You Never Give Me Your Money: The Need For A Transnational Approach For More Equity In The Music Streaming Industry

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I. INTRODUCTION[1]

Forty-two dollars and twenty-five cents. This is how much the songwriters of the hit song "Low" were paid after one million plays on Pandora, a famous on-demand radio website.[2] The low payouts provided to artists by online music services, like Pandora, have been criticized for years. This was best stated by Radiohead lead singer and principal songwriter Thom Yorke: "Make no mistake new artists you discover on #Spotify will not get paid. Meanwhile shareholders will shortly being rolling in it. Simples."[3]

Since the late 1990s, music's dematerialization has caused major changes in the music business.[4] Online music streaming is "[a] method of transmitting or receiving data (especially video and audio material) over a computer network as a steady, continuous flow, allowing playback to proceed while subsequent data is being received."[5] Streaming companies, such as Spotify, provide clients with a music catalog for free, or in exchange for a monthly fee.[6] While this is ideal for consumers, the music streaming economy is currently so inequitable for songwriters that it is necessary to reflect on various ways of revising it.

Thus, this Note addresses songwriters' compensation for use of their works on music streaming services. Songwriters are distinguishable from performers because performers, unlike songwriters, "typically assign all copyright interest in the sound recording to the recording company in exchange for royalties or other compensation."[7] These royalties are generally higher for performers than they are for songwriters, as the following developments will explain. Hence, it is necessary to keep in mind that the music streaming inequities mainly concern songwriters, hereinafter referred to as "authors."

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[1] Note: The issues faced by songwriters may plague others in the music streaming industry, however, all authors other than songwriters are outside the scope of this paper.

[2] David Lowery, *My Song Got Played on Pandora 1 Million Times and all I got was $16.89, Less Than What I Make From a Single T-Shirt Sale!*, THE TRICHORDIST (June 24, 2013), http://thetrichordist.com/2013/06/24/my-song-got-played-on-pandora-1-million-times-and-all-i-got-was-16-89-less-than-what-i-make-from-a-single-t-shirt-sale/.

[3] Zack O'Malley Greenburg, *Spotify Doesn't Enrich New Artists - But Who Does?*, FORBES (July 15, 2013), https://www.forbes.com/sites/zackomalleygreenburg/2013/07/15/spotify-doesnt-enrich-new-artists-but-who-does/#2a5c51ea6d51.

[4] James H. Richardson, *The Spotify Paradox: How the Creation of a Compulsory License Scheme for Streaming On-Demand Music Platforms Can Save the Music Industry*, 22 UCLA ENT. L. REV. 45 (2014) (providing a detailed description of the music business's history).

[5] *Streaming*, OXFORD DICTIONARY, http://www.oxforddictionaries.com/us/definition/american_english/streaming (last visited Oct. 9, 2015).

[6] *Go Premium*, SPOTIFY, https://www.spotify.com/us/premium/?checkout=false (last visited Oct. 12, 2015).

[7] JULIE E. COHEN, ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 411 (4th ed. 2015); Note: Songwriters ("authors") and performers will be collectively referred to as "artists."

Music streaming services are a great way of accessing culture at a highly affordable cost. While a CD costs, on average, $16.98,[8] members of the streaming service Apple Music can listen to a catalog of more than 30 million songs for $9.99 per month.[9] However, music-streaming services do not seem as favorable for authors as they are for Internet users. Streaming services have been criticized for the very low payouts to songwriters.[10] As a result, major artists, such as Taylor Swift, have even decided to withdraw their works from streaming websites. Taylor Swift explained: "I am not willing to contribute my life's work to an experiment that I don't feel fairly compensates the writers, producers, artists, and creators of this music."[11]

The inequities of the music streaming business can be related to its legal framing, which the very different American and French systems reveal. In the United States, authors of musical works are entitled to certain amounts of royalties under a set of complex formulas.[12] This system fails to grant sufficient incomes to authors for several reasons. Critics have focused on the disconnect between a song's market value and the amount authors are paid for its online play, known in the industry as "public performance,"[13] as well as the public performance rates' disconnect with music's market value.[14]

Unlike the U.S. Copyright Act, the French Intellectual Property Code does not provide any minimum rate for the authors' and performers' work exploitation, leaving its determination to the parties' contractual autonomy. This system does not appear to be more satisfactory than the American one because, on average, performers are paid 0.0001€ (0.00011

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[8] Neil Strauss, *Pennies that Add Up to $16.98: Why CDs Cost So Much*, N.Y. TIMES (July 5, 1995), http://www.nytimes.com/1995/07/05/arts/pennies-that-add-up-to-16.98-why-cd-s-cost-so-much.html?pagewanted=all.

[9] *Home*, APPLE MUSIC, http://www.apple.com/music/ (last visited Oct. 10, 2015) [hereinafter, Apple Music].

[10] Caitlin Kowalke, *How Spotify Killed the Radio Star: An Analysis on How the Songwriter Equity Act Could Aid the Current Online Music Distribution Market in Failing Artists*, 6 CYBARIS AM. INTELL. PROP. L. REV. 193 (2015).

[11] Jesse Denham, *Taylor Swift Reveals Why She Quit Spotify: "I Will Not Dedicate My Life's Work to an Experiment,"* THE INDEP. (Nov. 7, 2014), http://www.independent.co.uk/arts-entertainment/music/news/taylor-swift-reveals-why-she-quit-spotify-i-will-not-dedicate-my-lifes-work-to-an-experiment-9845941.html.

[12] 37 C.F.R. § 385.13 (2010).

[13] 17 U.S.C.A. § 101 (2010) ("To perform or display a work "publicly" means—(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.").

[14] Kyle Duncan, *The Songwriter Equity Act*, THE AMPED BLOG (June 24, 2014), http://www.theampedblog.com/#!The-Songwriter-Equity-Act/c112t/5542ae740cf273133508ac2c.

cents) per listen on free streaming platforms.[15] This review also reveals that, unlike several areas of copyright law, the issue of artists' remuneration for online use is not internationally harmonized.[16] This lack of harmonization is an obstacle for authors and performers being equitably compensated. As this Note will show, revising only domestic laws would be insufficient for artists to gain fair amounts of money out of music streaming.

This Note proposes a renewed approach to songwriters' compensation for the online exploitation of their works. The proposal emphasizes goodwill and free negotiation, in order to reach a perennial and balanced money system in the music streaming industry. Part II illustrates the lack of fair compensation provided to authors throughout different legal systems, and stresses that an international framing of this issue should be implemented. Part III proposes an international approach to the music streaming revenues split. This provision consists of an international compulsory license system that lets the different stakeholders freely negotiate the re-partitioning of streaming revenues under a fair remuneration requirement. The proposal emphasizes balance, equity, and free negotiation. Finally, Part IV anticipates potential criticism of the proposed approach and, in light of those criticisms, provides further support for the arguments being made.

