips LLC describes these allocations as follows:

“There is a ‘Minimum All-In Royalty Pool’ calculated as a percentage of the amount the service reports to pay labels (the “label payment”), which applies if the result is greater than 10.5% of service revenue. That percentage changes depending on whether the record label or the service obtains the mechanical license. In practice, it is always the service, which means the All-In Royalty Pool is calculated as 21% of the label payment. If the licensee were ever the label, the All-In Royalty Pool will be 17.36% of the label payment. There is also a ‘Subscriber-Based Floor’ of 80¢ per subscriber per month, which will be used only if it results in a smaller amount than the Minimum All-In Royalty Pool. There is an additional mechanical Subscriber[-]Based Floor of 50¢ per subscriber per month that applies if the Payable Royalty Pool is smaller after deducting performance monies (which it almost certainly is for Spotify). Note that for ad-supported interactive services, there are no Subscriber-Based Floors and there are different percentages for the Minimum All-In Royalty Pool. Practically, this means the All-In Royalty Pool for Spotify’s ad-supported service is the greater of (i) 10.5% of service revenue and (ii) 22% of the label payment.”⁷¹

However, for purposes of this paper, and to give a simpler presentation of the complexities of the statute, the easiest calculation method to conceptualize the general equation for the royalty pool for any given royalty period is:⁷²

depending upon whether the sound recording licenses are pass-through or not pass-through. For certain subscription services, the percent-of service revenue is balanced against the lesser of two or three other potential mathematical outcomes. The second calculation reduces the All-In royalty pool to the “payable” royalty pool in a two-step process. First the parties subtract royalties the services pay for musical works performance rights from the All-In royalty established in the first calculation. This remainder is considered the payable royalty pool for certain service offerings; viz., non-subscription, ad-supported, purchased content lockers, mixed service bundles, and music bundles. For subscription service offerings, whether standalone or bundled, and depending upon whether the offering is portable or non-portable, streaming only or mixed use, determining the payable royalty pool requires a balancing of the mechanical remainder against a set rate for “qualified” subscribers per month to determine the greater-of result. The set rate for qualified subscribers differs for each variation of subscription offering. The final step in the rate determination for each service offering is an allocation among licensors based upon the number of plays from each licensor’s catalog.”

70. See generally 37 C.F.R. § 385 (2019); 84 FR § 1918 (2019).

71. Manatt, *supra* note 62; see generally Kohn, *supra* note 63, at 846-850.

72. This is a conceptualized formula and does not include all the nuances of the equation, or provide the different calculations as required by 37 C.F.R § 385 based on service offering. This is for conceptualization purposes only. See generally 37 C.F.R. § 385 (2019); 84 FR § 1918 (2019).

CHRISTINE SMITH BURTON

$$\frac{(\text{Net Revenue}) \times (\text{Total number of streams of a track})^{73}}{(\text{Total number of streams})}$$

The net revenue is determined by the revenue obtained by monthly subscriber fees minus overhead costs. This calculation is calculated monthly.⁷⁴

This net revenue is then divided into three categories: the digital platform, the rightsholders of the sound recordings, and the rightsholders of the composition.⁷⁵ In using Spotify as an example, Spotify retains 30% of the revenue, the rightsholders of the sound recordings receive 55-60% and the rightsholders of the compositions receive 10-15% of this revenue.⁷⁶ When the royalty allocation is broken down to a per stream variable, the estimated calculated rate is approximately \$0.004 per stream.⁷⁷

This royalty structure favors higher market share rightsholders.⁷⁸ When a particular rightsholder controls a greater market share within a given royalty pool, that rightsholder will receive a greater share of that royalty allocation decreasing the allocations for smaller market share rightsholders.⁷⁹

III. THIRD PARTY FRAUD

There are many different types of third-party music streaming fraud in the current music streaming market. Third parties may include third party promotional companies, called playlist pluggers, which are hired by an artist or label.⁸⁰ A third party may also include a user that commits fraud by manipulating the royalty pool to

73. Chris Castle, *Arithmetic on the Internet: The Ethical Pool Solution to Streaming Royalty Allocation*, MUSIC TECH SOLUTIONS (Oct. 2, 2018), <https://musictech.solutions/2018/10/02/arithmetic-on-the-internet-the-ethical-pool-solution-to-streaming-royalty-allocation/>.

74. *Id.*

75. Chris Cooke, *Dissecting the Digital Dollar, Part Two: Full Report* 30, MUSIC MANAGERS FORUM (2016), https://themmf.net/site/wp-content/uploads/2015/09/MMF_DDD-Part-Two_Full-Report_Web.pdf.pdf.

76. *Id.*

77. This is an approximate value and not a fixed rate. The rate varies monthly based on individual service calculations and services do not pay the same rates. See generally *2019-2020 Streaming Price Bible: YouTube Is STILL the #1 Problem to Solve*, THE TRICHORDIST (Mar. 5, 2020), <https://thetrichordist.com/category/royalty-rates-2/>. See also Hu, *supra* note 7.

78. Castle, *supra* note 73.

79. *Id.*

80. Kodi Vonn, *How to Get on a Spotify Playlist (and How Not To): Playlist Promotion Companies Are on the Rise. But Are They Worth It?*, MEDIUM (Dec. 18, 2017), <https://medium.com/bandbasher/playlist-plugging-companies-scam-savior-or-superfluous-a43ad36a763>.

'Playola' and Fraud on Digital Music Platforms

obtain financial gain.⁸¹ In other instances, a third party may be a fan of an artist that believes that they are helping their artist gain greater revenue and success by manipulating the streaming system.⁸²

A. Third-Party Playlist Pluggers

Third party playlist pluggers are companies that an artist, artist manager, and/or label may hire for playlist promotion. This promotion is important as these promotional efforts may allow for an artist's compositions to gain access to successful playlists created by companies like Spotify and Apple Music.⁸³ In some cases, these third-party services are legitimate and create sophisticated promotional and marketing campaigns in order to promote a song to a particular fan base.⁸⁴ Through that outreach, a song will reach success with listeners, and through that success gain a highly-competitive placement on a digital music platform playlist.⁸⁵ However, there are other third-party playlist pluggers that have promised artists the same type of services as offered by legitimate services, but actually use fraudulent practices to falsely develop success for a particular artist or song.⁸⁶

These fraudulent third party playlist pluggers create fake streams – that is, automated streams that do not actually represent a real listener - on digital music service platforms like Spotify.⁸⁷ These fake streams not only increase the artist's pro-rated royalty share, but also obtain enough success to land on a playlist.⁸⁸ Companies, like Streamify,⁸⁹ offer this service on their website and even offer a warning that an artist should not buy too many streams for a particular song as significant stream increases for a particular composition may be labeled fraudulent by the digital music streaming platforms.⁹⁰ Streamify suggests buying increments of streams.⁹¹ However, even though these practices may seem obviously fraudulent, many artists believe that they are simply purchasing a marketing campaign for their composition.⁹² The artist

81. Ingham, *supra* note 13.

82. *See generally* Respers France, *supra* note 11; Wang, *supra* note 2.

83. *See generally* Peoples, *supra* note 16; Vonn, *supra* note 80.

84. Peoples, *supra* note 16.

85. *Id.*

86. Vonn, *supra* note 80.

87. Fraudsters will buy streams for a client or give an artist the opportunity to purchase streams. Vonn, *supra* note 80; Ingham, *supra* note 9.

88. Vonn, *supra* note 80; Hu, *supra* note 7.

89. Streamify is a third-party playlist plugger that allows customers to purchase streams on Spotify. *See* Ingham, *supra* note 9.

90. Ingham, *supra* note 9.

91. *Id.*

92. *See generally* Hu, *supra* note 7.

CHRISTINE SMITH BURTON

does not always realize that companies like Streamify are actually using stream farms or bot programs to falsely generate those streams.⁹³

This false manipulation of streams violates most digital music platforms' terms and conditions of service.⁹⁴ When a digital music platform, like Spotify, identifies such fraud, the artist may be permanently removed from the service, at the service's discretion.⁹⁵ And, as previously mentioned in this section, the artist may not be aware of the fraudulent practices committed by the third party plugger.⁹⁶ For instance, when the musician Ari Herstand used the Streamify placement service, he was later removed from Spotify for fraudulent streams accumulated under his Streamify contract.⁹⁷ Unfortunately for artists like Herstand, the artists' lack of knowledge of a contracted third party placement plugger's fraudulent practices does not prevent the artist from being removed from a digital music platform.⁹⁸ The artist, as the contracting party with the digital music service, is the person that is responsible for the contractual obligations contained in a digital music service's terms and conditions.⁹⁹ There are multiple third party placement services that have been accused of these practices. Although the *Focus* case is the first complaint filed, there have been accusations against companies in addition to Streamify, like Spotlister, StreamKO, Fiverr, and many others.¹⁰⁰

B. Fake Artists, Songs, and Playlists

A popular practice for stream manipulation is for an end user to create fake artists, fake songs, fake playlists, and fake user accounts to manipulate royalty pools to falsely generate royalty income.¹⁰¹ In 2017, a Bulgarian scammer allegedly created a fake artist account on Spotify and uploaded 467 digitally auto-generated tracks.¹⁰²

93. See generally Vonn, *supra* note 80.

94. APPLE, INC., APPLE MEDIA TERMS AND CONDITIONS (2019), <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Dec. 31, 2019) (explaining that you may not use the Services to plan or engage in any illegal, fraudulent, or manipulative activity); Peoples, *supra* note 7 (explaining that Spotify's head of communications announced "new terms of service... which prohibit selling accounts and playlists or "accepting any compensation, financial or otherwise, to influence...the content included on an account or playlist); Raymond, *supra* note 59; Yoo, *supra* note 59.

95. Vonn, *supra* note 80.

96. Hu, *supra* note 7.

97. Vonn, *supra* note 80.

98. *Id.*; Hu, *supra* note 7.

99. Vonn, *supra* note 80; Hu, *supra* note 7.

100. Vonn, *supra* note 80; Hu, *supra* note 7.; Ingham, *supra* note 9.

101. See generally Tim Ingham, *The Great Big Spotify Scan: Did a Bulgarian Playlister Swindle Their Way to a Fortune on Streaming Service?*, MUSIC BUS. WORLDWIDE (Feb. 20, 2018), <https://www.musicbusinessworldwide.com/great-big-spotify-scam-bulgarian-playlister-swindle-way-fortune-streaming-service/>.

102. *Id.*

'Playola' and Fraud on Digital Music Platforms

Each of the tracks were a little over 30 seconds in length and all 467 tracks were placed across two fake playlists entitled “Soulful Music” and “Music From the Heart.”¹⁰³ After creating these artists and playlists, the scammer allegedly then opened 1200 individual fake accounts on the Spotify Premium platform.¹⁰⁴ Each account was set to listen to the fake playlists on continual 30 second loops.¹⁰⁵ This false manipulation led the scammer to earn royalty income of over \$400,000 per month.¹⁰⁶ These fraudulent playlists became so successful based on these forced loops that the “Soulful Music” playlist ranked No. 11 and “Music from the Heart” playlist ranked No. 22 on Spotify’s top revenue playlists in the United States.¹⁰⁷ The scam was discovered by a label executive who received internal Spotify chart lists and notified Spotify.¹⁰⁸ Spotify removed the playlists, but only after the scammer generated over a speculated \$1 million dollars in royalty pool revenue.¹⁰⁹

This “click-fraud”¹¹⁰ type of music streaming fraud has become rather commonplace within digital music streaming platforms. Along with the scammer above, there are also bots that masquerade as fake artists and create fake tracks, often mimicking songs from established artists.¹¹¹ The bots then repeatedly play the streams and generate revenue each time the song loops.¹¹² The bots will use multiple accounts to avoid detection.¹¹³ Spotify has developed and uses an algorithm to detect various factors considered to be artificial listening habits.¹¹⁴ Such artificial listening

103. *Id.*

104. *Id.*

105. Ingham, *supra* note 101.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Click Fraud*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/click-fraud.asp> (last visited Nov. 24, 2020). Click fraud is similar to music streaming fraud as multiple clicks effects the overall outcome of the product. In advertising, click fraud is used to decrease the value of an ad. In music streaming fraud, click fraud is used to generate royalty income which, in turn, decreases the royalty revenue for legitimate streams. See Bishop Cheen, *Streaming Music Is Also a Victim of Click Fraud*, S&P GLOBAL: MARKET INTELLIGENCE (Mar. 18, 2016, 1:09 PM), <https://www.spglobal.com/marketintelligence/en/news-insights/trending/8ltyrme8rsavsydv74sehw2>.

111. Clinch, *supra* note 11.

112. *Id.*; see generally William Bedell, *I Built a Botnet That Could Destroy Spotify with Fake Listens: Automated Streaming Is the Next Frontier of Click Fraud*, VICE (Oct. 16, 2015, 9:00 AM), https://www.vice.com/en_us/article/gv5xbx/i-built-a-botnet-that-could-destroy-spotify-with-fake-listens (explaining how, in 2013, Peter Fillmore was among the first to demonstrate the automated programs could generate massive royalties by having software-based robots to listen to music non-stop. Fillmore’s account existed for 6 months, but Spotify took the account down. Also, the author mentions how he built a bot to exploit the music service and accumulate royalties from fake streams).