II. FLAWED NATIONAL SYSTEMS AND THE NEED FOR INTERNATIONAL HARMONIZATION

Throughout the world, there are currently many legal systems addressing authors' remuneration from the online exploitation of their work. The French and American examples have been chosen in this Note for two reasons. First, they represent very important music markets. In 2016, France's music industry was worth €569 million ($669 million), and 30% of French music incomes originated from streaming.[17] In the U.S. that same year, music generated $15.87 billion, and 10% of these incomes came from digital streaming.[18] More

[15] Pierre Lescure, *Contribution Aux Politiques Culturelles à l'ère Numérique*, 232 (2013), http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescure/index.htm.
[16] *See* Jessica L. Bagdanov, *Internet Radio Disparity: The Need for Greater Equity in the Copyright Royalty Payment Structure*, 14. CHAP. L. REV. 135 (2010).
[17] *Chiffres Clés: Le Marché Français de la Musique sur Internet (Key Figures: French Music Market on the Internet,* ZDNET, (Mar. 1, 2017), http://www.zdnet.fr/actualites/chiffres-cles-le-marche-francais-de-la-musique-sur-internet-39790982.htm.
[18] *Music Industry Revenue in The U.S.,* STATISTA, http://www.statista.com/statistics/259980/music-industry-revenue-in-the-us/ (last visited Oct. 16, 2015); *Music Streaming*, STATISTA, http://www.statista.com/outlook/209/109/music-streaming/united-states#market-revenue (last visited Oct. 16, 2015).

importantly, these two systems witness antagonistic legal approaches to digital music and, therefore, illustrate the lack of harmonization in this area.

Thus, the industry must tackle this absence of a global standard in order to properly address the inequities experienced in the music streaming industry. Hence, Part II(A) will stress that the American legal system fails to provide songwriters with fair remuneration, Part II(B) will show that the French legal system is also flawed on that matter, and Part II(C) will demonstrate that an international approach is necessary to solve this issue.

A. The Lack of Fair Remuneration for Songwriters in the U.S.

There are several reasons why songwriters are not compensated adequately for the online exploitation of their works in the U.S. Three main explanations will be proposed in this paper: First, the inadequate legal framing of songwriters' remuneration; second, the public performance rates' disconnection from marked value; and finally, the incapacity of authors to efficiently negotiate with other rights holders.

1. An Inadequate Legal Framing of Songwriter Remuneration

Streaming companies generally obtain the right to perform a recording through negotiation with labels.[19] If no agreement is reached through this avenue, royalties are calculated through legal formulas.[20] "The formula for determining payments is beyond complicated, but it essentially involves alternative calculations based upon revenue, numbers of subscriptions, and per use minimums."[21]

Unfortunately, the royalty repartition calculation formulas do not manage to ensure a fair repartition of streaming revenues in practice. In 2014, only 1.85% of Pandora's $920 million revenue was given away to songwriters.[22] As the American Society of Composers, Authors and Publishers (ASCAP) illustrates, "Miranda Lambert's hit song 'The House that Built Me' was streamed on Pandora nearly 22 million times, earning its songwriters and

[19] THOMAS R. LEAVENS, MUSIC LAW FOR THE GENERAL PRACTITIONER, 164 (1st ed. 2013).
[20] 37 C.F.R. § 385.13 (2010).
[21] LEAVENS, *supra* note 19, at 164.
[22] David Holmes, *Is the Songwriter Equity Act a Good Idea? Or Just Another Weapon in the Record Industry's Fight Against Pandora?*, PANDO (Apr. 27, 2015), https://pando.com/2015/04/27/is-the-songwriter-equity-act-a-good-idea-or-just-another-weapon-in-the-record-industrys-fight-against-pandora/.

publishers roughly $1,788.48."[23] These figures correspond to a rate of 0.00008 cents per stream. Further, in January 2014, Spotify earned over $7 million in net revenues, after it distributed roughly $3.5 million to songwriters and publishers.[24] That represents only 0.00071 cents per stream. At this time, Spotify had 1,365 employees, which means that $7 million was split between 1,365 people, while only $3.5 million was shared between all the authors and publishing companies who own a copyright in Spotify's catalogue of 30 million songs.[25]

Unsurprisingly, this re-partition is considered unfair by many major authors. Ne-Yo denounces a system that allows streaming companies to "enjoy billion-dollar revenues at [songwriters'] expense." [26] Aloe Blacc claims he only earned $4,000 in return for writing a major hit song for the largest musical streaming service.[27] Radiohead[28] and Cracker[29] made similar statements. Some songwriters went further: Taylor Swift, as mentioned, withdrew her music from Spotify,[30] and Adele decided not to make her latest album available on any streaming platform.[31]

The increasing growth of streaming revenues makes this situation even more unequal. Subscription revenues rose 52% in 2015, essentially only to the benefit of labels and streaming companies, leaving songwriters up the creek without a paddle because, despite the explosion of streaming, the per-stream rate is dropping.[32] Authors, who are at the origin of creating the industry's products, should be entitled to a share of this growth.

These inequities seem inconsistent with the primary objective of intellectual property rights, as identified by the U.S. Constitution. The supreme law of the United States has a

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[23] *Get the Facts: Pandora Buys FM Radio Station in Bid to Undercut Songwriters,* ASCAP (May 29, 2015), http://www.ascap.com/playback/2013/06/action/pandora-buys-fm-radio-station-in-a-bid-to-undercut-songwriters.aspx.
[24] *Streaming Rates Analysis*, SCRIBD, http://fr.scribd.com/doc/268412667/Streaming-Rates-Analysis-2014 (last visited Jan. 22, 2016) [hereinafter, Scribd].
[25] *Number of Spotify Employees From 2011 to 2014*, STATISTA, http://www.statista.com/statistics/245130/number-of-spotify-employees/ (last visited Apr. 16, 2016); *Information*, SPOTIFY, https://press.spotify.com/hn/about/ (last visited Oct. 30, 2015).
[26] *Songwriters Shouldn't Have to Subsidize the Billion-Dollar Streaming Industry*, ROLL CALL (Apr. 22, 2015), http://www.rollcall.com/news/songwriters_shouldnt_have_to_subsidize_the_billion_dollar_streaming-241405-1.html?pg=1&dczone=opinion.
[27] Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014), http://www.wired.com/2014/11/aloe-blacc-pay-songwriters/.
[28] Charles Arthur, *Thom Yorke Blasts Spotify on Twitter as He Pulls His Music,* THE GUARDIAN (July 15, 2013) https://www.theguardian.com/technology/2013/jul/15/thom-yorke-spotify-twitter.
[29] Lowery, *supra* note 2 (referencing the quote in the title).
[30] Denham, *supra* note 11.
[31] Ben Sisario, *Adele Is Said to Reject Streaming for "25"*, N.Y. TIMES (Nov. 19, 2015), http://mobile.nytimes.com/2015/11/20/business/media/adele-music-album-25.html?_r=0.
[32] Ed Christman, *U.S. Recording Sees Slight Uptick in Revenues Last Year, Streaming Dominates Digital,* BILLBOARD (Mar. 22, 2016), http://www.billboard.com/biz/articles/news/record-labels/7271732/us-recording-industry-sees-slight-uptick-in-revenue-last.

utilitarian approach to copyrights. The Constitution says the goal of copyrights is "to promote the progress of Science and useful Arts."[33] A system providing such minimal revenues to songwriters cannot efficiently incentivize creation and promote the progress of useful arts. Therefore, the inequity of music streaming is inconsistent with the American utilitarian concept underlying intellectual property law.

2. The Public Performance Rates' Disconnection from Market Value

a. The Legal Principle and its Consequences

When a sound recording has been distributed to the public in the U.S., the Copyright Act grants a compulsory license that permits anyone to make and sell new recordings of this work.[34] The Copyright Royalty and Distribution Reform Act of 2004, which created the Copyright Royalty Board (CRB), is responsible for determining the royalty rates due to authors for such recordings.[35] This rate, also called the "mechanical royalty rate," "has increased by only 7 cents, over 100 years, to 9.1¢ per song."[36]

In addition to mechanical royalties, authors are also entitled to public performance royalties, which correspond to the right "to transmit or otherwise communicate a performance or display of the work … by means of any device or process…"[37] Music streaming falls within this last definition.[38] Thus, payments made by streaming companies to artists are public performance royalties. The rate of these royalties may be reached by an agreement between streaming companies and songwriters, or their representatives, such as performing rights organizations (PROs).[39] If no agreement is reached, the CRB will determine the applicable public performance rate.[40]

However, mechanical rates cannot be taken into consideration to determine public performance rates under 17 U.S.C. § 114(i).[41] This provision also prohibits the CRB from

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[33] U.S. CONST. art. I, § 8, cl. 8.
[34] 17 U.S.C.A § 115 (2012).
[35] LEAVENS, *supra* note 19, at 47.
[36] *Songwriter Equity Act of 2015: One Page Summary*, AM. SOC'Y OF COMPOSERS, AUTHORS, & PUBLISHERS, https://www.ascap.com/-/media/files/pdf/advocacy-legislation/sea-one-pager.pdf?la=en (last visited Apr. 18, 2016) [hereinafter, ASCAP].
[37] 17 U.S.C.A. § 101 (2010).
[38] COHEN, ET AL., *supra* note 7, at 430 (stating that "web streaming is, indeed, a public performance.").
[39] ASCAP, *supra* note 36.
[40] *Id.*
[41] 17 U.S.C. §114(i) ("License fees payable for the public performance of sound recordings under section 106(6), [mechanical licenses] shall not be taken into account in any administrative, judicial, or other

taking performing artists' compensation to determine the remuneration due to authors.[42] This rule can be criticized, because mechanical rates and performers' compensation provide a good reference to the market value of musical material.

According to several songwriters, this rule can be identified as the main reason why the digital exploitation of artists' work does not provide them with satisfactory compensation.[43] For the year 2015, the statutory rate of mechanical licensing is 9.1 cents per song and per copy.[44] For the same period, the rates due to authors for public performances amount to 0.009 cents per stream.[45] These figures show how the digital music exploitation is disconnected from the value of the physical musical embodiments. According to these figures, one material copy of a musical work, on a CD for instance, generates approximately 1,000 times more royalties than a performance on a streaming platform. In other words, if one reproduction of a sound recording on a CD provides 9.1 cents to the artist, one click on the same recording on a music platform will generate 0.009 cents of royalties. Although the online public performance of a work does not allow the users to *own* a copy of the work, unlike a material copy, this considerable gap still seems very hard to justify.

b. The Songwriter Equity Act Project and its Flaws

The Songwriter Equity Act was introduced by Senator Orrin Hatch and Congressman Doug Collins, and attempts to provide remedies for the aforementioned inconsistencies.[46] The bill, which is currently pending in the U.S. House of Representatives, has two goals.[47] First, it directs the CRB to more closely align mechanical royalty rates with works' fair market value, or what a willing buyer would pay a willing seller. Second, it repeals the interdiction to take mechanical rates into consideration when setting public performance rates.[48] As Kyle Duncan, a music blogger, explains, "it will try to create better mechanical rates based on what the

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governmental proceeding [such as the CRB] to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works….")

[42] ASCAP, *supra* note 36.

[43] Kowalke, *supra* note 10, at 196; *see also* Duncan, *supra* note 14.

[44] *Statutory Royalty Rates*, THE HARRY FOX AGENCY, https://secure.harryfox.com/public/StatutoryReports.jsp (last visited Oct. 23, 2015).

[45] ASCAP, *supra* note 36.

[46] Ed Christman, *Songwriter Equity Act Reintroduced to Congress*, BILLBOARD (Mar. 4, 2015), http://www.billboard.com/articles/business/6487798/songwriter-equity-act-introduced-to-congress.

[47] *Songwriter Equity Act of 2015*, H.R. 1283, 114th Cong. (2015), available at https://www.congress.gov/bill/114th-congress/house-bill/1283.

[48] ASCAP, *supra* note 36.

consumer would pay the artist and in turn use this better mechanical rate to establish better performance rates paid by digital streaming services."[49]

However, the Songwriter Equity Act contains several flaws. First, it will increase the cost of the rates streaming services have to pay in order to exploit copyrighted works.[50] In these conditions, it is very likely that these services will attempt to recoup their losses by increasing the prices of their services, which means "the higher rates will be passed onto consumers."[51] This backlash on consumers could have very damageable consequences on the music industry. Between 2008 and 2014, illegal file sharing has grown 44% in North America, and the increase of costs borne by consumers could encourage piracy even more.[52]

Second, the Songwriter Equity Act's consequences could be hard to deal with for independent labels. The increase of license costs may leave them unable to "afford marketing efforts to promote a variety of lesser-known artists."[53] This would result in less catalogue diversity for online consumers. Lastly, the "willing buyer, willing seller" standard is inaccurate. The Songwriter Equity Act fails to explain how the CRB will actually determine the rates. If the CRB's decisions are to be grounded in empirical data, these rates would probably still be too low because the prices consumers currently pay for music streaming services are very low.[54]