113. Clinch, *supra* note 11; Bedell, *supra* note 112.

114. Clinch, *supra* note 11; Bedell, *supra* note 112.

CHRISTINE SMITH BURTON

habits can include excessive streaming by a small numbers of users may trigger Spotify's anti-fraud algorithm.¹¹⁵ Any account detected as an artificial listening habit is then removed by Spotify.¹¹⁶ Some fraudsters have infiltrated artists' page with auto-generated songs to gain greater illegal gains by hoping the consumer will be tricked into listening to the fake track.¹¹⁷ The consumer may listen to the fake track believing it to be a new track released by the artist.¹¹⁸ Other scams have included fraudsters releasing previous unreleased songs, and sometimes released tracks under similar titles, by famous musicians under a fake artist name.¹¹⁹

C. Bots

Although bots were mentioned in the previous section, there are different ways in which a bot can be used to manipulate music streams.¹²⁰ A bot is "a software program that operates on the Internet and performs repetitive tasks."¹²¹ A bot is automated and runs according to programmed human instruction.¹²² These bots operate amongst many industries, but in the music industry a person programs the software to repetitively stream a track, or tracks, of either legitimate songs by actual artists or fake auto-generated tracks.¹²³ In some cases, bots are merely individuals that register accounts and play tracks for about 35 seconds repeatedly.¹²⁴ Sophisticated bots are computer programs that are designed to click on certain links at certain times.¹²⁵ Bots can be incorporated into click-farm environments to falsely boost streams.¹²⁶ Peter Fillmore, a security consultant in Melbourne Australia, used a sophisticated bot on a

115. Clinch, *supra* note 11; Bedell, *supra* note 112.

116. Clinch, *supra* note 11; Bedell, *supra* note 112.

117. See generally Rob Arcand, *El-P Calls Out Spotify for Not Protecting Artists Against Fraud*, SPIN (Oct. 20, 2018), <https://www.spin.com/2018/10/el-p-calls-out-spotify-for-not-protecting-artists-against-fraud/>; Yoo, *supra* note 59.

118. Raymond, *supra* note 59; see generally Arcand, *supra* note 117; Yoo, *supra* note 59.

119. Raymond, *supra* note 59; see generally Arcand, *supra* note 117; Yoo, *supra* note 59.

120. Vonn, *supra* note 80.

121. *What Is a Bot?*, CLOUDFARE, <https://www.cloudflare.com/learning/bots/what-is-a-bot/> (last visited Dec. 15, 2020); See generally Paris Martineau, *What Is a Bot?*, WIRED (Nov. 16, 2018, 9:00 AM), <https://www.wired.com/story/the-know-it-all-what-is-a-bot/>.

122. *What Is a Bot? Definitions and Examples*, MARKET BUS. NEWS, <https://marketbusinessnews.com/financial-glossary/bot-definition/#:~:text=%E2%80%9CA%20bot%20is%20a%20software,replace%20a%20human%20user's%20behavior.%E2%80%9D> (last visited Nov. 23, 2020).

123. Tim Ingham, *The Music Industry Is Tackling Streaming Fraud with a Pointless 'Code.' It Won't Work . . . but These Ideas Might*, MUSIC BUS. WORLDWIDE (Jun. 23, 2019), <https://www.musicbusinessworldwide.com/the-music-industry-is-tackling-streaming-fraud-with-a-pointless-code-it-wont-work-but-these-ideas-might/>.

124. Vonn, *supra* note 80.

125. *Id.*

126. *Id.*; Clinch, *supra* note 11.

'Playola' and Fraud on Digital Music Platforms

now defunct platform, Rdio, to automate fake streams, and avoided detection for 6 months.¹²⁷ William Bedell¹²⁸ created his own sophisticated bot program to automate fake streams on Spotify in 2015.¹²⁹ Bedell predicts, based on his experiment of fraud on Spotify, that if a sophisticated computer-programed bot could mimic consumer listening behavior well enough, the bot could be completely undetectable by the digital music services current anti-fraud algorithms.¹³⁰ Considering the ongoing use of bots to generate streams and the length of times it takes for digital music platforms to detect this type of fraud, Spotify, and any other affected digital music platform, have not implemented enough policing measures to combat illegitimate parties from accumulating fraudulent royalty payouts.¹³¹

IV. INSIDER FRAUD: A NEW FORM OF PAYOLA

Music streaming fraud perpetrated by industry insiders has been labeled playola.¹³² The term is a play-on the previously coined term payola.¹³³ Payola occurs when a person pays a DJ or radio programmer for a song placement on a radio broadcast playlist.¹³⁴ Playola similarly occurs when a person pays or influences a playlist curator for a song's placement on a particular playlist.¹³⁵ Before proceeding with insider manipulation of a music streaming playlist, it is important to address payola and how the manipulation of radio playlists are strikingly similar to the current speculated manipulation of the playlists on digital music platforms.

127. See generally Bedell, *supra* note 112.

128. William Bedell is a computer engineer and journalist that wrote a step-by-step tutorial on how to set-up a click fraud scheme using bots. See Wang, *supra* note 2.

129. See generally Bedell, *supra* note 112.

130. *Id.*

131. *Id.*; Hu, *supra* note 7; Wang, *supra* note 2.

132. See generally Peoples, *supra* note 7.

133. R.H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269 (1979) (explaining “[t]he term ‘payola’ is generally said to have been introduced by the trade periodical *Variety* and its popularity resulted from its use in that periodical”).

134. *Id.* at 269 (“In Webster’s Third New International Dictionary, payola is defined as “an undercover or indirect payment for a commercial favor (as to a disc jockey for plugging a song.)”). *Payola*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/payola>. (showing that Merriam-Webster continues to apply the same payola definition) (last visited Dec. 31, 2019).

135. Peoples, *supra* note 7.

CHRISTINE SMITH BURTON

*A. Payola**1. The History of Payola*

Payola has been documented in the music industry as early as the 1800s.¹³⁶ Payola began when songwriters started to pay leading performance artists and orchestra band leaders to perform their material to gain further performances.¹³⁷ Unfortunately, these payments eventually led to harassment and extortion of the paid performing artists.¹³⁸ This pay-to-play mentality continued into the vaudeville industry,¹³⁹ and then into radio broadcasting.¹⁴⁰ By the time radio broadcasting became popular, record companies had emerged and represented an artist's releases. Radio disc jockeys became superstars, as their selections of songs could make or break an artist.¹⁴¹ When disc jockeys started to realize the power they had in an artist's career, many began to demand payment from record companies to play new material.¹⁴² Payments included cash, expensive gifts, homes, airplane tickets, drugs, prostitutes or whatever else the disc jockey demanded.¹⁴³ Some disc jockeys required a portion of record royalties or a portion of copyright ownership in a composition and would open their own publishing companies and talent agencies to account for those royalties.¹⁴⁴ Some disc jockeys would demand a substantial number of records in exchange for plays, and would then open their own record stores to sell the free records they required as payment.¹⁴⁵ Disc jockeys began to refuse to play any new material without some form of payment to do so.¹⁴⁶ Any record company or music publisher that refused to make such a payment was blacklisted across the radio industry.¹⁴⁷

136. See generally KERRY SEAGRAVE, *PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880-1991*, 1-7 (1994).

137. See generally *id.*

138. See generally *id.*

139. *Id.* at 8-29.

140. *Id.* at 30-50.

141. Seagraves, *supra* note 136 at 74-75.

142. *Id.* at 75.

143. *Id.* at 80, 98.

144. *Id.* at 80-83.

145. *Id.* at 81.

146. *Id.* at 80-81.

147. Seagraves, *supra* note 136 at 80.

'Playola' and Fraud on Digital Music Platforms

In 1938, *Variety*¹⁴⁸ began reporting on pay-for-play in the radio industry, coining the term “payola” to describe the activity.¹⁴⁹ *Billboard*¹⁵⁰ followed and began reporting pay-for-play.¹⁵¹ Additionally, at this time, a small record company that could not afford the payola payments filed a complaint with the Federal Communications Commission (“FCC”).¹⁵²

2. Payola and Federal Government Interventions

Throughout the late 1950s multiple government investigations occurred, including an investigation launched by the House Special Committee on Legislative Oversight, to investigate payola.¹⁵³ In 1957, a senator proposed an amendment to the Communications Act that would force broadcasters to divest themselves of conflicting interests created through payola schemes.¹⁵⁴ The FCC threatened to terminate radio broadcasting licenses from any radio stations that participated in payola practices.¹⁵⁵

The Federal Trade Commission (“FTC”) also began an investigation based on complaints of unfair methods in competition in interstate commerce. The FTC investigation was initiated because payola had the ability to suppress competition and to unfairly divert business from competitors in violation of the Federal Trade Commission Act.¹⁵⁶ Three record manufacturers and six independent record distributors were accused.¹⁵⁷ However, the FTC’s powers were limited to cease and desist orders, but their continued findings of violations led to the Department of Justice’s (“DOJ”) intervention.¹⁵⁸

After public Congressional hearings in 1960, a new amendment to the Communications Act was passed.¹⁵⁹ The Amendment stated that payola was

148. *Variety* is a magazine and internet news source that specializes in the entertainment business. *About Us*, VARIETY, <https://variety.com/variety-about-us/> (last visited Dec. 28, 2020); *see also Variety (magazine)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Variety_\(magazine\)](https://en.wikipedia.org/wiki/Variety_(magazine)) (last visited Dec. 28, 2020).

149. Seagraves, *supra* note 136 at 1, 52-100.

150. *Billboard* is an entertainment trade magazine that specializes in music, video, and home entertainment. *Billboard (magazine)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Billboard_\(magazine\)#:~:text=Billboard%20publishes%20a%20news%20website,music%2C%20video%20and%20home%20entertainment.&text=The%20charts%20track%20music%20sales,ongs%20was%20introduced%20in%201958](https://en.wikipedia.org/wiki/Billboard_(magazine)#:~:text=Billboard%20publishes%20a%20news%20website,music%2C%20video%20and%20home%20entertainment.&text=The%20charts%20track%20music%20sales,ongs%20was%20introduced%20in%201958) (last visited Dec. 28, 2020).

151. Seagraves, *supra* note 136 at 75, 80-81.

152. *Id.* at 75.

153. *Id.* at 100.

154. *Id.* at 94.

155. *Id.* at 101.

156. Seagraves, *supra* note 136 at 111, 116-124.

157. *Id.* at 116.

158. *Id.* at 156.

159. *Id.* at 94-123.

CHRISTINE SMITH BURTON

acceptable only when “sponsorship” was announced to the listening audience.¹⁶⁰ Prosecutions for any violations would be handled by the DOJ and the FCC would handle any administrative penalties and license revocations.¹⁶¹

However, this new law did not stop the practice of payola.¹⁶² Payola went underground, which in turn made it harder to prove.¹⁶³ Record companies and disc jockeys began to use independent promoters,¹⁶⁴ and thus payola fees were hidden in advertising and promotion budgets.¹⁶⁵ Rumors began that the mafia had become involved in the practice and would threaten violence on anyone that would not participate.¹⁶⁶ The FCC attempted to conduct additional hearings, but could not find evidence to conduct a formal investigation.¹⁶⁷ Informal industry complaints continued, but no one from the music industry would come forward for fear of being blacklisted.¹⁶⁸

In 1986, NBC televised a two part series claiming that independent promoters had strong connections with organized crime.¹⁶⁹ NBC’s report claimed that organized crime was now controlling payola.¹⁷⁰ The Recording Industry Association of America (“RIAA”) released a statement that denied all allegations from the NBC report.¹⁷¹ At this time, a New York federal grand jury investigating payola issued a sweeping subpoena to the RIAA that demanded all RIAA documentation pertaining to record company relations with industry promoters.¹⁷² The FCC refused to investigate because past experience had failed to turn up any relevant evidence.¹⁷³ Congress tried to initiate investigations, but no one within the industry was willing to testify.¹⁷⁴ Another NBC report was televised.¹⁷⁵ The RIAA had begun an internal

160. See generally 47 U.S.C. § 317 (1960); see generally 47 U.S.C. § 508 (1960).

161. See generally 47 U.S.C. § 317 (1960); see generally 47 U.S.C. § 508 (1960).

162. See generally Seagraves, *supra* note 136, at 159-214.

163. *Id.*

164. *Id.* at 95.

165. *Id.* at 195-221.

166. *Id.*

167. Seagraves, *supra* note 136, at 195-221.

168. *Id.*

169. *Id.* at 196-197.

170. *Id.*

171. *Id.* at 197.

172. *Id.*

173. Seagraves, *supra* note 136, at 200.

174. *Id.* at 203. The industry’s unwillingness to testify may have been due to a fear of being blacklisted from radio. See note 169.

175. *Id.* at 205.

'Playola' and Fraud on Digital Music Platforms

investigation, but the investigation was squashed.¹⁷⁶ Although investigations and probes began across the United States, all indictments were eventually dropped.¹⁷⁷

In the 2000s, the New York Attorney General's office led another investigation into major labels' and radio stations' payola practices.¹⁷⁸ The investigation turned up enough illegal payola evidence to force the major labels¹⁷⁹ and several prominent radio chains to pay million-dollar settlements and agree to change their practices ("2005 Settlements").¹⁸⁰

Payola, although still in existence, remained untested until September of 2019 when the FCC issued a letter to the RIAA that demanded the RIAA investigate current payola practices in the industry.¹⁸¹

B. Playola

As the Internet has leveled many power blocks of the old music business, playlists have become valuable currency in streaming's new world order, so much so that record companies now actively promote – and sometimes pay for – their songs to appear on such services as Spotify, Deezer, and Apple Music.

-Glenn Peoples, Billboard¹⁸²

Just as the selection by a radio DJ could make or break a song in the twentieth century, the selection for a streaming playlist is the key to success today - as was the case with payola, where there is power, there is "pay-for-play."¹⁸³ Major label marketing executives have stated that "popular playlists can and have been bought"¹⁸⁴ and this is considered part of the payola practice.¹⁸⁵ According to a 2015

176. *Id.* at 206.

177. *Id.* at 195-221.

178. Elias Leight, *Want to Get on the Radio? Have 50,000?: 15 Years Ago, New York's Attorney General Investigated Pay-For-Play in the Radio Industry. Insiders Say the Practice Lives on – in a More Sophisticated Form*, ROLLING STONE (Aug. 6, 2019, 1:09 PM), <https://www.rollingstone.com/music/music-features/radio-stations-hit-pay-for-play-867825/> (explaining that the New York Attorney General's office found that "money and other "valuable considerations" moved among labels or middlemen known as "indie promoters" and radio stations.").

179. *Id.*

180. *Id.*

181. See generally Elias Leight, *FCC Commissioner Asks RIAA to Investigate Payola Allegations: Commissioner Mike O'Reilly Sends Letter "to Determine Whether the Law Is Being Followed or Whether Any Problematic Conduct Must Be Addressed*, ROLLING STONE (Sept. 5, 2019, 2:13 PM), <https://www.rollingstone.com/music/music-news/payola-radio-fcc-riaa-letter-880304/>.