3. The Absence of Authors from Negotiations

Authors do not have the power to remediate these legal flaws through negotiation because they do not have the faculty to negotiate with streaming companies. Labels obtain the right to record a song through a mechanical license from a publishing company, or more often, through the Harry Fox Agency, which issues these licenses.[55] Once the song is recorded, labels own the rights on the sound recordings, while authors keep the copyrights on

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[49] Duncan, *supra* note 14.
[50] Holmes, *supra* note 22.
[51] Daniel Horowitz, *Editorial : Songwriter Equity Act Inequity*, THE WASH. TIMES (June 6, 2014), http://www.washingtontimes.com/news/2014/jun/6/editorial-songwriter-inequity/.
[52] Robert Steele, *If you Think Piracy is Decreasing, You Haven't Looked at the Data*, DIGITAL MUSIC NEWS (July 16, 2015), http://www.digitalmusicnews.com/2015/07/16/if-you-think-piracy-is-decreasing-you-havent-looked-at-the-data-2/.
[53] Kowalke, *supra* note 10, at 227.
[54] *Commercial Webcaster*, SOUNDEXCHANGE, https://www.soundexchange.com/wp-content/uploads/2016/03/Memo-to-Commercial-Webcasters-CRB-Re-2016-Obligations_3-10-2016.pdf (memo of royalty rates applicable to commercial webcasters) (last visited Apr. 16, 2016) [hereinafter, Sound Exchange].
[55] LEAVENS, *supra* note 19, at 48.

the underlying compositions and lyrics: "Each recording of a musical composition is protected by a claim to copyright that is separate from the copyright to the musical composition performed in the recording…"[56] To obtain the rights on the music they play, streaming companies only have to negotiate with the music labels, the owners of recordings.[57] When digital music services "offer digital music files without licensing sound recordings from the copyright owners," they are obtaining catalogues without negotiating with songwriters.[58] Hence, songwriters are unable to negotiate for more money.

Authors' absence from negotiations has major repercussions for their remuneration capabilities. That is one reason why performing artists, who are paid through royalties by labels, earn more than composers.[59] Furthermore, artists are entitled to a rate of performing royalties, which is set by SoundExchange, and amounts to 0.0022 cents per performance in 2015.[60] In 2013, a song played 20 million times on Spotify would provide a performing artist between $120,000 and $170,000.[61] These incomes are significantly higher than the ones provided to songwriters. Thus, the complex American music business system leaves authors in the lurch when it comes to online remuneration.

B. The French System and its Excessive Emphasis on Contractual Autonomy

Part II(B)(1) will show that unlike the American system, the French legal framework of musical streaming does not provide any minimum rate for the exploitation of authors' and performers' works. Part II(B)(2) will stress that this emphasis on the parties' contractual autonomy does not seem to provide more equity in the music digital business any more than the minimum-rate system does.

1. The French Liberal Approach to Authors' Remuneration

The French Intellectual Property Code states that when an author sells his rights, any exploitation must result in a proportional compensation for the author, except in very

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[56] *Id*. at 8.
[57] Micah Singleton, *This Was Sony Music's Contract with Spotify*, THE VERGE (May 19, 2015), http://www.theverge.com/2015/5/19/8621581/sony-music-spotify-contract.
[58] LEAVENS, *supra* note 19, at 162.
[59] Holmes, *supra* note 22.
[60] SoundExchange, *supra* note 54.
[61] David Johnson, *See How Much Every Top Artist Makes on Spotify*, TIME MAG. (Nov. 18, 2014), http://time.com/3590670/spotify-calculator/.

particular cases, such as when it is impossible to determine the basis of the compensation.[62] Unlike the American system, French law does not set forth any minimum rate that the authors shall be entitled to. French law is even more liberal on performers' rights. Indeed, they are not even entitled to a proportional remuneration, according to the intellectual property code. Hence, they can dispose of their rights in exchange for a flat-rate remuneration. Most of the time, this is the option performing artists choose.[63]

The rationale underlying these provisions can be identified in the French vision of contractual autonomy, or "liberté contractuelle." This principle is one of the cornerstones of French law, and provides that the parties are free to determine the content of their contracts: Article 1102 of the Civil Code expressly sets forth the contractual autonomy principle, by stating that anyone is free to choose the content of his or her contract.[64] These rules explain why, unlike the American system, no minimum rate is set forth for the authors and performers' works exploitation, leaving it to free negotiation. Nonetheless, this system seems no more efficient than the American system on matters related to fair compensation.

2. The Excessive Emphasis of Contractual Autonomy

The French emphasis on contractual autonomy does not grant authors and performers satisfactory remuneration from the exploitation of their works on the Internet. As the most recent studies conducted in this field point out, the music industry is paradoxical in France: It is the most advanced sector in the digital era, yet one of the least regulated.[65]

As a result, the average remuneration of an author for one play of his song is €0.0001 (0.00011 cents) when the user is listening for free.[66] When the user pays for a subscription, the songwriter will earn €0.004 (0.0044 cents).[67] As in the United States, these observations show that the French emphasis on contractual autonomy does not provide satisfactory results.

One reason for this can be found in the negotiation process between French PROs and music streaming services. In France, authors usually entrust the management of their rights to

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[62] CODE DE LA PROPRIÉTÉ INTELLECTUELLE, Art. L.132-4 (Fr.) [hereinafter, C.P.I.].
[63] Lescure, *supra* note 15, at 20.
[64] CODE CIVIL, Art.1102 (Fr.), available at https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000032040787&idSectionTA=LEGISCTA000032040792&cidTexte=LEGITEXT000006070721&dateTexte=20171209.
[65] Lescure, *supra* note 15, at 19.
[66] *Id.* at 232.
[67] *Id.*

a PRO called SACEM.[68] This organization authorizes uses and negotiates rights to the artists' songs.[69] However, since many PROs are monopolies in their market, they must avoid raising rates too high to steer clear of unfair competition provisions: the Court of Justice of the European Union (CJEU) has, in the past, reminded member states that they must not allow their PROs to charge excessive rates when they are in a dominant position.[70] For this reason, the PROs have in fact very little leverage when they negotiate with streaming companies.[71] Thus, French law, like American law, fails to provide artists satisfactory compensation for online streaming, and these systems must be revised on an international scale.

C. The Need for a Global Framing of Music Streaming

Internal modification of merely the various domestic laws would not provide artists with more equitable compensation: As Part II(C)(1) explains, contracts' governing law can be chosen by the parties. Part II(C)(2) will show that the risk of forum shopping is a direct consequence of this eligibility. This is why, in accordance with the general tradition of copyright law, an international framing of music streaming is needed.