182. Peoples, *supra* note 7.

183. *Id.*

184. *Id.*

185. *Id.*

CHRISTINE SMITH BURTON

Billboard article, the price of playlist “pay-for-play” can range from \$2,000 to \$10,000 depending on the fan size of an individual playlist.¹⁸⁶ Unlike payola, playola is not illegal.¹⁸⁷ Currently, playola is not illegal because the Communications Amendment that covered payola is strictly limited to radio broadcasts and does not apply to digital streaming.¹⁸⁸ However, some companies, like Spotify, include in their terms of service a prohibition of selling accounts or playlists or “accepting any compensation, financial or otherwise, to influence . . . the content included on an account or playlist.”¹⁸⁹ However, playola may fall outside of these prohibitions because most labels refer to these payments as consultancy fees.¹⁹⁰ Some companies believe that because they pay small consultancy fees to independent promoters to only ensure that the playlist curator hears the song, it cannot be proven that the curator is influenced by the payment.¹⁹¹ Some playlist curators are paid \$100-150 to hear and consider a song.¹⁹² Many within the industry fear that placements on playlists, as was the case with payola, are quickly becoming available only to labels and artists with big pockets.¹⁹³

In addition to the payment of fees to playlist curators, labels, artist managers and artists have also been accused of hiring third-party playlist pluggers to manipulate stream boosts.¹⁹⁴ Although fraudulent third-party plugging is also performed by industry outsiders as described in *supra* Section III,¹⁹⁵ when industry insiders, like labels and artists, engage in the same tactics it is a form of industry playola.¹⁹⁶ Y-Kollektiv¹⁹⁷ interviewed an unidentified streaming fraudster that claimed his services were being used by some of the biggest artists in the market.¹⁹⁸ The fraudster claimed to generate over € 100,000 a month because of the fraudster’s

186. *Id.*

187. *Id.*

188. 47 U.S.C. § 317.

189. Peoples, *supra* note 7.

190. Peoples, *supra* note 16.

191. Peoples, *supra* note 7.

192. *Id.*

193. *Id.*; Owens, *supra* note 33.

194. Ingham, *supra* note 13; Peoples, *supra* note 7; Anna Nicolaou, *Music Industry Targets Troll Farms Distorting Streaming Revenues*, FINANCIAL TIMES (Jun. 20, 2019), <https://www.ft.com/content/371b7b96-92e1-11e9-aea1-2b1d33ac3271>; *See generally* Ingham, *supra* note 9; *See* Vonn, *supra* note 80.

195. *See supra* Section III.

196. *See generally* Peoples, *supra* note 16; Peoples, *supra* note 7.

197. Y-Kollektiv is a German YouTube channel that transmits video documentaries and is operated by the public service. *Y-Kollektiv*, WIKIPEDIA, <https://translate.google.com/translate?hl=en&sl=de&u=https://de.wikipedia.org/wiki/Y-Kollektiv&prev=search> (Last visited Dec. 31, 2019).

198. Ingham, *supra* note 13; Y-Kollektiv, *Der Rap Hack: Kauf Dich in die Charts! Wie Klickzahlen manipuliert werden*, YOUTUBE (May 23, 2019) [hereinafter *Y-Kollektiv*], <https://www.youtube.com/watch?v=qiQYuSQwkHo>.

'Playola' and Fraud on Digital Music Platforms

ability to operate or gain access to 150,000-250,000 streaming accounts.¹⁹⁹ Most of his clients are said to be artist managers, but also include labels and artists as well.²⁰⁰ The actions of major artists, artist managers, and labels using third parties, stream farms or other bot type activity, if true, not only boost artist streams, but also gives major artists a greater market share.²⁰¹ An artificially increased market share provides these artists and labels more royalty income to the detriment of newer and/or independent artists and labels.²⁰²

In addition, major labels have purchased major influential playlists to guarantee placements.²⁰³ All of the major labels now own some of Spotify's most popular and largest playlists: Universal Music Group owns Digster, Sony Music Group owns Filtr, and Warner Music Group owns Topsyfy.²⁰⁴

Artists have also been accused of requesting that fans help manipulate streams in that artist's favor.²⁰⁵ In 2015, the band Vulfpeck asked fans to stream their new album to boost revenue to finance a new album.²⁰⁶ The fans obliged and the band earned \$20,000 in royalties.²⁰⁷ This request would not usually warrant any accusations of fraud except, here, the album consisted of nothing but silence.²⁰⁸ Additionally, in 2015, the band Ohm & Sport created an application entitled Eternify.²⁰⁹ The application let fans listen to the band's music on recurring 30 second loops, triggering substantial boosts in royalty payments.²¹⁰ When questioned regarding the application, Ohm & Sport contested that because success in streaming is slanted towards major artists, the band used the application in order to compete in the marketplace.²¹¹ Fans similarly used looping software to help Nelly pay a \$2.4 million tax debt.²¹²

Although playola and payola are very similar in practice and effect, payola laws only cover pay-for-play in broadcasting.²¹³ There are currently no direct laws to protect affected artists, labels, rightsholders, or music consumers from manipulated

199. Ingham, *supra* note 13; *Y-Kollektiv*, *supra* note 198.

200. Ingham, *supra* note 13; *Y-Kollektiv*, *supra* note 198.

201. Ingham, *supra* note 13.

202. *See generally* Leight, *supra* note 1.

203. Peoples, *supra* note 7.

204. *Id.*

205. Clinch, *supra* note 11.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. Clinch, *supra* note 11.

211. *Id.*

212. Respers France, *supra* note 11.

213. Peoples, *supra* note 7; *see generally* 47 U.S.C. § 317.

CHRISTINE SMITH BURTON

music streaming playlists via playola.²¹⁴ However, the manipulation of data affects royalty payouts to other artists, labels and rightsholders.²¹⁵ Manipulated playlists do not just affect these parties, but also affect the choice of the consumer.²¹⁶ These manipulations create not only unfair competition in the marketplace for artists and rightsholders, but also manipulates how the music consumer discovers new music by manipulating consumer choice. The law should be changed to include protections against playola.

V. DIGITAL MUSIC SERVICE FRAUD

Digital music platforms have also been accused of committing music streaming fraud.²¹⁷ Various digital music services have been accused of diluting the royalty pool for their own benefit by creating their own songs and placing those songs on popular playlists.²¹⁸ Another digital music platform has been accused of outright data manipulation.²¹⁹

Spotify has been accused of creating their own fake artists and hiring producers to generate songs to dilute royalty payouts so Spotify may retain a higher net income.²²⁰ Tim Ingham, in a Music Business Worldwide article, cites multiple unnamed sources that have accused Spotify of paying producers a flat fee, in addition to studio and musician expenses, to create tracks with certain musical specifications.²²¹ Spotify then holds the master recording rights, where the publishing ownership rights are negotiated between the parties.²²² These tracks, upon completion, are then placed on popular playlists (jazz, chill, peaceful piano) and then collect money from the royalty pool with other rightsholders.²²³ Although Spotify has been accused of creating music in order to dilute the royalty pool and decrease royalty payouts to other artists, Spotify, if true, is still actually creating music that, receives streams from real listeners.²²⁴ These are not auto-generated compositions as

214. Peoples, *supra* note 7.

215. Leight, *supra* note 1; Gensler & Christman, *supra* note 44.

216. Raymond, *supra* note 59.

217. *Id.*; *see generally* Ingham, *supra* note 17.

218. Ingham, *supra* note 17.

219. Markus Tobiassen & Kjetil Saeter, *Strømme-Kuppet*, DAGENS NÆVINGSLIV (May 9, 2018), <https://www.dn.no/staticprojects/special/2018/05/09/0600/dokumentar/strommekuppet/> (explaining the newspaper claims access to TIDAL's own hard drive containing proof to these falsifications of stream numbers).

220. Ingham, *supra* note 17; Raymond, *supra* note 59; Gensler & Christman, *supra* note 44; *see generally* Roy Trakin & Jem Aswad, *Spotify Denies Creating 'Fake Artists,' Although Multiple Sources Claim the Practice Is Real*, VARIETY (Jul. 11, 2017, 11:38 AM), <https://variety.com/2017/biz/news/spotify-denies-creating-fake-artists-although-multiple-sources-claim-the-practice-is-real-1202492307/>.

221. Ingham, *supra* note 17.

222. *Id.*

223. *Id.*

224. Gensler & Christman, *supra* note 44.

'Playola' and Fraud on Digital Music Platforms

is the case with bots.²²⁵ However, these songs are specifically created for placement on the most popular playlists of certain genres.²²⁶ As previously mentioned, placement on popular playlists significantly boosts streams and market share that allows these compositions and recordings to acquire a much greater portion of royalties from the royalty pool.²²⁷ Although the sources stated that this practice was to intended by Spotify to perfectly curate a playlist to consumer preference, the compositions nevertheless increase Spotify profits at the expense of other artists.²²⁸

In 2018, a Norwegian financial newspaper²²⁹ accused the music streaming service Tidal of falsifying tens of millions of streams in favor of certain artists.²³⁰ Specifically, the digital service was accused of manipulating stream numbers in favor of Beyoncé's album *Lemonade* and Kanye West's album *Life of Pablo*.²³¹ In June 2020, the Norwegian Supreme Court revealed that Tidal had been an official suspect in an investigation by Norwegian authorities for about a year for streaming manipulation.²³² Further, the Norwegian Supreme Court ruled that Norwegian authorities could seize Tidal's proprietary documents in order for authorities to further conduct their investigation.²³³

All these fraudulent practices dilute royalty payouts to legitimate licensors.²³⁴ Because the current royalty pool is distributed based on market share and prorated number of streams, there is an argument to protect those legitimate members of the royalty pool.²³⁵

Additionally, in the recent Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords III) issued by the Copyright Royalty Board in February of 2019, the Copyright Royalty Board determined that the digital music services did not have to pay for fraudulent streams by a quantitative measure.²³⁶ In the definitions section of 37 C.F.R. § 385, the definition of "Play" excludes any same stream played by a single end user more than 50 straight times²³⁷ as that stream is considered fraudulent. The definition makes sense, but it doesn't answer or solve various fraud issues. This definition does not consider any fraudulent

225. *Id.*

226. *Id.*; Trakin & Aswad, *supra* note 220; Raymond, *supra* note 59; *see generally* Ingham, *supra* note 17.

227. Gensler & Christman, *supra* note 44; *see also* Hu, *supra* note 7; Wang, *supra* note 2.

228. Ingham, *supra* note 17.

229. The newspaper claims access to TIDAL's own hard drive containing proof to these falsifications of stream numbers. Tobiassen & Saeter, *supra* note 219.

230. *Id.*; Stassen, *supra* note 18.

231. Tobiassen & Saeter, *supra* note 219; Stassen, *supra* note 18.

232. Stassen, *supra* note 18.

233. *Id.*

234. Leight, *supra* note 1; Hu, *supra* note 7; Gensler & Christman, *supra* note 44.

235. Wang, *supra* note 2; Hu, *supra* note 7; Gensler & Christman, *supra* note 44.

236. 37 C.F.R. § 385 (2019); 84 FR § 1918 (2019).

237. §385.2.

CHRISTINE SMITH BURTON

stream manipulation by the service itself.²³⁸ The definition also does not define any rules for when a streaming service does not immediately recognize fraud but paid out royalties before the fraudulent activity was detected by the service.²³⁹

VI. PREVENTION? WHAT PREVENTION?*A. Why Has Little Been Done to Actively Prevent Fraud and Playola?*

The digital music platforms and the music industry have done very little to prevent music streaming fraud and playola.²⁴⁰ This lack of implementation has led to a lot of music industry-wide speculation of fraud.²⁴¹ Some speculation is pointed at the digital music platforms because direct admission that the fraud is as prevalent as speculated could hurt their public image and current business relationships.²⁴²

Most of the speculation, however, is pointed at the Spotify platform directly and the deals that Spotify initially formed with the major labels.²⁴³ In initial negotiations between the majors²⁴⁴ and Spotify, Spotify needed to license the major labels' catalogs in order to offer enough popular music to provide a viable business model.²⁴⁵ As payment for these licenses, Spotify gave each major label an equity partnership in the company.²⁴⁶ If Spotify admitted fraud, this could decrease the value of the equity that each major label holds in the company.²⁴⁷ As a result, it is in the interest of both Spotify and the major labels to protect Spotify's reputation. Neither side has incentive to expose the fraud.²⁴⁸ Additionally, the admission of fraud could hold the

238. *Id.*

239. *Id.*

240. Ingham, *supra* note 13; Wang, *supra* note 2.

241. Gensler & Christman, *supra* note 44; *see* Leight, *supra* note 1; Ingham, *supra* note 13.

242. Gensler & Christman, *supra* note 44; *see* Leight, *supra* note 1; *see* Raymond, *supra* note 59; *see* Ingham, *supra* note 13.

243. Gensler & Christman, *supra* note 44; Peoples, *supra* note 7; *see generally* Tim Ingham, *Here's Exactly How Many Shares the Major Labels and Merlin Bought in Spotify – and What Those Stakes Are Worth Now*, MUSIC BUS. WORLDWIDE (May 14, 2018), <https://www.musicbusinessworldwide.com/heres-exactly-how-many-shares-the-major-labels-and-merlin-bought-in-spotify-and-what-we-think-those-stakes-are-worth-now/>.

244. *Record Label*, WIKIPEDIA, https://en.wikipedia.org/wiki/Record_label (last visited Dec. 18, 2020); Majors are a term of art and refer to the major recording labels that include Universal Music Group, Warner Music Group and Sony Music Entertainment. Matthew Justin, *Indie vs. Major Record Labels: Which Is Right for You?*, ICON COLLECTIVE (May 27, 2020), <https://iconcollective.edu/indie-vs-major-record-labels/#:~:text=The%20big%20three%20major%20record,either%20of%20the%20big%20three>.

245. Gensler & Christman, *supra* note 44; *see also* Ingham, *supra* note 243 (explaining that Sony Music was given 5.8% stake, Universal was given a 4.8% stake, and Warner Bros. Music was given a 3.8% stake. Those stakes have since decreased since Spotify went public, but all three maintained some equity share).

246. Gensler & Christman, *supra* note 44.

247. Gensler & Christman, *supra* note 44; Peoples, *supra* note 7; *see* Ingham, *supra* note 243.

248. Gensler & Christman, *supra* note 44; Peoples, *supra* note 7; *see* Ingham, *supra* note 243.

'Playola' and Fraud on Digital Music Platforms

company secondarily liable, further decreasing the value of Spotify and thus the equity that the labels maintain.²⁴⁹

There is also some speculation that the music industry does not work towards preventive fraud measures as it would expose various playola schemes that all parties may have committed.²⁵⁰ In either case, the boosts in streams helps the label's bottom line and leaves those labels, artists, music publishers and songwriters that do not participate in playola schemes exposed to decreased royalties.²⁵¹ Additionally, some of the labels may have participated in playola practices only to compete with other labels that participate in the practice.

The unfortunate possibility is that proper fraud prevention methods have not been put in place as it might expose the playola by music industry insiders and fraud committed internally by the digital music services.²⁵² In order for proper measures to be implemented, fraud prevention may require Congressional involvement by legislative action.

B. Current Prevention Methods

Some forms of policing playola have been introduced in the industry, but the effectiveness of those measures has been limited. Preventive measures have included a development of an industry code of conduct²⁵³ and third-party technological developments to monitor and detect fraudulent streaming patterns.²⁵⁴

In June of 2019, record companies, music publishers, industry organizations and streaming services partnered and signed a 21-point "code of conduct" created to prevent and eliminate fake music streams.²⁵⁵ This code of conduct defines streaming manipulation as "the artificial creation of plays, by human or non-human means, of online and offline plays on audio and audio-visual streaming services, i.e., where those plays do not represent genuine listening."²⁵⁶ Under this code, artificial creation

249. Paige Clark, *The Invisible Defense Against Music Piracy*, 15 J. MARSHALL REV. INTELL. PROP. L. 297, 299 (2016).

250. Ingham, *supra* note 13.

251. Leight, *supra* note 1; Hu, *supra* note 7; Gensler & Christman, *supra* note 44.

252. Ingham, *supra* note 13.

253. *Id.*

254. See generally Chris Eggerton, *Distrokid Teams with Audible Magic to Combat Streaming Piracy*, BILLBOARD (Jun. 12, 2019), <https://www.billboard.com/articles/business/8514899/distrokid-audible-magic-combat-streaming-piracy>, Hu, *supra* note 7.

255. Ingham, *supra* note 13.

256. Jessica Nicholson, *Major Music Industry Companies Sign "Code of Best Practice" Against Streaming Manipulation*, MUSIC ROW (Jun. 20, 2019), <https://musicrow.com/2019/06/major-music-industry-companies-sign-code-of-best-practice-against-streaming-manipulation/>; Amy X. Wang, *The Music Industry Signs a Pledge Against Fake Streams*, ROLLING STONE (Jun. 20, 2019, 3:07 PM), <https://www.rollingstone.com/pro/news/music-industry-icmp-pledge-against-fake-streams->

CHRISTINE SMITH BURTON

includes, but is not limited to, the manipulation of streams through automated processes (“bots,” “click-farms” or “stream farms”).²⁵⁷ The code is not legally binding on the industry or any of the signatories, and does not affect any terms and conditions of any private agreements of the parties.²⁵⁸ This code of conduct has been highly criticized throughout the music industry because it lacks enforcement mechanisms and many critics feel the code will do nothing to prevent future streaming manipulation.²⁵⁹ According to these critics, the code consists only of “imprecise promises by the streaming services to monitor and crack down on illegal streaming activity . . . [and] imprecise pledges by labels to share information” when possible fraud is detected.²⁶⁰

Another development in playola prevention is the emergence of third-party companies that have developed software that may be able to detect fraudulent activity.²⁶¹ This software recognizes patterns of streaming manipulation that may occur through fake user accounts, fake artists, and streaming farms.²⁶² The software is supposed to detect sudden shifts in listener patterns and determine whether the activity is legitimate.²⁶³

Unfortunately, there have been no developments to prevent old payola schemes, like pay-for-play for radio airplay, from infiltrating music streaming platforms and manipulating curated playlists, in turn diluting the royalty pool.

VII. I'M NOT LIABLE – YOU'RE LIABLE

A. *Why Litigation Is Not the Answer*

Before the Communications Act of 1934 was amended, while payola was not expressly illegal, it may nevertheless have constituted actionable fraud or unfair competition. The practice of playola is in a similar situation today. There are many forms of music streaming fraud, but as of today's date, little has been done to prevent it. Rightsholders have been able to identify inconsistencies in playlist reports, and multiple journalists have demonstrated the ability to fraudulently game the system;

850428/#:~:text=On%20Thursday%2C%20an%20assortment%20of,collective%20agreement%20on%20the%20issue.

257. Nicholson, *supra* note 256.

258. Wang, *supra* note 256.

259. Ingham, *supra* note 13.

260. *Id.*

261. Hu, *supra* note 7. See *infra* note 399-400 and accompanying text.

262. Eggerton, *supra* note 254; see generally *Rebeat*, FRAUD DETECTION SOFTWARE, [hereinafter REBEAT] <https://rebeat.com/fraud-detection-software/> (Last visited Oct. 14, 2020).

263. Eggerton, *supra* note 254; see generally REBEAT, *supra* note 262.

'Playola' and Fraud on Digital Music Platforms

therefore, one would think that litigation is imminent.²⁶⁴ But why haven't more lawsuits been filed by the rightsholders against these third-party streaming promotion companies? Why haven't rightsholders filed complaints against the digital music platforms themselves? The reason is because successful litigation is almost impossible in these cases.²⁶⁵

The most comparable legal analysis to determine why music streaming fraud is not litigated is best answered in the litigation of "click fraud" in advertising.²⁶⁶ Click fraud is defined as a type of fraud that is committed by repeatedly clicking an advertisement to fraudulently increase the cost to an advertiser.²⁶⁷ Many companies have tried to file complaints that contain claims of click fraud against Google, Facebook and many others, but most of these cases were dismissed by the court, or at the very least, the click fraud claim was dismissed.²⁶⁸

Most of these dismissals are due to an insufficient showing of fraud.²⁶⁹ Under the Federal Rules of Civil Procedure Rule 9(b), any claim of fraud is subject to heightened pleading requirements.²⁷⁰ This heightened pleading requirement means that a plaintiff that alleges fraud is required to state with particularity the circumstances constituting the instance or instances of fraud.²⁷¹ The plaintiff must identify the "who, what, where, when and how" of the alleged misconduct and why that misconduct is fraudulent.²⁷² If a plaintiff does not have an inside source that can obtain particular documentation that demonstrates an instance of fraud, the plaintiff may only have circumstantial evidence of the possibility of fraud. Circumstantial evidence does not meet the exact "who, what, where, when and how" the heightened pleading requires.²⁷³

264. See generally Bedell, *supra* note 112; see generally Ingham, *supra* note 9; Ingham, *supra* note 101; Wang, *supra* note 2.

265. See Wang, *supra* note 2.

266. Cheen, *supra* note 110.

267. *Click Fraud*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/click%20fraud> (last visited Jan. 1, 2020).

268. See generally Feldman v. Google, Inc., 513 F.Supp. 2d 229 (E.D. Pa. 2007); see generally Singh v. Google LLC, No. 16-cv-03734-BLF, 2018 U.S. Dist. LEXIS 27111 (N.D. Ca. 2018); see generally Woods v. Google Inc., No. 11-cv-1263-JF, 2011 U.S. Dist. LEXIS 88795 (N.D. Ca. 2011); see generally *In re Facebook PPC Adver. Litig.*, No. 09-cv-03043-JF, 2010 U.S. Dist. LEXIS 136505 (N. D. Ca. 2010).

269. See generally Feldman v. Google, Inc., 513 F.Supp. 2d 229 (E.D. Pa. 2007); see generally Singh v. Google LLC, No. 16-cv-03734-BLF, 2018 U.S. Dist. LEXIS 27111 (N.D. Ca. 2018); see generally Woods v. Google Inc., No. 11-cv-1263-JF, 2011 U.S. Dist. LEXIS 88795 (N.D. Ca. 2011); see generally *In re Facebook PPC Adver. Litig.*, No. 09-cv-03043-JF, 2010 U.S. Dist. LEXIS 136505 (N. D. Ca. 2010).

270. Singh, 2018 U.S. Dist. LEXIS 27111 at *8; Fed. R. Civ. P. 9(b).

271. Kearns v. Ford Motor Co., 567 F.3d 1120, 1125 (9th Cir. 2009) (citing Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1103 (9th Cir. 2003)).

272. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011) (citing Fed. R. Civ. P. 9(b)).

273. *Cafasso*, 637 F.3d at 1055 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007)).

CHRISTINE SMITH BURTON

Further, the Federal Rules of Civil Procedure Rule 12(b)(6) “tests the legal sufficiency of a claim.”²⁷⁴ In *Balistreri v. Pacifica Police Dept.*, the Court determined that based on 12(b)(6), a Court’s dismissal can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a particular cognizable legal theory.²⁷⁵ Again, this sufficiency of alleged facts is an issue in click fraud accusations against advertising platforms.²⁷⁶ Although there may be indications of fraud or the possibility that fraud exists based upon a trail of miscellaneous documents, merely conclusory statements stringing these facts together will not meet the heightened pleading requirement of fraud and will fall short of establishing sufficient facts to meet the burden of proof.²⁷⁷ In fact, the *Ashcroft v. Iqbal* Court stated, “the tenet that a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice.”²⁷⁸ Although the Court examining the facts of a click fraud case may accept the facts of the case as true, the facts themselves may not draw enough conclusory evidence to proceed at trial.²⁷⁹ In fact, these cases usually result in just that: a string of facts that may be true, but not enough to provide sufficient evidence of fraud.²⁸⁰

As with click fraud, complaints of music streaming fraud would also typically lack sufficient facts to meet the heightened pleading requirements of fraud. Rightsholders may be able to show irregularities in chart reporting and show that users have notified them of irregular listening activity on their accounts, but those few pieces are likely to fall short of the court’s requirements of a heightened pleading.²⁸¹ When labels have reported these accusations to the digital music platforms, these platforms have remained silent on whether these specific reports are fraudulent, let alone whether additional fraud exists.²⁸² The digital music services hold all of the evidence on specific circumstances of any fraudulent activity and it is unlikely those services would provide that information to a rightsholder for fear the platform could also be held liable for the fraudulent activity or practices.²⁸³

274. *Narrow v. Black*, 250 F.3d 729, 732 (9th Cir. 2001) (referencing Fed. R. Civ. P. 12(b)(6)).

275. *Narrow*, 250 F.3d at 732 (citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)).

276. *See generally* Feldman, 513 F.Supp. 2d 229 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

277. *See generally id.*

278. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting *Bell*, 550 U.S. at 555).

279. *Narrow*, 250 F.3d at 732 (citing *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996)).

280. *Id.*

281. *See generally* Bedell, *supra* note 112; *see generally* Ingham, *supra* note 9; *see generally* Ingham, *supra* note 101.

282. Wang, *supra* note 2; Nicolaou, *supra* note 194; Yoo, *supra* note 59.

283. *See generally* Bedell, *supra* note 112; *see generally* Ingham, *supra* note 9; *see generally* Ingham, *supra* note 101. However, there could be instances where a digital music platform may be willing to hand evidence

'Playola' and Fraud on Digital Music Platforms

What about the unidentified fraudulent accounts that have manipulated the royalty pool? For those fraudsters that have auto-generated compositions and created fake artist accounts, rightsholders may have little success in litigation.²⁸⁴ First, the rightsholder cannot go after the fraudster unless that person can be identified or tracked.²⁸⁵ Second, without sufficient facts of the fraud itself, as evidence of which is only in possession of a digital music platform, any litigation under a vicarious liability claim against a digital music service would meet the same fate as click fraud cases.²⁸⁶

Additionally, fraudsters are uploading unreleased albums or songs of artists without rightsholders' permission.²⁸⁷ The digital music platforms have been notified of the copyright infringing activity of some users, but the infringing activity continues to occur.²⁸⁸ In cases such as these, the digital music service may be held as a contributory infringer.²⁸⁹ In *A & M Records, Inc. v. Napster, Inc.*, the Court stated that in order for a plaintiff to establish contributory infringement, the plaintiff must show that a defendant had a reasonable knowledge of a specific infringement, knows or should know that infringing material is available on the platform, and fails to act to prevent viral distribution.²⁹⁰ However, these elements may also be impossible for a potential plaintiff to prove with mere circumstantial evidence.

B. How the Digital Music Services MAY Be Held Contributory Liable Based on Past Precedent

When a fraudster uploads the copyrighted material to a digital music platform in order to manipulate the royalty pool, a digital platform may be held contributory liable.²⁹¹ Typically, an artist, label, publisher or songwriter will notify the digital platform that the infringing material exists.²⁹² Typically, in these cases, a digital music platform like Spotify will remove the infringing material per their terms of use.²⁹³ However, although Spotify may have removed the material as infringing, the

over to a rightsholder in a case of third-party playlist pluggers that has been removed from a platform due to fraudulent practice for a precise instance of a particular third-party fraud case.

284. See generally Ingham, *supra* note 101; see generally Yoo, *supra* note 59.

285. See generally Leight, *supra* note 1; Wang, *supra* note 2.

286. *Narrow v. Black*, 250 F.3d 729, 732 (9th Cir. 2001) (citing *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988)).

287. Yoo, *supra* note 59.

288. *Id.*; see generally Arcand, *supra* note 117; Hu, *supra* note 7.

289. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

290. *Id.* at 1027.