1. The Eligibility of Contracts' Governing Law

The American and French examples of music streaming legal approaches have shown there is no international harmonization in this field. Both of these countries provide very different framings of music streaming, and both end up with a lack of fair compensation for songwriters. Even if one of these countries chose to change its law for more equity, this revision would still not be efficient. A simple international law reasoning can illustrate this remark.

The EU's Rome I regulation sets forth the governing laws and the jurisdiction rules for contractual obligations that have an international scope.[72] The regulation grants significant autonomy to parties when it comes to the governing law of their contracts by providing that "[a] contract shall be governed by the law chosen by the parties … By their choice, the parties

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[68] *Id.*, at 241.
[69] *Our Missions*, SACEM, https://societe.sacem.fr/en/missions (last visited Dec. 9, 2017).
[70] Case 110/88, Lucazeau v. Sacem, 1989 E.C.R. 326.
[71] Lescure, *supra* note 15, at 242.
[72] Commission Regulation 593/2008 of June 17 2008, On the Law Applicable to Contractual Obligations, art. 3(1), 2008 O.J. (L 177).

can select the law applicable to the whole or to part only of the contract."[73] Moreover, "[t]he parties may at any time agree to subject the contract to a law other than that which previously governed it…"[74]

Even though this regulation is implemented in the EU, it can apply to companies throughout the world. Indeed, under Rome I, the only limit to the choice of law by the parties is "where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen."[75] One could argue that the mere fact a streaming company makes its services available in the EU would be sufficient for it to benefit from the Rome I regulation, since this activity could qualify as an "other element relevant to the situation." Thus, a major streaming company could choose virtually any legislation for its contracts' governing law under the Rome I regulation. This flexibility raises major forum shopping issues.

2. The Risks of Forum Shopping

Even if national laws that fail to grant an equitable remuneration to songwriters changed in a way favorable to them, streaming companies could avoid these revisions. For the sake of the argument, consider the example of Spotify. Spotify has its headquarters in Stockholm, Sweden.[76] This country has been part of the EU since 1995.[77] As a member of the E.U., Sweden has signed the Rome Convention.

Since Spotify has its headquarters in signatory states of the Rome I regulation, it can benefit from the rules this treaty sets forth. Article 23 of the treaty's terms and conditions provides detailed information as to what law applies and which courts have jurisdiction over the contracts its users enter into.[78] For instance, Swedish law applies to Spotify users located in Hong-Kong.[79] If Spotify chooses the law applicable to the agreements made with its

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[73] *Id.* at Art. 3(1).
[74] *Id*. at Art. 3(2).
[75] *Id.* at Art. 3(3).
[76] *Spotify Terms and Conditions of Use, (Contracting Entity)*, SPOTIFY, https://www.spotify.com/us/legal/end-user-agreement/#s24 (last visited Dec. 12, 2017) [hereinafter, Spotify].
[77] *Member Countries of the EU,* EUROPEAN UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Oct. 30, 2015).
[78] *Spotify Terms and Conditions of Use, (Choice of Law, Mandatory Arbitration, and Venue)*, SPOTIFY, https://www.spotify.com/us/legal/end-user-agreement/#s24 (last visited Oct. 30, 2015).
[79] *Spotify Terms and Conditions of Use (Choice of Law, Mandatory Arbitration, and Venue)*, SPOTIFY, https://www.spotify.com/us/legal/end-user-agreement/?language=en&country=hk (last visited Nov. 02, 2017).

customers, there is no reason why it would not do the same for the contracts entered into with the record labels. Hence, it is possible that California law applies to the American artists who license their work to Spotify, just like it applies to the American users of this service.[80]

Theoretically, if the U.S. passes a bill providing high revenues to authors for the online exploitation of their work, such a revision would not be favorable to Spotify. However, under the laws of the E.U., where Spotify has its headquarters, nothing prevents Spotify from deciding that Swedish law would apply to the contracts to be signed with American artists. Similar to France, Sweden does not provide any minimum rate for artists.[81] Therefore, a revision of the American law would not be efficient, because Spotify, like other music streaming services in similar circumstances, has the right to choose another liberal governing law.

Furthermore, it is very likely that Spotify could actually change the governing law of its contracts in practice. To obtain its music, Spotify negotiates directly with music labels.[82] These record companies earn "45.6% of the streaming revenue from on-demand sites."[83] Record labels rely on Spotify for a significant amount of income because they make money when music is streamed. Hence, if streaming companies pick a governing law that tends to raise their profits, it is highly probable that the record labels will allow, or even encourage, them to do so.[84] Thus, since a domestic revision of laws governing music streaming would be highly inefficient, it seems that only an international revision would truly help artists.

III. A TRANSNATIONAL NEGOTIATED APPROACH TO ROYALTIES FROM MUSIC STREAMING

Part III(A) proposes the implementation of an international compulsory license system, as well as an international fair remuneration clause. Part III(B) stresses that this system would efficiently address the issues of unfair payment and forum shopping pointed out in Part II.

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[80] *Id*.; Spotify*, supra* note 76.
[81] *Sweden: Act on Copyright in Literary and Artistic Works (1960:729)*, WIPO, (Mar. 5, 2013), http://www.wipo.int/wipolex/en/text.jsp?file_id=290912.
[82] Singleton, *supra* note 57.
[83] Holmes, *supra*, note 22.
[84] Sisario, *supra* note 31. "Most artists have no choice but to opt for streaming and accede to the terms set by the services … Adele, along with Taylor Swift and Beyoncé, are viewed as among the very few superstar acts with enough leverage to set the terms for how they want their music to be consumed." *Id*.

A. Proposal of TRIPS Revised Article 14

The international compulsory license system proposal will focus on two main objectives: providing songwriters with satisfactory remuneration from the exploitation of their work, and guaranteeing an international application of the newly implemented rules to avoid forum shopping.

1. Content of Revised Article 14

Since domestic modification of laws would not be enough for songwriters to effectively earn fair amounts of money from music streaming, an international implementation of the proposal should be encouraged. To that end, an implementation of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement would be a good solution because of the enforcement mechanisms it contains.[85] More specifically, the proposal should be integrated in the already existing Article 14, titled, "Protection of Performers, Producers of Phonograms and Broadcasting Organizations,"[86] in the following language:

Art. 14. (3.1): "Music Webcasters are entitled to a compulsory license on the Producers of phonograms' catalog of sound recordings. The content of these licenses is freely negotiated between the Music Webcasters, the Copyright Holders, and the Producers of phonogram."

Art. 14 (3.2.): "Composers, Music Publishers, Performing artists, and Producers of phonograms, are entitled to a fair remuneration out of the online exploitation of sound recordings."

Art. 14. (6): "Any Member may, in relations to the rights conferred under paragraphs 1, 2, 3.0, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention..."