291. See generally *id.*

292. Ingham, *supra* note 101; see generally Arcand, *supra* note 117; Yoo, *supra* note 59.

293. Hu, *supra* note 7; Yoo, *supra* note 59.

CHRISTINE SMITH BURTON

material may reappear under a different user account.²⁹⁴ Multiple infringing songs from the same artist appear to replace each removed infringing composition.²⁹⁵ Many times, these infringing uses become viral and gain extensive royalty revenue before the infringing compositions are taken down by the digital music platform²⁹⁶ and a royalty check has already been sent to the infringing party.²⁹⁷ As a result, the royalty pool is diluted.²⁹⁸ This contributory infringement has expanded past the days of Napster, when an infringing Napster download only supplanted a sale of the affected artists' song, and moved into a universe in which every rightsholder is affected by one single act of copyright infringement because the dilution of the royalty pool affects all participants in the streaming marketplace.²⁹⁹ The digital music platform is ultimately in control of everything on the platform and is thus in the best place to implement preventative measures to protect the copyrights of licensors.³⁰⁰

Further, in *BMG Rights Management (US), LLC v. Cox Communications, Inc.* (“*BMG I*”), the District Court found Cox Communications liable for contributory infringement for third-party users.³⁰¹ In this instance, Cox subscribers shared copyrighted files that the subscriber did not have permission to do.³⁰² Cox maintained that their user agreement reserved the right to suspend or terminate subscribers who use Cox services to post, copy, transmit or disseminate any content that infringes the copyrights of another party.³⁰³ However, Cox rarely terminated accounts of repeat infringers and when Cox did terminate infringers' accounts, it always reactivated those accounts.³⁰⁴ Additionally, Cox had only created a limited automated system to handle notifications of infringement and, although maintaining a thirteen strike policy against users that infringe on another's property rights, the policy was rarely implemented.³⁰⁵

294. Yoo, *supra* note 59.

295. *Id.*

296. *See generally* Ingham, *supra* note 101; Yoo, *supra* note 59.

297. *See generally* Ingham, *supra* note 101; Yoo, *supra* note 59.

298. Wang, *supra* note 2, Hu, *supra* note 7; Gensler & Christman, *supra* note 44.

299. Wang, *supra* note 2, Gensler & Christman, *supra* note 44.

300. Wang, *supra* note 2; Yoo, *supra* note 59.

301. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns., Inc.*, 199 F.Supp. 3d 958, 973-980 (4th Cir. 2018); *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 304-305 (4th Cir. 2018). The contributory infringement award in this case was remanded for a new trial due to erroneous jury instructions. The jury instruction should have allowed for the jury to determine contributory infringement by willful blindness but not negligence.

302. *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 304-305 (4th Cir. 2018).

303. *Id.* at 299.

304. *Id.* at 304-305.

305. *Id.*

'Playola' and Fraud on Digital Music Platforms

By the following year, Cox Communications was sued again by 53 members of the RIAA for unauthorized downloads and distribution across its network.³⁰⁶ Cox had attempted to adopt a policy to respond to alleged acts of infringement.³⁰⁷ Cox received and processed notices of infringement and had implemented a program to notify subscribers identified in those received notices.³⁰⁸ The plaintiffs, in the complaint, identified Cox accounts that had received three or more infringement notices and established those accounts as the basis for Cox's liability.³⁰⁹ This Court applied the holding of *Luvdarts, LLC v. AT&T Mobility, LLC* that defined the proper standard of knowledge as "specific enough knowledge of infringement that the defendant could do something about it."³¹⁰ In *Perfect 10 v. Amazon, Inc.*, and as applied by this Court, the Court also held this same standard but also determined that a service provider's knowing failure to prevent infringing actions could be the basis for imposing contributory infringement.³¹¹ A proper notification may include information and specific data about an individual infringing account, specific infringing activity of that individual user, a time stamp for the infringing data, and the date the notice was sent.³¹² The Court determined because the plaintiff's notifications included the above-mentioned information, Cox was knowledgeable of specific instances of infringement and, therefore, could be held contributory liable.³¹³

The Cox case is slightly different than some of the actions that the digital music platforms take today. Users may be removed at a digital music platform's discretion, if the platform sees any patterns of infringing activity.³¹⁴ Each platform, like Cox, includes a policy in their terms and conditions of service that warns any user that copyright infringement of any kind will not be tolerated.³¹⁵ Spotify has instituted a

306. See generally *Sony Music Ent. v. Cox Commc'ns, Inc.*, 426 F.Supp. 3d. 217 (4th Cir. 2019).

307. *Sony Music Ent.*, 426 F.Supp. 3d. at 221.

308. *Id.*

309. *Id.*

310. *Id.* at 230 (quoting *BMG Rights Management (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 311-312).

311. *Id.* at 230 (citing *Perfect 10 v. Amazon.com, Inc.*, 503 F.3d 1146, 1172 (9th Cir. 2007)). See generally *Perfect 10 v. Amazon.com, Inc.*, 503 F.3d 1146, 1172 (9th Cir. 2007) (holding that "a computer system operator can be held contributory liable if it has actual knowledge that specific infringing material is available using its system . . . and can take simple measures to prevent further damage to copyrighted works . . . yet continues provide access to infringing works.").

312. *Sony Music Ent.*, 426 F.Supp. 3d. at 231-232.

313. *Id.* at 232.

314. APPLE, INC., APPLE MEDIA TERMS AND CONDITIONS, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Dec. 31, 2019) (explaining that you may not use the Services to plan or engage in any illegal, fraudulent, or manipulative activity); Peoples, *supra* note 7 (explaining that Spotify's head of communications announced "new terms of service...prohibit selling accounts and playlists or "accepting any compensation, financial or otherwise, to influence...the content included on an account or playlist).

315. APPLE, INC., APPLE MEDIA TERMS AND CONDITIONS, <https://www.apple.com/legal/internet-services/itunes/us/terms.html> (last visited Dec. 31, 2019) (explaining that you may not use the Services to plan

CHRISTINE SMITH BURTON

fraud detection department.³¹⁶ However, what makes Cox relevant is that despite Cox's attempt to facilitate an intellectual property abuse department, Cox did not implement their abuse prevention policies well enough to avoid potential contributory liability.³¹⁷ It is time to apply these same standards to the digital music streaming platforms, as despite the steps they have taken, these platforms still have not addressed the fundamental forms of streaming fraud that have been around for years.³¹⁸ This fraud does not continue to be a problem because fraudsters find new ways to manipulate the royalty pool and falsely induce monetary gain, although they do.³¹⁹ The same types of fraud from over five years ago are still significantly diluting the royalty pool in the exact same way as it did five years ago.³²⁰ The digital music platforms have not created any sufficient solution to combat early types of fraud, let alone new fraud developments.³²¹ Additionally, any user that has been deleted from a digital platform can simply sign up as another user.³²² Further, there are some instances where some sources have alleged that infringing user accounts have not been terminated in apparent violation of Spotify's own user agreements.³²³ If this is the case, and the users have not rectified their infringing behavior, Spotify may be held contributory liable.³²⁴

C. What About Safe Harbor Provisions?

But, what about safe harbor protections under the Digital Millennium Copyright Act ("DMCA")?³²⁵ Is Spotify protected from contributory infringement claims by the safe harbor protections of the DMCA?³²⁶ Because Spotify is a direct licensee of

or engage in any illegal, fraudulent, or manipulative activity); SPOTIFY, TERMS AND CONDITIONS OF USE (2019), <https://www.spotify.com/us/legal/end-user-agreement/> (last visited Dec. 18, 2020).

316. Wang, *supra* note 2; Hu, *supra* note 7.

317. See generally *Sony Music Ent. v. Cox Commc'ns, Inc.*, 426 F.Supp. 3d 217 (4th Cir. 2019). See generally *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293, 304-305 (4th Cir. 2018).

318. See generally Hu, *supra* note 7; see generally Ingham, *supra* note 9; see generally Yoo, *supra* note 59; see generally Raymond, *supra* note 59; see generally Wang, *supra* note 2.

319. See generally Hu, *supra* note 7; see generally Arcand, *supra* note 117; see generally Ingham, *supra* note 9; see generally Yoo, *supra* note 59; see generally Raymond, *supra* note 59; see generally Wang, *supra* note 2; see generally Ingham, *supra* note 101.

320. Clinch, *supra* note 11.

321. Leight, *supra* note 1; Hu, *supra* note 7; Nicolaou, *supra* note 194; Wang, *supra* note 2.

322. Ingham, *supra* note 101.

323. Hu, *supra* note 7.

324. With these accusations that Spotify was notified of infringing activity and the infringing activity remains on the Spotify platform, it remains undisclosed whether Spotify received proper notification and whether that notification was received by a proper party. If improper notification was received, Spotify may not be required to takedown the infringing use if Spotify obtained proper licensing. See *The Copyright Act of 1976*, 17 U.S.C. § 512(c)(3) (1999).

325. 17 U.S.C. § 512.

326. *Id.*

'Playola' and Fraud on Digital Music Platforms

copyrighted works, Spotify may not qualify for protection under the DMCA.³²⁷ In order to obtain DMCA protections, Spotify first must be considered an online service provider within the definition of 17 U.S.C. § 512(i).³²⁸ Under this definition, Spotify could argue that it is an online service provider under a transitory communications business.³²⁹ A transitory communication business is a business that provides connections for its users.³³⁰ Spotify is a transitory communication business because Spotify connects users to the Spotify music database without changing or modifying the content of the music or any other material that is received by the rightsholders.³³¹

The DMCA safe harbor provisions³³² were established to protect internet companies from the massive piracy that occurs online.³³³ However, for a transitory digital network to qualify under the safe harbor protections, the transitory digital network is subject to the following conditions: (1) the data transmission was initiated by or at the direction of a person other than the service provider; (2) the data transmission . . . is carried out through an automated technical process without selection of the material by the service provider; (3) the service provider does not select the recipients of the material except as an automatic response to the request of another person; (4) the intermediate or transit copies that are stored on the service provider's system must not be accessible other than to anticipated recipients, and these copies must not be maintained on the system for longer than is necessary for the transmission; and (5) the service provider must not have modified the content of the transmitted data.³³⁴ Under these qualifications, Spotify does not fall under safe harbor protections.³³⁵ First, and as previously mentioned, Spotify has its own editorial playlists where, although mostly automated, have human intervention in the selection process.³³⁶ Second, Spotify is directly knowledgeable about online music piracy of its licensed works.³³⁷ Spotify is required to obtain a license for each and every song distributed on its site, and it must therefore know with particularity about each item of content on the site.³³⁸ Although the direct deals with labels may

327. Clark, *supra* note 249.

328. 17 U.S.C. § 512(i).

329. 17 U.S.C. § 512(k)(1)(A), Clark, *supra* note 249, at 307.

330. 17 U.S.C. § 512(k)(1)(A).

331. Clark, *supra* note 249, at 307.

332. 17 U.S.C. § 512.

333. Clark, *supra* note 249, at 311.

334. 17 U.S.C. § 512(k)(1).

335. Clark, *supra* note 249, at 312; *See* 17 U.S.C. § 512(A)(1).

336. *See generally Behind the Playlists: Your Questions Answered by Our Playlist Editors*, SPOTIFY, <https://artists.spotify.com/blog/behind-the-playlists-your-questions-answered-by-our-playlist-editors> (last visited Dec. 5, 2020); Clark, *supra* note 249, at 312; Hogan, *supra* note 45; Owens, *supra* note 33.

337. Clark, *supra* note 249, at 312.

338. Coe Ramsey, *Music Law 101: Common Music Licenses*, DJ COUNSEL.COM (Jul. 17, 2019), <http://www.djcounsel.com/music-law-101-common-music-licenses/>; 17 U.S.C. § 115 (2018).

CHRISTINE SMITH BURTON

excusably fall under a safe harbor protection, the licenses required for music publishers and songwriters under 17 U.S.C. § 115 may not.³³⁹ It is Spotify's statutory obligation to obtain all § 115 licenses and one would be hard-pressed to excuse Spotify under a safe harbor protection for a misrepresented composition when platform algorithms can identify artist compositions by individual music tastes of end users.³⁴⁰

D. Well, Litigation May Work When the Universe Aligns Just Right

There have also been instances where a fraudster releases unreleased material by an artist under an account claiming to be said artist without artist or rightsholder permissions.³⁴¹ Because the material is posted without permission by any owner of the copyrights, this action of the fraudster would be copyright infringement and the fraudster could be subject to criminal penalty.³⁴²

According to the Copyright Office and the Copyright Act, "copyright infringement occurs when a copyrighted work is reproduced, distributed, performed, publicly displayed, or made into a derivative work without the permission of the copyright owner."³⁴³ The penalty for copyright infringement is either the actual dollar amount of damages and profits or statutory damages ranging from \$200 to \$150,000 for each work that was infringed.³⁴⁴ Statutory damages are awarded based upon evidence provided by the plaintiff in a copyright infringement lawsuit.³⁴⁵ In the instance of a fraudster uploading copyrighted material without permission and that has also not been released, it is likely that a jury would find a fraudster guilty of copyright infringement, that is assuming the fraudster could be identified.³⁴⁶

After the onset of the Napster litigation,³⁴⁷ the RIAA filed 261 lawsuits against individuals that illegally shared copyrighted music on the internet.³⁴⁸ These individuals were targeted as a group that shared folders containing more than 1000 copyrights on file sharing platforms like KaZaa and allowed millions of users to

339. See generally 17 U.S.C. § 512.

340. 17 U.S.C. § 115; Clark Boyd, *How Spotify Recommends Your New Favorite Artist*, TOWARD DATA SCIENCE (Nov. 11, 2019), <https://towardsdatascience.com/how-spotify-recommends-your-new-favorite-artist-8c1850512af0>.

341. Yoo, *supra* note 59.

342. 17 U.S.C. § 506 (2008).

343. *Definitions: What Is Copyright Infringement*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq-definitions.html> (last visited on Jan. 1, 2020).

344. 17 U.S.C. § 504 (2010).

345. *Id.*

346. Amy Harmon, *The Price of Music: The Overview; 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES (Sept. 9, 2003), <https://www.nytimes.com/2003/09/09/business/the-price-of-music-the-overview-261-lawsuits-filed-on-music-sharing.html?auth=login-email&login=email>.