Art. 14 (6.1.): "Members may opt out of Article 3.1. In the event that they do not, the Music Webcaster' right to broadcast sound recordings of the Producers of phonogram's catalog

[85] TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter, TRIPS Agreement].
[86] *Id.*

is conditioned to new negotiations under the conditions set forth in Articles 14(3.1.) and 14(3.2.) of this Agreement."[87]

Current Article 14:

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

4. The provisions of Article 11 in respect of computer programs shall apply mutatis mutandis to producers of phonograms and any other right holders in phonograms as determined in a Member's law. If on 15 April 1994 a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall

[87] Note: The non-underlined parts of Article 14 of TRIPS Agreement already exist in the treaty.

last for at least 20 years from the end of the calendar year in which the broadcast took place.

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, mutatis mutandis, to the rights of performers and producers of phonograms in phonograms.

2. Elements of Revised Article 14

a. Compulsory License

The money generated by music streaming is divided primarily between three stakeholders: owners of sound recordings (labels), the music webcasters (streaming companies), and the copyright holders (publishing companies and songwriters).[88] The major representatives of these three stakeholders should get together to set forth new ways of distributing streaming incomes. This implementation would let industry members freely decide upon an equitable re-partition scheme. For this negotiation to occur, the different stakeholders must all come to the table.

The first part of the proposal intends to encourage music stakeholders to negotiate through a compulsory license system. Webcasting services, as streaming companies, would be entitled to a compulsory license on the labels' catalogue. This license would favor streaming companies, which would have a legal right to broadcast sound recordings produced by record labels. Such favor would be a strong counterpart to a possible diminution of their incomes.

In practice, the granting of the compulsory license could coincide with the commercial release of the sound recording. In the U.S., the compulsory license for making and distributing sound recordings starts when they "have been distributed to the public in the United States under the authority of the copyright owner."[89] The implementation of the proposal by TRIPS member countries could follow this example. Under this proposal, streaming companies would be entitled to a compulsory license on sound recordings made available to the public under the authority of the copyright holder. This proposal does not need to address the content

[88] Scribd, *supra* note 24.
[89] 17 U.S.C.A. § 115(a) (2010).

of the compulsory license because the stakeholders themselves would be free to negotiate the conditions of the licenses.

b. Fair Remuneration Requirement

Although this proposal leaves the negotiation of the compulsory license to stakeholders, the stakeholders still have to comply with a fair remuneration clause. This objective could be reached through a minimum rate, or an indexation of revenues.

i. Principle

The second part of the proposal, Article 14 (3.2.), sets forth that copyright owners, performing artists, and labels should be entitled to a fair remuneration for the online exploitation of their sound recording. This clause ensures that streaming companies provide a fair share of their incomes to the various stakeholders.

The "fair remuneration" standard is very broad. This allows TRIPS member countries to have leeway when implementing the proposal because each country would be autonomous as to the legal mechanisms set forth to reach the fair remuneration terms. By leaving each country this liberty, the proposal does not violate their legal traditions and standards.

Furthermore, this provision leaves stakeholders self-governing as to the means of reaching fair remuneration. Copyright holders, labels, and streaming companies could, for instance, decide on a per-stream rate, or a direct split of the streaming companies' incomes among stakeholders. The objective is to let stakeholders reach equitable agreements through negotiation in the conditions they find the most convenient. Thus, in practice, streaming companies would negotiate jointly with labels and authors' representatives, establishing the applicable rates under the compulsory license and finding a repartition that meets the "fair remuneration" standard. A minimum rate or an indexation of revenues could help streaming companies meet these standards.

ii. A Minimum Rate

A minimum per-stream rate could help songwriters make more money from the online exploitation of their works. The current remuneration of songwriters from plays on Spotify

corresponds to a rate of 0.00071 cents per stream.[90] As Part II stressed, these very low rates lead to unsatisfactory incomes for songwriters.[91] Hence, in their negotiations, music business stakeholders should be able to set forth a minimum per-stream rate.

In practice, such a rate should take into consideration the market value of musical goods because users of streaming services do not own a copy of the sound recording, they can only access it. Therefore, the amount of money due to copyright holders from a single stream of their work should be inferior to the mechanical rates due to authors.[92] However, this rate should still be superior to the current one in order to provide songwriters with satisfactory incomes.

An ideal minimum per-stream rate of 0.009 cents to the copyright holders could be contemplated. This amount is ten times inferior to the U.S. mechanical rate, but more than a hundred times superior to the current per-stream rate, using Spotify as an example. Currently, a song played one million times on this service only provides $700 to copyright holders, but, with this suggested minimum per-stream rate, the copyright holders would get $9,000. This amount is much fairer for authors than the current one.

iii. The Indexation of Revenues

Another option for fixing the amount of money due to authors is to make the amount due to any copyright holder proportional to how much is due to other stakeholders in the streaming industry, particularly the owners of the sound recordings. Sound recordings cannot exist without an underlying composition, so it would be fair to create a value connection between the amount received by composers and the amount received by the sound recording owners. For instance, the parties could decide that for one stream, the remuneration due to the author cannot be X^{93} times inferior to the income perceived by the label.

If such a standard was implemented, it would leave streaming companies with two choices. First, they could try to renegotiate their contracts with record labels to lower their remuneration in order to reach a sustainable amount that would permit payment to both labels and songwriters. Alternatively, they could try to maintain the rates due to record labels, and then compensate the difference due to copyright holders out of their own incomes.

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[90] *Music Streaming*, STATISTA, http://www.statista.com/outlook/209/109/music-streaming/united-states#market-revenue (last visited Oct. 16, 2015).
[91] *See infra* Part II(A).
[92] The mechanical rate is currently 0.91 cents in the U.S. *See* Holmes, *supra* note 22.
[93] Note: "X" reflects a to-be-determined figure that music professionals have the ability to define themselves.

If streaming companies choose to implement the latter system, which does not involve any renegotiation, and considered that songwriters cannot make less than half of what labels own, the monthly incomes generated by music streaming would be distributed as follows: In a month, a gross revenue of 27 million would grant $15 million to record labels, $7.5 million to copyright holders, and $4.5 million to the streaming company.[94] Therefore, the incomes of the phonorecord owners would stay the same while copyright holders' income will more than double.

c. Opting Out of the Compulsory License System

The last part of the proposal, Article 14 (6.1.), provides that member states may opt out of the compulsory license system.

The opt-out system set forth in Article 14 (6.1.) does not encompass the right to a fair remuneration because it does not mention Article 14 (3.2.). Therefore, TRIPS member states will have to comply with this principle even if they choose not to implement the compulsory license system. Once again, countries would be free to determine the mechanisms set forth to reach this objective.

To this extent, countries would have a strong institutional incentive to respect the proposal's mandatory fair remuneration clause. Indeed, the TRIPS Agreement is the only international intellectual property treaty that contains an enforcement mechanism: the Dispute Settlement Body (DSB) of the WTO.[95] This institution has the power to "establish panels, adopt panels and Appellate Body Reports, maintain surveillance of implementation of rulings and recommendations…"[96] In the event a member state does not comply with a provision of TRIPS, another party may engage a dispute before the DSB.[97] Respect for the DSB's decisions is effectively assured because a party may sue in court for compensation in the event that DSB rulings or recommendations are not implemented within a reasonable period of

[94] Note: The gross income and the amount distributed to labels used in the following hypothesis is inspired by the revenues declared by Spotify in January 2014. Sribd, *supra* note 24.
[95] Annex 2 of the WTO Agreement, Art. 4.3.
[96] *Id.* at Art. 2.1.
[97] *Module VIII: Dispute Prevention and Settlement*, WTO, at 2, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules8_e.pdf (last visited Dec. 9, 2017).

time.[98] Therefore, a country that fails to implement a system providing authors with a fair remuneration would be exposed to a potentially costly challenge of its law.

3. Application: How a Revised Article 14 May Be Applied

In order to explain the application of the proposal, the U.S. will be used as an example, surmising that the U.S. fully implements the proposal, *i.e.* puts the compulsory license system into action. Under American law, consistent with the amended TRIPS Agreement, streaming companies broadcasting in the U.S. would be entitled to a compulsory license on the American labels' catalogue.

In order to enjoy the proposed compulsory license, however, streaming companies would have to negotiate their content with the other stakeholders: labels who own the copyright on the sound recordings, and authors who own the copyright on the underlying composition. Article 14 (6.1.) specifies that in the event member states do not opt out, a new round of negotiations has to be conducted under the conditions of the revised TRIPS Agreement, including the fair remuneration requirement. Hence, streaming companies would have to negotiate the content of the compulsory licenses with labels and copyright holders' representatives in order to keep their right to broadcast the labels' catalogue. For instance, if Spotify does not reach an agreement with ASCAP, it would not have the right to broadcast works of ASCAP-registered songwriters under the proposal.

This provision gives a lot of leverage to labels and copyright holders. Streaming companies, which would be in a position of losing their right to their existing catalogue, would likely be inclined to negotiate licenses at a rate that satisfies other parties. This bargaining disadvantage is balanced out because, under the compulsory license system, these companies should be able to broadcast a considerable amount of songs if they conduct fair negotiations.

B. Advantages of the Revised Article 14

1. A Fairer Remuneration for Authors from Music Streaming

The proposed approach would lead the music streaming parties to negotiate, allowing them to freely determine new remuneration provisions. As opposed to the current situation,

[98] *Id.* at Art. 22.2.

where authors have no contractual tie with streaming companies, the proposed solution would allow these two businesses to advocate for their respective best interests. These negotiations would more likely achieve positive results, since the three major stakeholders would all have strong leverage.

First, music streaming companies are the ones who generate value out of sound recordings. As an intermediary between the artists, the labels, and the public, streaming companies are responsible for the money generated in the online market. Spotify, for instance, declared $2.9 billion of net revenue in 2016.[99] This status of value creator is likely to ensure streaming companies bargaining power. Second, record labels are responsible for transforming the song into a valuable asset. They discover talents, produce the sound recordings, distribute, and promote.[100] Without record labels, songs would not be transformed into valuable sound recordings. Under the current system, if labels refused to license sound recordings to streaming companies, their online catalogue would be empty. All of this demonstrates the record labels' bargaining power.

Finally, authors are the source of this chain of value. They are responsible for the composition of the song, which will later be recorded, licensed to a streaming service, and paid for by users. If copyright owners do not reach an agreement with the streaming companies under the proposal, the whole industry would be paralyzed.

These facts show how each stakeholder is necessary, and therefore powerful in the industry. All of these protagonists have converging interests: Finding a sustainable model that allows music to remain a value generator. For this goal to be reached, streaming companies have to make money, record labels need to produce records, and authors need to carry on writing songs. Each has a direct interest in the sustainability of the others' business. This blend of converging interests and strong leverage for each party, constitutes an ideal basis for efficient bargaining. Bringing the stakeholders to the negotiation table would therefore certainly lead to significantly superior results.

This likelihood for success is even stronger due to the fair remuneration requirement. According to this provision, stakeholders would have to reach an agreement that guarantees satisfactory compensation to each party. This would remedy the songwriters' unfair compensation issue.

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[99] *Spotify's Revenue and Net Income/Loss from 2009 to 2016*, STATISTA, *https://www.statista.com/statistics/244990/spotifys-revenue-and-net-income/* (last visited Dec. 9, 2017).
[100] LEAVENS, *supra* note 19, at 87.

2. The Avoidance of Forum Shopping

Because of the wide implementation of the TRIPS Agreement, the proposal would have a very broad geographical application. As of July 2016, the WTO has 164 members.[101] The TRIPS Agreement is an annex of the Marrakech Agreement establishing the WTO.[102] This means that membership of the WTO requires the adoption of the TRIPS Agreement. Hence, there are 164 signatory states to the TRIPS Agreement.

Even if all of these countries opt out of the compulsory license system, they still would have no choice but to implement the mandatory fair remuneration clause. Hence, 164 countries over the world would have legal systems recognizing the songwriter's fair remuneration principle. Under these conditions, it would be very hard for streaming companies to escape these rules through forum shopping.

IV. RESPONDING TO CRITICISMS ON AN INTERNATIONAL COMPULSORY-LICENSE PROVISION

The proposal set forth in this article may face several criticisms regarding its feasibility, efficiency, and compatibility with existing national laws: One may consider that the number of stakeholders make the negotiations infeasible (Part IV(A)), that the proposal leaves room for forum shopping (Part IV(B)) or that it would lead to anti-competition law violations (Part IV(C)). These criticisms shall be addressed in the following part of this paper.

A. Negotiation Made Infeasible by the Number of Stakeholders

One may argue that the proposal is infeasible because the stakeholders are too numerous in the music industry for negotiation to be conducted between them. Ultimately, the proposal attempts to reach fair remuneration through negotiation between music streaming companies, record labels, and copyright holders. There are hundreds of record labels throughout the world.[103] Streaming websites, such as Apple Music, contain a catalogue of over 40 million songs.[104] In these conditions, a negotiation between the different stakeholders

[101] *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 19, 2016).
[102] *Agreement on the Trade Related Aspects of Intellectual Property Rights*, WTO, https://www.wto.org/english/docs_e/legal_e/27-trips.pdf (last visited Nov. 02, 2017).
[103] *List of Record Labels,* WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_record_labels (last visited Apr. 16, 2016).
[104] Apple Music, *supra* note 9.

could seem practically infeasible, for it would be impossible to bring thousands of participants to negotiate together.