347. *A&M Records, Inc.*, 239 F.3d 1004.

348. Harmon, *supra* note 346; see *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (2012).

'Playola' and Fraud on Digital Music Platforms

download those compositions illegally.³⁴⁹ The lawsuits were strictly to deter the pattern of illegally traded copyrighted material and to change perceptual patterns that the illegal trade could continue without punishment.³⁵⁰ As the 261 lawsuits were filed, the RIAA also announced a 'clean slate program.'³⁵¹ The clean slate program provided amnesty for any file sharer that turned themselves in before legal action was taken against them.³⁵² The lawsuits were nothing more than a tactic to prevent behaviors of ongoing copyright infringement amongst the general public.³⁵³

In this instance of copyright infringement and where the fraudster could be identified, such lawsuits could occur again and the courts could award a plaintiff substantial statutory damages. These awards could once again act as a significant deterrent from future fraudsters attempting the same type of music streaming fraud. However, such cases would only be able to proceed on the extremely limited chance that a rightsholder could identify a particular fraudster and show enough evidence to substantiate that fraud existed. As previously mentioned throughout this comment, this identification and evidence of fraud is almost impossible for rightsholders to obtain.

VIII. INDUSTRY SOLUTIONS*A. User-Centric Royalty Models*

Many industry commentators have suggested that moving away from the current per stream royalty structure to a user-based model would help contain music streaming fraud and playola practices.³⁵⁴ Deezer³⁵⁵ is expected to launch this user-based royalty model upon obtaining licenses with rightsholders.³⁵⁶ In a user-based model, the pro-rated royalty pool is based on a single individual's user's account and the streams of that individual user.³⁵⁷ If a particular user only streamed the songs of one artist for the entirety of a month, all of the royalty pool revenue would be paid

349. Harmon, *supra* note 346.

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.*

354. Ingham, *supra* note 9.

355. Deezer is an online music streaming service based in France. *Deezer*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Deezer> (last visited Dec. 28, 2020).

356. Althae Legaspi, *Deezer Launches Initiative for 'User-Centric' Approach to Distribute Royalties: New Website Emphasizes Potential Benefits of "User-Centric Payment System" Versus Market Share-Based Artist Payments*, ROLLING STONE (Sept. 11, 2019, 10:13 PM), <https://www.rollingstone.com/music/music-news/deezer-launches-initiative-for-user-centric-approach-to-distribute-royalties-883310/>; see Stuart Dredge, *Deezer Still Pushing for User-Centric Payouts: 'We Will Continue Fighting . . .'*, MUSICALLY (Oct. 1, 2020), <https://musically.com/2020/10/01/deezer-still-pushing-for-user-centric-payouts-we-will-continue-fighting/>.

357. Legaspi, *supra* note 356.

CHRISTINE SMITH BURTON

to the rightsholders associated with those streamed compositions.³⁵⁸ The current royalty model for subscription-based services bases royalties on all streams listened throughout the entirety of the platform by all users.³⁵⁹ Under the user-centric model, royalties would no longer be distributed based on an aggregate of all streams.³⁶⁰ This method could be used to limit fraudulent activity to a particular user account, as a particular fraudster's royalty income would be limited to the individual fraudsters account; in other words, when a fraudster sets up a user account to boost streams by click fraud, the fraudster would never receive more royalty income than the fraudster put in setting up that account as all royalty income would be based off of the activity of that one account.³⁶¹ A user-centric model will not allow for a fraudster to set up a user account in the hopes to defraud the system.³⁶² Currently, all user streams are collectively accounted by using one royalty pool.³⁶³ In a user-centric model, the royalty pool is refocused to individual users.³⁶⁴ So, if a fraudster sought to stream songs in a manner to defraud the royalty pool, that royalty pool will be limited to that individual user, so the fraudster could not gain any more income than was already put into the account.³⁶⁵

However, there are many issues with this model and much criticism within the industry regarding it. One particular criticism is that the user-centric royalty payout would no longer provide a viable royalty model for all rightsholders.³⁶⁶ In a Spotify conducted study, Will Page, Spotify's then Chief Economist, suggests that a digital platform's cost to switch from the current pro-rata royalty platform to a user-centric royalty platform would result in higher administrative costs that would be deducted from the overall royalty pool; therefore, decreasing the overall royalty distribution to all rightsholders.³⁶⁷ Additionally, although a Finnish based user-centric model study declares that a move to a user-centric model would decrease the overall royalties of

358. Stuart Dredge, *Spotify 'Bulgarian' Scam Fuels Call from MMF for User-Centric Licensing Debate*, MUSICALLY, (Feb. 22, 2018), <https://musically.com/2018/02/22/mmf-calls-new-user-centric-licensing-debate-spotify-bulgarian-scam/>.

359. Tim Ingham, *Spotify Still Pays Artists Out of One Big 'Pot'. Should the Company Change Its Policy?*, MUSIC BUS. WORLDWIDE (Dec. 10, 2018), <https://www.musicbusinessworldwide.com/spotify-still-pays-artists-out-of-one-big-pot-should-the-company-change-its-policy/>.

360. Hu, *supra* note 7.

361. Chris Cooke, *Deezer Steps Up Endorsement of User-Centric Approach to Digital Royalties*, COMPLETE MUSIC UPDATE (Sept. 11, 2019), <https://completemusicupdate.com/article/deezer-steps-up-endorsement-of-user-centric-approach-to-digital-royalties/>; Ingham, *supra* note 13.

362. Hu, *supra* note 7; Dredge, *supra* note 358.

363. Ingham, *supra* note 13; Dredge, *supra* note 358.

364. Ingham, *supra* note 13; Dredge, *supra* note 358; Ingham, *supra* note 359.

365. Ingham, *supra* note 13; Ingham, *supra* note 359.

366. See generally Will Page & David Safir, *Money In, Money Out: Lessons from CMOs in Allocating and Distributing License Revenue*, OVUM (Aug. 29, 2018), http://serci.org/congress_documents/2018/money_in_money_out.pdf.

367. *Id.*; Ingham, *supra* note 359.

'Playola' and Fraud on Digital Music Platforms

the 0.4% top earning artists from 9.9% to 5.6% (with the remaining 4.3% allocated to mid-tier artists and rightsholders), Page mentions that the Finnish study itself acknowledges significant variations of these numbers of +/- 50% and the Finnish study concluded that these fluctuations are not rare occurrences.³⁶⁸ With such significant variations, it would be hard to determine, at this time, whether there is any significant shift in royalty allocation that would favor lesser known artists in a user-centric royalty model.³⁶⁹

Moreover, and in further criticism of the user-centric model, it is impossible to predict the listening behavior of an average consumer to know whether any significant shift in royalty allocation would occur using this model.³⁷⁰ Such unpredictability may occur in how an average listener is exposed to any given artist.³⁷¹ For instance, if most listeners depend on playlists to introduce them to new music, fraud may become hugely impactful to a user-centric model. Most proponents of a user-centric model claim that a move to this model will help to alleviate types of fraud like the Bulgarian scam previously mentioned.³⁷² However, this model does not account for the industry's use of playola and alleged digital platform fraud to boost streams and manipulate playlists.³⁷³ Many listeners rely on playlists to find new music or as a convenient way to listen to music based on mood, which then exposes the listener to new music.³⁷⁴ If industry insiders pay their way on to those playlists or digital platforms manipulate those playlists to benefit themselves (or for any reason), independent artists may lose access to those playlists which eliminates a significant portion of potential royalty income for that independent artist and associated rightsholders.³⁷⁵ Playlists help generate income by exposure.³⁷⁶ When one person finds a composition from a playlist that they like, that person may add the

368. Page, *supra* note 366.

369. Ingham, *supra* note 359.

370. See generally Will Page & David Safir, 'User-Centric' Revisited: The Unintended Consequences of Royalty Distribution, OVUM, http://www.serici.org/congress_documents/2019/user_centric_revisited.pdf (last visited Nov. 24, 2020); see generally Page & Safir, *supra* note 366; see generally Jari Muikku, *Pro Rata and User Centric Distribution Models: A Comparative Study*, DIGITAL MEDIA FINLAND (Nov. 30, 2017), <https://www.fim-musicians.org/wp-content/uploads/prorata-vs-user-centric-models-study-2018.pdf> (this study repeatedly mention that the increases seen in the user-centric model are based on consumer listening behaviors.).

371. See generally Page & Safir, *supra* note 366; see generally Page & Safir, *supra* note 370; Paula Mejia, *The Success of Streaming Has Been Great for Some, but Is There a Better Way?*, NPR (Jul. 22, 2019, 6:00AM), <https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way>.

372. See generally Dredge, *supra* note 358.

373. Stuart Dredge, *How Would User-Centric Payouts Affect the Music Streaming World?*, MUSICALLY (Mar. 2, 2018), <https://musically.com/2018/03/02/user-centric-licensing-really-affect-streaming-payouts/>.

374. See generally Peoples, *supra* note 36.

375. Leight, *supra* note 1; Pierce, *supra* note 32.

376. Peoples, *supra* note 16; Gensler & Christman, *supra* note 44.

CHRISTINE SMITH BURTON

composition to their own playlist.³⁷⁷ This person's addition can cause other followers to do the same, exponentially increasing the market share of that composition.³⁷⁸ If playola, or other forms of fraud, limits an artist's playlist exposure, that artist may never achieve enough activity to produce any significant royalty income under a user-centric royalty model.³⁷⁹

B. Music Industry-Wide Policing Measures

There are multiple ways that the music industry and digital music platforms can police fraud. First, the music industry can invest in stream-farm crackdowns.³⁸⁰ The three major labels generated more than \$13 billion in revenue in 2019.³⁸¹ The labels could commit to a specific level of financing to fund both an investigation of stream farms and subsequent litigation against stream farm operators.³⁸² This has already occurred in other countries. In 2018, the U.K.-based PPL, a performance music licensing company, donated £1.5 million of member money towards fraud prevention.³⁸³ This donated amount only represented 0.6% of the organization's total collections on behalf of labels and artists.³⁸⁴ SoundExchange, in the United States, could provide similar funding with permission of their represented labels and artists.³⁸⁵ The digital music platforms can provide a similar financial commitment to develop more effective policing software and empower current anti-fraud departments.³⁸⁶

Additionally, the digital music platforms could also commit to a specific level of financing to help prevent fraudulent activities on their platforms in a more effective manner than current implementations and further empower antifraud employment teams.³⁸⁷ Currently, although the companies may have fraud detection departments, the same types of fraud exist today that did over five years ago.³⁸⁸ With sufficient

377. Peoples, *supra* note 16.

378. *Id.*

379. *Id.*; Leight, *supra* note 1; Pierce, *supra* note 32.

380. Ingham, *supra* note 13.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*; *see generally* About Us, SOUNDEXCHANGE, <https://www.soundexchange.com/about/#:~:text=SoundExchange%20provides%20royalty%20solutions%20for%20master%20rights%20owners'%20accounts> (last visited Dec. 18, 2020); *see generally* What We Do, PPL, <https://www.ppluk.com/what-we-do/#:~:text=PPL%20is%20the%20UK's%20music,in%20the%20UK%20since%201934>. (last visited Dec. 18, 2020).

386. Ingham, *supra* note 13.

387. *Id.*

388. *Id.*; *see generally* Clinch, *supra* note 11.

'Playola' and Fraud on Digital Music Platforms

investment, a service may be able to create more efficient fraud prevention software while also building trust and good faith with content licensors.³⁸⁹

Companies can also hire third-party fraud detection services.³⁹⁰ Although this is a relatively new service, there are companies that help prevent fraudulent activity.³⁹¹ DistroKid,³⁹² because of a strategic partnership with Audible Magic, can now identify “extreme manipulations of rate, pitch and tempo” by using small audio clips.³⁹³ Upon announcement of this partnership, DistroKid also announced the release of a new, free resource to artists called DistroLock.³⁹⁴ DistroLock is available to any artist, not just DistroKid clients.³⁹⁵ The artist may use the system to upload and register unreleased tracks to the service and have that track encoded with a unique audio fingerprint.³⁹⁶ DistroLock then encodes these audio tracks with an audio fingerprint and uploads them to the Audible Magic registry.³⁹⁷ Audible Magic then uses these audio fingerprints to block unauthorized music, such as previously unreleased tracks, from appearing on streaming services.³⁹⁸

Rebeat³⁹⁹ is another service currently under development to help prevent streaming fraud.⁴⁰⁰ Rebeat is a solution for labels to monitor and detect any irregular streaming activity of label content.⁴⁰¹ Rebeat analyzes an individual label or artist statement from any of the digital music platforms and flags any irregularities in data.⁴⁰² For instance, the program identifies any irregular “spikes in data” and helps determine if that spike was an error or attempted fraud.⁴⁰³

389. Ingham, *supra* note 13.

390. See Eggerton, *supra* note 254; Hu, *supra* note 7; see also *Fraud Detection Software*, REBEAT, *supra* note 262.

391. See Eggerton, *supra* note 254; Hu, *supra* note 7; see also *Fraud Detection Software*, REBEAT, *supra* note 262.

392. DistroKid is a digital distribution service that distributes the music of independent music artists to digital music streaming platforms. *DistroKid*, WIKIPEDIA, <https://en.wikipedia.org/wiki/DistroKid> (last visited Dec. 28, 2020).

393. Eggerton, *supra* note 254. Audible Magic is a content identification company that helps rightsholders identify and protect their copyrighted material. *Audible Magic*, WIKIPEDIA, https://en.wikipedia.org/wiki/Audible_Magic (last visited Dec. 28, 2020).

394. Eggerton, *supra* note 254.

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. Rebeat is a third-party service that is developing software to combat music streaming fraud on digital music streaming platforms. REBEAT, *supra* note 262.

400. Hu, *supra* note 7; see also REBEAT, *supra* note 262.

401. REBEAT, *supra* note 262.

402. *Id.*

403. *Id.*

CHRISTINE SMITH BURTON

C. Industry Penalties

The music industry and digital music services, in cooperation with companies like Billboard that control music industry charts can enact instant chart penalties for artists engaging in streaming fraud, as suggested by some industry journalists.⁴⁰⁴ Any party caught in fraudulent streaming activity would be subject to an automatic chart penalty.⁴⁰⁵ Under this enforcement scheme, the chart position of a song or album released by a violating party would be reduced by deducting the stream count by some decided numeric value for a certain amount of releases.⁴⁰⁶ The number of releases that would be affected could be determined by the severity of the fraudulent infraction or how many times the violating party has committed that infraction.⁴⁰⁷ This same penalty could also be determined by a predetermined number of releases based on the type of infraction.⁴⁰⁸ The impact of such a chart penalty could keep some artists from reaching top charting position, deterring future fraudulent streaming activities.⁴⁰⁹

Further, digital music service employees or music industry employees can be penalized for any engagement in playola to manipulate music streaming playlists or participate in any form of music streaming fraud.⁴¹⁰ For instance, Sony released an internal memorandum to all employees that stated that no employee is permitted to engage in playola or any music streaming fraud.⁴¹¹ However, the internal memo contained no direct penalties or consequences that would occur if any employee was caught fraudulently boosting streams.⁴¹² Although this is an important step, it is not enough as employees that may engage in playola or fraudulent music streaming practices may not be deterred from the practice without possible ramifications for their actions.⁴¹³

404. Ingham, *supra* note 13.

405. *Id.*

406. *Id.*

407. *Id.*

408. *Id.*

409. Ingham, *supra* note 13.

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

*'Playola' and Fraud on Digital Music Platforms***IX. HOW CURRENT LEGISLATION CAN SERVE AS A BASIS FOR NEW MUSIC STREAMING FRAUD LEGISLATION***A. Current Applicable Laws*

Currently, there are two statutes that currently could be applied to music streaming fraud: The Federal Trade Commission Act⁴¹⁴ (“FTC Act”) that prevents actions of fraud and deceptive practice, and the Computer Fraud and Abuse Act⁴¹⁵ (“CFAA”) that prevents fraud on the Internet.

The FTC Act⁴¹⁶ prevents unfair and deceptive practices by persons, partnerships, or corporations.⁴¹⁷ Unfair acts are those acts that will cause substantial injury to a consumer that cannot be reasonably avoided by that consumer and is not outweighed by any countervailing benefit or any other company that may be in competition with the business causing the injury;⁴¹⁸ and deceptive acts are acts by a business that involve a representation, omission or practice that is likely to mislead a consumer.⁴¹⁹ For instance, deception can occur when a particular business has actively tried to conceal the truth about a particular product or service⁴²⁰ or when a business does not disclose information about a product or service that a reasonable person would expect the business to disclose.⁴²¹ The FTC Act⁴²² also allows the Federal Trade Commission (“FTC”) to investigate reports of deceptive practices of a business.⁴²³

The FTC Act⁴²⁴ could be applied to both music streaming fraud and playola. If companies like Spotify are diluting the royalty pool purposefully to decrease royalty payouts, this could be cause for the FTC to initiate an investigation.⁴²⁵ If the FTC were to find the fraudulent streams to be a deceptive practice, penalties and repercussions would follow and may help to diminish the practice.⁴²⁶ Additionally, through reports of fraud and investigations, the FTC could find that companies like

414. *See generally* The Federal Trade Commission Act of 1914, 15 U.S.C. § 45 (1914).

415. *See generally* The Computer Fraud and Abuse Act of 1984, 18 U.S.C. § 1030 (1984).

416. 15 U.S.C. § 45.

417. 15 U.S.C. § 45(a)(2).

418. *Federal Trade Commission Act or Practices*, FEDERAL RESERVE, <https://www.federalreserve.gov/boarddocs/supmanual/cch/ftca.pdf> (last visited Jan. 1, 2020).

419. *The Federal Trade Commission: Deceptive Practices Affecting Consumers*, JUSTIA, <https://www.justia.com/consumer/enforcing-your-rights-as-a-consumer/the-federal-trade-commission/> (last visited Jan. 1, 2020).

420. *Id.*

421. *Id.*

422. 15 U.S.C. § 45.

423. *Id.*

424. 15 U.S.C. § 45.

425. 15 U.S.C. § 45(a).

426. *See generally* 15 U.S.C. § 45(a)(1).

CHRISTINE SMITH BURTON

Spotify are aware of fraudulent activity and do not perform due diligence in monitoring fraudulent activity by third parties.⁴²⁷

Furthermore, the FTC could perform an investigation, as they did with payola, to find whether the music industry or the digital music platforms themselves are offering money (or any other form of payment) to curators to have their songs placed on influential playlists, or any playlists at all.⁴²⁸ Although payola is not illegal as payola is,⁴²⁹ this practice could nevertheless be considered misleading to the consumer.⁴³⁰ If the playlists are not based on the choice of the consumer through consumers' overall listening patterns but are manipulated by a fraudulent party, the fraudulent party is forcing the consumer to listen to products they would not normally listen to and prevents the playlist from being one that is based on a song's popularity due to consumer preference.⁴³¹

The CFAA⁴³² may also be used to prevent further acts of music streaming fraud.⁴³³ Because music streaming is currently being undermined by the use of bots to rack up royalty streams and increase royalty payouts, any ligating party may be able to file suit under § 1030(a)(4) of the CFAA against any party committing or that has committed music streaming fraud.⁴³⁴ Although application would require a broader reading of the statute, this Section considers it a crime to “knowingly, and with the intent to defraud, access[] a protected computer without authorization, or exceed[] authorized access . . . and obtain anything of value.”⁴³⁵ The phrase “obtain anything of value” includes obtaining subscribers, and Courts could easily interpret the law to apply to increased streams, which in turn increases royalty payouts, to be something of value.⁴³⁶

The judicial interpretation of the Statute and whether that interpretation can be broadly applied is split between the judicial circuits.⁴³⁷ The broader interpretation, as would be required in instances of music streaming fraud, could only apply in those

427. 15 U.S.C. § 45(b); *See generally Report Fraud to the FTC*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/faq/consumer-protection/submit-consumer-complaint-ftc> (last visited Dec. 18, 2020).

428. *See generally* Seagrave, *supra* note 136, at 94-100.

429. Payola is only illegal if “sponsorship” of a composition on a particular broadcast playlist is not revealed to the listening public. 47 U.S.C. § 317 (1960).

430. 15 U.S.C. § 45(n).

431. *Id.*

432. 18 U.S.C. § 1030.

433. *See generally* Rohan Parekh, *Applying Broader Interpretations of the Computer Fraud and Abuse Act Could Help Curb Fraudulent Plays on Music Streaming Platforms*, J. OF GENDER, SOC. POL'Y & L. (Jun. 11, 2018), <http://www.jgspl.org/applying-broader-interpretations-of-the-computer-fraud-and-abuse-act-could-help-curb-fraudulent-plays-on-music-streaming-platforms/>.

434. *Id.*; *see also* Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(4) (1986).

435. 18 U.S.C. § 1030(a)(4).

436. Parekh, *supra* note 433.

437. *Id.*

'Playola' and Fraud on Digital Music Platforms

circuits where the court has determined that the terms of service are subject to the CFAA.⁴³⁸ Currently, the First and the Fifth Circuits are the only Circuits that interpret the CFAA as applicable to a violation of terms of use to control the scope of authorization.⁴³⁹ These Circuits have supported this broader interpretation of the Statute within the legislative history of the CFAA⁴⁴⁰ that suggests that the law be responsive to changes in technology and increased hacker sophistication.⁴⁴¹ These Circuit Courts have interpreted this history to apply to changes of the scope of authorization as technology develops.⁴⁴² With this knowledge of the legislative history and the already adopted broader interpretation of the First and Fifth Circuits, other Circuits should adopt the broader interpretation in order to prevent the devaluation of online agreements and terms of service.⁴⁴³ Additionally, by providing a broader interpretation of the statute, the CFAA could apply a criminal liability as a potential deterrent of future fraudulent music streaming activity.⁴⁴⁴

B. Legislative Action

The FTC Act and the CFAA might help address some aspects of fraud, but a comprehensive statutory scheme is required to effectively combat all aspects of playola and music streaming fraud. At this point, legislative action to prevent playola is necessary and the only real means to combat playola, if an effective statute could be passed. As explained in *supra* Sections IV and VII, playola prohibits some companies from participating in the market on an equal footing, and these companies cannot successfully sue because of their inability to prove the fraudulent activity in court.⁴⁴⁵ However, and as previously mentioned in *supra* Section IV,⁴⁴⁶ every artist and rightsholder deserves the right to fair competition in the marketplace, and every music consumer deserves the chance to discover and enjoy the best music. Playola

438. *Id.*

439. Parekh, *supra* note 433 (citing *United States v. John*, 597 F.3d 263, 269 (5th Cir. 2010) (finding that “authorized access” or “authorized” encompasses limits placed on the use of information obtained through permitted access to a computer system and data available on that system)). The author further states that “in contrast, the Ninth Circuit held in *United States v. Nosal* that criminal prosecution under the CFAA’s “exceeding authorized access” provisions could not be based on violating contractual “use” restrictions but must be linked to contractual or technological “access” restrictions.”); see also *EF Cultural Travel BV v. Explorica*, 274 F.3d 577, 582 (1st Cir. 2001) (holding terms of use and access restrictions control the scope of “authorization.”)).

440. Parekh, *supra* note 433 (citing S. Rep. No. 140-357, at 11 (1996) (discussing how the CFAA amendments reflect the importance of the new ways hackers manipulate technologies)).

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.*

445. See *supra* Section VIII; see generally 18 U.S.C. § 1030.

446. See *supra* Section IV.

CHRISTINE SMITH BURTON

practices not only distort the marketplace but suppress listener choice. A comprehensive statutory solution is required.

Congressional action is required to remedy the growing problem of fraud in the music industry. As in the early days of payola, Congress will need to launch an investigation or hearings into the possibility of and speculations regarding playola. Based upon this information, Congress must establish a law that specifically states that playola is an illegal practice. Multiple laws establish precedent guiding the form of an anti-playola law: the Payola clause of the Federal Communications Act (“FCA”),⁴⁴⁷ the FTC Act,⁴⁴⁸ and CFAA.⁴⁴⁹

The FCA’s payola provisions⁴⁵⁰ could serve as legislative precedent in favor of anti-playola laws. The practice of payola and playola are strikingly similar, but the current payola laws only apply to radio broadcasts.⁴⁵¹ The FCA has no applicability to music streaming and the Federal Communications Commission (“FCC”) has no authority over fraudulent activity of interactive music streaming.⁴⁵² But, because the practices and outcome are similar, Congress could easily make the connection and create a statute to protect the consumer from fraudulent activity on music streaming playlists.⁴⁵³

The FTC Act⁴⁵⁴ was passed into law to prevent deceptive acts on consumers and unfair business methods of competition in the marketplace, and a similar law could guide an anti-playola law.⁴⁵⁵ Digital music streaming fraud is deceptive to the consumer because the consumer, when listening to a particular playlist, no longer has a real choice in the compositions that are placed on that playlist as those playlists are

447. *See generally* Federal Communications Act of 1934, 47 U.S.C. § 317, 508 (1934).

448. 15 U.S.C. § 45.

449. *See generally* 18 U.S.C. § 1030.

450. *See generally* 47 U.S.C. §§ 317, 508.

451. *Id.*

452. Cookson, *supra* note 33.

453. In September of 2019, the FCC Commissioner sent a letter to the RIAA requiring the RIAA to investigate payola allegations. The letter followed a *Rolling Stone* article stating that payola still exists in the form record labels and artists using independent promoters for radio playlist promoters. Interestingly, the article points to DJs and radio programmers using other station playlists as radio stations are more reluctant to add a song that is not being played by any other stations. DJs and radio programmers have also been known to use top music streaming playlists to determine their own radio broadcasting playlists. If a music streaming playlist is influenced by payola, this could also force radio programming manipulation. If the RIAA were to uncover any payola through the use of playola, this discovery could instigate further fraud investigations into record labels and digital music services for fraudulent activity if the FCC provided this information to the FTC or DOJ. *See* Leight, *supra* note 181; Peoples, *supra* note 7.

454. 15 U.S.C. § 45.

455. *Federal Trade Commission: History*, ALLGOV, <http://www.allgov.com/departments/independent-agencies/federal-trade-commission-ftc?agencyid=7429> (last visited Jan. 1, 2020).

'Playola' and Fraud on Digital Music Platforms

influenced by fraud and not by listening preferences or popularity.⁴⁵⁶ Unfair methods of competition affect the market when a fraudster, or multiple fraudsters, auto-generate tracks in order to manipulate illegitimate financial gains at the detriment of the legitimate rightsholders.⁴⁵⁷ Because of the uniqueness of the types of fraud, deceptive acts and unfair methods of competition in the music streaming market, Congress should tailor a new anti-playola statute to directly address the music streaming industry.

Last, Congress could use the CFAA⁴⁵⁸ to further establish precedent in favor of an anti-playola statute. The CFAA⁴⁵⁹ was enacted by Congress in order to prevent hackers from accessing servers without authorization for substantial gain.⁴⁶⁰ However, as previously stated, the statute only protects the service platforms and not the rightsholders directly.⁴⁶¹ The CFAA⁴⁶² may only protect the digital music services in the First and Fifth Circuits as applied to digital music streaming fraud.⁴⁶³ But, Congress wished for the CFAA⁴⁶⁴ to be responsive to changes in technology and hacker sophistication.⁴⁶⁵ Unfortunately, most judicial circuits have applied the CFAA⁴⁶⁶ very narrowly even when applied to just the digital music services.⁴⁶⁷ However, Congress could further incorporate the elements from the CFAA⁴⁶⁸ into an anti-playola statute, narrowly tailoring aspects of fraud specific to the music streaming industry and its effects on both digital music streaming services and rightsholders.⁴⁶⁹

Currently, playola is not illegal in the United States. Despite years of speculation and unnamed sources affirming its prevalence, Congress has not initiated any formal investigation into the matter. Playola seems to be following the same direction that payola did, where Congress did not address the issue of payola until payola's impact on the consumer and business competition could no longer be

456. Hu, *supra* note 45; *See generally* Peoples, *supra* note 7; Peoples, *supra* note 16; Leight, *supra* note 1; Raymond, *supra* note 59.