This fear is unfounded. First, a small number of people could represent all the labels in the world. Nearly 80% of the world music market is controlled by three major companies: Sony Music Entertainment, Universal Music Group, and Warner Music Group.[105] When it comes to independent music labels, they are licensed to music streaming companies through specialized organizations: for instance, the Merlin Network is an organization that licenses the catalogue of over 20,000 independent music labels to major streaming websites like Spotify, SoundCloud, Deezer, or Google Play.[106] Therefore, on the label side, the vast majority of sound recordings could be represented by less than ten negotiators.

A similar argument can be made on the songwriter side. There are hundreds of thousands of songwriters and hundreds of publishing companies sharing the copyrights on most streaming services' songs. However, this situation is exactly the same as the one observed for public performance of copyrighted works. In that area, PROs issue blanket licenses for public performances, and collect the royalties due to the vast majority of songwriters in the United States.[107] A similar system could be used to negotiate the license rates under the proposal. There are only three PROs in the U.S.[108] Hence, the representation of songwriters by these organizations would be very feasible.

B. The Opt-Out System Leaving Room for Forum Shopping

One may also criticize the proposal on the grounds that it does not address the forum shopping issue because it contains an opt-out provision that allows TRIPS member states to exclude the application of the negotiation system. For instance, if France decided to opt out of the system, a music streaming company could try and make French law applicable to its major contracts in order to avoid paying more money to songwriters. As Part II showed, the French music streaming system is not songwriter-friendly because it does not provide any minimum rate for online use.[109] Therefore, just one country opting out could threaten the whole proposed system because streaming companies could choose the law of this country as

[105] *The Big Three Record Labels,* THE BALANCE, https://www.thebalance.com/big-three-record-labels-2460743 (last visited Dec. 9, 2017).
[106] *What We Do,* THE MERLIN NETWORK, http://www.merlinnetwork.org/what-we-do (last visited Apr. 16, 2016).
[107] LEAVENS, *supra* note 19, at 43.
[108] *Id.*
[109] *Infra* Part III(B)(1).

governing law. From this point of view, the proposal would fail to address the forum shopping issue, and would therefore not be effective in granting authors satisfactory remuneration on an international scale.

However, this concern is erroneous. First, countries would have no real interest in opting out of the proposed compulsory license system. The proposal does not affect the amount of revenues generated by the streaming industry; it only gives stakeholders the opportunity to modify their repartition. From this point of view, the amounts owed by TRIPS member states through taxation of music incomes would be left unchanged.

Second, the strong leverage enjoyed by copyright holders makes the objection irrelevant. Let us consider the scenario that the U.S. is the only country in the world that fully implements the proposal. As a result, streaming companies would have a compulsory license on every major American label's catalogue, such as Universal Music Group, Warner Music Group, or Sony Music Entertainment. In exchange, they would have to negotiate the content of their contracts both with the labels and with copyright holders of the songs contained in the catalogs, and these contracts would contain governing law provisions.

In theory, streaming companies could certainly arrange for the law of an opting-out party to apply to their contracts. However, because of the strong leverage enjoyed by copyright holders and labels, there is no guarantee that streaming companies could, in fact, manage to obtain the application of songwriter-unfriendly laws. In reality, labels and copyright holders, who both need to be remunerated to keep the music business alive, could manage to obtain the application of American law, which would provide for fair remuneration under the proposal. Hence, the proposal could lead to fair remuneration for authors world-wide, even if only one country decided to implement it.

Third, under Article 14 (6.1.) of the proposal, member countries can opt out from the streaming companies' compulsory license system and fair remuneration. On the contrary, the entitlement of authors and labels to a fair remuneration is mandatory. Therefore, if one country decided to opt out from the free negotiation system, it would nonetheless have to find a way of providing authors with satisfactory incomes.

C. The Obstacles of Anti-Competition Law

Finally, the proposal may be criticized on the grounds that it would lead to anti-competitive practices. In the U.S., anti-competitive practices are prohibited by the Sherman

Act (Act), which has been incorporated in Title 15 of the U.S. Code. First, this Act incriminates trusts, which are defined as acts restraining trade or commerce.[110] Further, monopolizing one area of trade is also prohibited by this legislation.[111] One could argue that the gathering of the music business stakeholders around a negotiation table could encourage anti-competitive practices, such as price fixing, which the Federal Trade Commission (FTC) defines as an agreement "among competitors that raises, lowers, or stabilizes prices or competitive terms."[112] This criticism is legitimate because the improvement of the authors' financial repartition should not jeopardize free competition and consumer welfare.

However, the proposal's breadth allows TRIPS member states to make sure that their anti-competition laws will not be violated. While the provision requires a negotiation of the compulsory licenses granted to streaming companies, the conditions in which these negotiations are conducted are not directly addressed. Therefore, member states have leeway to set forth more specific provisions framing these negotiations in a way that does not infringe their respective competition laws.

In the United States, the implementation of the proposal would not lead to a violation of anti-competition provisions, if implemented properly. Granted, if competing streaming companies took advantage of the proposal to fix prices between them, they would certainly violate the Sherman Act because "the antitrust laws require that each company establish prices and other terms on its own, without agreeing with a competitor.[113] Hence, in the U.S., the proposal's implementation would require the different stakeholders to negotiate independently from their respective competitors, which is perfectly compatible with the proposal's intent. Such a system would not encourage price fixing between commercial competitors.

V. CONCLUSION

The new music economy has failed to provide songwriters with sufficient incomes. This failure manifests itself on an international level, and in several different legal systems. To respond to this problem, a compulsory license system that both protects songwriters and

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[110] 15 U.S.C.A. § 1 (2004).
[111] *Id*. at § 2.
[112] *Price Fixing*, FED. TRADE COMMISSION: PROTECTING AM'S. CONSUMERS, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited Apr. 16, 2016).
[113] *See* Starr v. Sony BMG Music Ent., 592 F.3d 314 (2d Cir. 2010) (reversing a district court holding that labels gathering their respective catalogues into a joint venture in order to offer streams to clients at a uniform price were not in violation of the Sherman Act).

allows them to be represented in the negotiations of the music streaming business would be adequate. First, it would integrate authors in the licensing negotiations, giving them leverage to advocate for stronger revenues under a fair remuneration requirement. Second, it would have a broad application, which would lead to equity between different songwriters throughout the world, avoiding forum shopping by other stakeholders. Thus, these current inequities can only be properly addressed on an international level because of the Internet's ubiquity and music's intangibility.