457. Vonn, *supra* note 80.

458. 18 U.S.C. § 1030.

459. *Id.*

460. *See generally* Kim Zetter, *Hacker Lexicon: What Is the Computer Fraud and Abuse Act?*, WIRED (Nov. 18, 2015, 6:38 AM), <https://www.wired.com/2014/11/hacker-lexicon-computer-fraud-abuse-act/>.

461. *See generally* 18 U.S.C. § 1030.

462. *Id.*

463. Parekh, *supra* note 433.

464. 18 U.S.C. § 1030.

465. Parekh, *supra* note 433.

466. 18 U.S.C. § 1030.

467. Parekh, *supra* note 433 (citing S. Rep. No. 140-357, at 11 (1996) (discussing how the CFAA amendments reflect the importance of the new ways hackers manipulate technologies).

468. 18 U.S.C. § 1030.

469. Parekh, *supra* note 433.

CHRISTINE SMITH BURTON

ignored.⁴⁷⁰ However, despite Congress' efforts, illegal payola is still present in the broadcasting industry.⁴⁷¹ Although payola and playola practices are similar, the payola statute should only act as a "jumping off" point towards a more effective tool to prevent playola practices.⁴⁷² Additionally, Congress should examine the old payola statute to form a basis for an anti-playola statute, but realize, as was the case with payola, the same parties that may influence the drafting of the statute may also be the same parties benefiting from playola and because of this, without careful monitoring, an ineffective statute could be drafted.⁴⁷³

Although the practice of payola and playola are strikingly similar, any playola laws will need to be applied in a more effective manner than the current payola laws. The ineffectiveness of the current payola laws are well-known throughout the industry.⁴⁷⁴ After the payola law became law, the music and radio industry continued to find relatively simple ways to avoid detection of payola practices;⁴⁷⁵ for example, many labels began to use independent promoters.⁴⁷⁶ Even when the 2005 settlement agreements forbade the transfer of payola to independent promoters, the labels and independent promoters found more sophisticated versions of radio playlist manipulation.⁴⁷⁷ If a similar statutory provision is applied to playola, the same avoidance processes may occur with music streaming playlist playola.⁴⁷⁸ Congress should take care to draft a more rigorous anti-playola statute.

X. A PROPOSED SOLUTION

A possible solution to combat music streaming fraud is to establish the Copyright Office as an independent federal agency.⁴⁷⁹ Currently, the Copyright Office is a separate department of the Library of Congress and all rules and regulations created

470. See generally Seagrave, *supra* note 136, at 95.

471. Leight, *supra* note 178.

472. *Id.*; Peoples, *supra* note 7.

473. Owens, *supra* note 33.

474. Messitte, *How Payola Laws Keep Independent Artists Off Mainstream Radio*, FORBES (Nov. 30, 2014, 10:25 AM), <https://www.forbes.com/sites/nickmessitte/2014/11/30/how-payola-laws-keep-independent-artists-off-mainstream-radio/?sh=5bba38f8519f>.

475. *Id.*

476. *Id.*

477. *Id.*

478. Peoples, *supra* note 7.

479. It is important for the Copyright Office to become an independent agency because the Copyright Office advises Congress on both domestic and international copyright matters and needs to remain impartial. *The U.S. Copyright Office: Its Functions and Resources: Hearing Before the Committee on the Judiciary House of Representatives*, 114th Cong. 113-16 (2015) (testimony of Maria Pallante, Registrar of Copyrights).

'Playola' and Fraud on Digital Music Platforms

by the Copyright Office must be approved by the Librarian of Congress.⁴⁸⁰ However, as an independent federal agency, the Copyright Office could be authorized to establish rules, adjudicate and investigate various copyright issues including music streaming fraud.⁴⁸¹ These various authorities can be limited by Congress, as necessary, but can specifically deal with the nuances that arise in the market as technology develops.

There are various justifications for a federal agency to establish regulations on a particular market.⁴⁸² First, although this country has a private market system, the markets can become subject to flawed business practice that may damage the market; an independent agency can remedy such flaws, like market manipulation and unfair trade practices, with regulation.⁴⁸³ Second, an unregulated market can negatively impact consumers even if businesses within that market establish economically viable and efficient systems.⁴⁸⁴ Lastly, regulations by agencies conform the market principles of business to social values that protect the public interest.⁴⁸⁵ These values include, but are not limited to, basic principles of fairness and equity.⁴⁸⁶ In the case of music streaming fraud, a Copyright Office, as a regulatory agency, could mitigate the imperfection of music streaming fraud on the digital music platforms as it affects rightsholders. As previously mentioned, various instances of music streaming fraud may affect the placement of a composition on a playlist, in turn, impacting not just royalty payouts, but what song is placed in front of the consumer. These regulations impact the fairness and equity of the market in royalty distributions and fairness in consumer choice.

Throughout the history of the United States, Congress has granted independent agencies regulatory, adjudicatory and investigatory abilities.⁴⁸⁷ For example, the Securities and Exchange Commission (“SEC”) was created to inform and protect

480. *Overview of the Copyright Office*, COPYRIGHT OFFICE, <https://www.copyright.gov/about/#:~:text=Copyright%20functions%20were%20first%20centralized,created%20by%20Congress%20in%201897> (last visited Dec. 28, 2020); 17 U.S.C. § 701(a).

481. *See Types of Administrative Agency Action*, USLEGAL, <https://administrativelaw.uslegal.com/three-types-of-administrative-agency-action-rulemaking-adjudication-investigation/> (last visited Jan. 23, 2020).

482. *See Independent Agencies of the United States Government*, WIKIPEDIA, https://en.wikipedia.org/wiki/Independent_agencies_of_the_United_States_government (last visited Jan. 23, 2020).

483. *Id.*

484. *Id.*

485. Franita Tolson, *Fairness Demands the Protection of the Administrative State*, THE HILL (Apr. 2, 2018, 2:00 PM), <https://thehill.com/opinion/judiciary/381200-fairness-demands-the-protection-of-the-administrative-state>.

486. *Id.*; *see also The Basics of Administrative Law*, THE LAW OFFICES OF STIMMEL, STIMMEL & ROESER, <https://www.stimmel-law.com/en/articles/basics-administrative-law> (last visited Jan. 23, 2020).

487. *See Types of Administrative Agency Action*, USLEGAL, <https://administrativelaw.uslegal.com/three-types-of-administrative-agency-action-rulemaking-adjudication-investigation/> (last visited Jan. 23, 2020).

CHRISTINE SMITH BURTON

investors, maintain fair and efficient markets, and facilitate capital formation.⁴⁸⁸ The SEC has an enforcement division that investigates potential violations of the securities laws and recommends whether the Commission should bring any civil action in federal court or before administrative law judges.⁴⁸⁹ The enforcement division obtains evidence of possible violations through surveillance activities, investor tips and complaints, other divisions and offices of the SEC, self-regulatory organization and other security industry sources, and media reports.⁴⁹⁰ As the SEC has regulatory, adjudicatory, and investigatory abilities, the same or similar powers can be granted to the independent agency of the Copyright Office. Congress may not give the Copyright Office the same expansive powers of the SEC, but the Copyright Office can have various limited regulatory, adjudicatory, and investigatory powers and work in conjunction with already established agencies such as the FTC and the DOJ.

Establishing the Copyright Office as an independent agency is not a new proposal. In 2017, a bill of this nature was introduced by Representatives Tom Marino (R-PA) and Judy Chu (D-CA) and called the Copyright Office for the Digital Economy Act.⁴⁹¹ The bill would have established the Copyright Office as an independent agency and would have made the Register of Copyrights a presidentially appointed position.⁴⁹² Unfortunately, this bill never went before a vote and died in the 115th Congress.⁴⁹³ However, the Copyright Office's establishment as an independent agency may still prove necessary to combat music streaming fraud and should be reintroduced with various changes.

In the 2017 bill, the regulatory functions of the Copyright Office were limited to the copyright registration process.⁴⁹⁴ In a new introduction of the bill, the Copyright Office should be granted the regulatory ability to combat music streaming fraud as music streaming fraud impacts the overall economic conditions of rightsholders. As mentioned throughout this comment, music streaming fraud hurts the royalty distributions of all rightsholders as well as hurts the consuming public. This independent agency could create a regulation for digital music platforms, such as Spotify, to report any instance of fraud caught by the service. The Copyright Office would be free to establish a committee that analyzes these reports of fraud.

488. *The Role of the SEC*, INVESTOR, <https://www.investor.gov/introduction-investing/investing-basics/role-sec#:~:text=The%20U.%20S.%20Securities%20and%20Exchange,Facilitate%20capital%20formation> (last visited Dec. 28, 2020).

489. *How Investigations Work*, U.S. SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/enforce/how-investigations-work.html> (last visited Dec. 28, 2020).

490. *Id.*

491. The Copyright Office for the Digital Economy Act, H.R. 890, 115th Cong (2017).

492. *Id.*

493. *H.R. 890 (115th): Copyright Office for the Digital Economy Act*, GOVTRAK, <https://www.govtrack.us/congress/bills/115/hr890> (last visited Dec. 28, 2020).

494. *See generally* H.R. 890.

'Playola' and Fraud on Digital Music Platforms

This committee can also be established to investigate reports of fraud from people in the music industry as well as consumers. In this situation, those with evidence of potential fraud could report these activities to the enforcement division of the Copyright Office. Additionally, the Copyright Office could use substantiated media reports to launch investigations. If fraud were determined, the Copyright Office could submit the investigation's findings to the FTC or DOJ for further investigation and prosecution. However, as the fraud impacts the royalty distribution of various rights holders, the investigation can be turned over to the Copyright Royalty Board for further determination on rates and rate regulations of the market.

The Copyright Royalty Board, under 17 U.S.C. § 115(c)(1)(F), must establish "rates and terms that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller." In these determination of rates, the judges of the Copyright Royalty Board must consider and "base their decision on economic, competitive, and programming information presented by the parties," including: (i) whether the use of a digital music service's platform may substitute for or promote sales of a particular song or whether that use may otherwise interfere with or enhance a rightsholder's other song revenue streams; and (ii) the relative roles of the rightsholder and the digital music service in a song and "the service made available to the public with respect to the relative creative contribution, technological contribution, capital investment, cost and risk."⁴⁹⁵ Fraudulent streams on a digital music platform would severely interfere and impact a rightsholder's revenues from its song as well as may decrease overall market share of royalty distributions. When an investigation finds fraud has impacted the royalty pool, this fraud limits creative works made available to the public, dramatically impacts fair returns of a rightsholder's creative work under existing economic conditions and has a disruptive impact on the structure of the industry and competition. Additionally, fraud that disrupts the royalty pool may severely impact creative contributions to the market. If copyright owners cannot make a fair income in the market due to fraud, creatives may cease creating to find a fair income, or living wage, in other industries. One of the Copyright Royalty Board's functions is to determine fair rates while considering economic conditions and the impacts of fraud on the market may severely impact these economic conditions.⁴⁹⁶ In cases of fraud, the Copyright Royalty Board may utilize its power to determine how the rate structure needs to be altered to account for the impact of fraud on the royalty pool.⁴⁹⁷ For instance, the Copyright Royalty Board could require a recalculation of the royalty pool that excludes fraudulent streams and a redistribution of royalties based on this recalculation to rightsholders. In turn, this recalculation requirement could force the digital music streaming services to create more effective policing measures

495. 17 U.S.C. § 115(c)(1)(F) (2018).

496. *Id.*

497. *Id.*; *see also* 17 U.S.C. § 801(b)(1).

CHRISTINE SMITH BURTON

to combat fraudulent practices on their sites. If an investigation found that the digital music service manipulated streams or participated in fraudulent practices to force lower royalty payouts to rightsholders, the Copyright Royalty Board⁴⁹⁸ could determine a penalty percentage on royalty payouts.

The Copyright Office is best established as an independent agency to combat music streaming fraud. Under this establishment, the Copyright Office could regulate and investigate instances of potential fraud and based on the expertise of the department, best determine the appropriate steps when instances of music streaming fraud arise.

XI. CONCLUSION

As mentioned throughout this comment, there are many types of fraud affecting the music streaming marketplace. Third party fraudsters, rightsholders, artists and digital music platforms have all been accused of some form of playola or fraudulent practice. If the accusations of playola and the fraudulent acts of the digital music streaming platforms are true, the industry itself is left without an objective party that could determine an effective solution for the prevention of fraud on music streaming platforms without implicating themselves. Because a solution for music streaming fraud requires an unbiased determination of prevention, Congressional intervention and legislation is required.

One possible solution is for Congress to initiate investigations and enact a statute that prevents and deters music streaming fraud. There are currently already established laws that serve as a possible starting point and show legislative history in the prevention of fraudulent activity in various markets including the anti-payola statute, FTC Act, and the CFAA. However, as seen with the anti-payola statute, a statute may only serve as words on paper as the industry and various would-be fraudsters find new practices to circumvent the language of the statute.

A better possible Congressional solution to combat music streaming fraud is to establish the Copyright Office as an independent federal agency. With this action, the Copyright Office could be empowered to impose regulations on the industry that are specifically formulated to extinguish music streaming fraud and playola. Additionally, the Copyright Office could form an investigatory committee that would require digital music platforms to report any indications of fraud as well as investigate any reports of fraud by the music industry and consumers. The Copyright Office as a regulatory agency may be best equipped to identify, investigate, and prevent music streaming fraud.

498. Currently, the Copyright Royalty Board is appointed by the Librarian of Congress after consultation with the Register of Copyrights. As an independent agency, the Copyright Royalty Board would be appointed by the Register of Copyrights. The Copyright Royalty Board would move under the new independent agency structure and would no longer fall under the constructs of the Library of Congress. *See* 17 U.S.C. § 801(a).