Pay-to-Playlist: The Commerce of Music Streaming

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Payola—sometimes referred to as "pay-for-play"—is the undisclosed payment, or acceptance of payment, in cash or in kind, for promotion of a song, album, or artist. Some form of pay-for-play has existed in the music industry since the nineteenth century. Most prominently, the term has been used to refer to the practice of musicians and record labels paying radio DJs to play certain songs in order to boost their popularity and sales. Since the middle of the twentieth century, the FCC has regulated this behavior—ostensibly because of its propensity to harm consumers and competition—by requiring that broadcasters disclose such payments.

As streaming music platforms continue to siphon off listeners from analog radio, a new form of payola has emerged. In this new streaming payola, musicians and labels simply shift their payments from radio to streaming music platforms like Spotify, YouTube, TikTok, and Instagram. Instead of going to DJs, payments (or their equivalents) go to platforms, third-party playlisters, and influencers who can help promote a song by directing audiences toward it. Because online platforms do not fall under the Federal Communications Commission's (FCC's) jurisdiction, streaming pay-for-play is not currently regulated at the federal level, although some of it may be subject to state advertising disclosure laws.

In this Article, we describe the history and regulation of traditional forms of pay-for-play and explain how streaming payola practices differ. Our account is based, in substantive part, on a novel series of qualitative interviews with music industry professionals. Our analysis finds the normative case for regulating the most common form of streaming payola

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lacking: contrary to conventional wisdom, we show that streaming pay-for-play paid to third parties, whether disclosed or not, likely causes little to no harm to consumers and may even help independent artists gain access to a broader audience. The case of "reverse payola," in which a platform itself offers promotion in exchange for paying out a lower-than-market royalty rate, is potentially more concerning. Given this state of affairs, regulators should proceed with caution to preserve the potential advantages afforded by streaming payola while avoiding further exacerbating extant inequalities and anticompetitive concerns in the music industry.

INTRODUCTION

Addison Rae Easterling is a twenty-year-old social media personality with tens of millions of followers across Instagram, Twitter, and TikTok. It is on the latter platform where Easterling's talents truly shine. Her account (@addisonre) has the second most followers on TikTok (currently 83.7 million),[1] even though she only began posting videos a year and a half ago. With an audience this large, Easterling is in high demand from companies that have goods to sell. Her dance videos provide an ideal platform to advertise clothes, makeup, and, of course, music. Interestingly, U.S. law treats her promotional activities for these products differently. The U.S. Federal Trade Commission Endorsement Guidelines dictate that Easterling must disclose payments she receives to her audience when promoting American

1. Addison Rae (@addisonre), TIKTOK, https://www.tiktok.com/@addisonre?lang=en [https://perma.cc/52QQ-R3RB] (last visited Mar. 24, 2022).

Eagle clothes or makeup by Item Beauty.[2] Similarly, if Easterling were a radio disc jockey (DJ), Federal Communications Commission (FCC) rules and regulations would require her to disclose if she'd been paid to play a song.[3] Currently, however, U.S. law mandates no such disclosure on TikTok or other streaming platforms. Easterling can take money from Warner Music Group to dance to Megan Thee Stallion's latest song,[4] and she need not disclose it. The same is true for curators of playlists on Spotify or YouTube. Record labels can pay third-party playlisters to add songs to their popular lists, and, at least as a matter of federal law,[5] they may do so without disclosing the payment.

Record labels paying for plays—or payola—isn't new. At the beginning of the twentieth century, sheet music publishers paid dance bands to perform their songs, hoping to boost music sales.[6] By the middle of the century, radio DJs controlled access to the ears—and wallets—of America's youth. Record labels secretly paid them hundreds of thousands of dollars to favor their songs, leading to a congressional investigation and, ultimately, the enactment of regulations intended to curb payola. But payola did not disappear; by the 1980s, it had reemerged as a moral panic connected with organized crime. Each era of music distribution has its own payola story. This is ours.

Drawing on novel qualitative research with active music industry participants, this Article catalogs a variety of new music streaming promotion strategies in which artists and their record labels engage in payola—i.e., pay to have their songs playlisted[7]—or in "reverse payola"—i.e., agree to accept a lower-than-market

2. FED. TRADE COMM'N, DISCLOSURES 101 FOR SOCIAL MEDIA INFLUENCERS (2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [https://perma.cc/7NQ4-TVL8].

3. *Commission Policy on the Noncommercial Nature of Educational Broadcasting*, FED. COMMC'NS COMM'N (June 15, 2017), https://www.fcc.gov/media/radio/nature-of-educational-broadcasting #announcements [https://perma.cc/U6N6-VV7E].

4. Addison Rae (@addisonre), *Cry Baby (feat. DaBaby)—Megan Thee Stallion*, TIKTOK (Dec. 28, 2020), https://www.tiktok.com/@addisonre/video/6911503601919741190 [https://web.archive.org/web/20210101101531/https://www.tiktok.com/@addisonre/video/6911503601919741190].

5. Some states have begun regulating online advertising. *See, e.g.*, Assemb. B. 2188, 2018 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml ?bill_id=201720180AB2188 [https://perma.cc/W7HZ-BC4F]. Some streaming platforms also forbid the practice, to mixed effect, as discussed *infra* Part II.

6. We describe the history of payola practices and their regulation *infra* Part I.

7. This Article's use of empirical methodology is part of the development in legal scholarship generally, and intellectual property law scholarship more specifically, of efforts to study the actual experiences of people who engage with the legal system. While some empirical projects are quantitative, others, like this one, are qualitative. For examples of recent empirical legal scholarship, see generally JESSICA SILBEY, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY (2015); Colleen Chien, *Startups and Patent Trolls*, 17 STAN. TECH. L. REV. 461 (2014); Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301 (2013); Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information?*, 25 HARV. J.L. & TECH. 545 (2012); Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28

royalty in exchange for promotion.[8] Unlike traditional payola in which DJs are paid to spin records, these streaming promotional practices are not regulated and do not need to be disclosed to audiences. This new streaming payola receives different treatment because the amendments to the Communications Act of 1934 that sought to curb radio payola do not apply to the internet.[9] Similarly, Federal Trade Commission rules requiring disclosure of sponsored advertising for goods like clothes and makeup do not cover music promotion.[10]

The proliferation of streaming pay-for-play has not been embraced by all commentators. Most recently, the announcement of Spotify's new "Discovery Mode" program—a reverse payola offering through which the platform has offered valuable playlist placement to artists and labels willing to accept a lower-than-market royalty—has thrust the practice into the spotlight. The concern owes, in large part, to a lack of meaningful competition in the streaming music space, and members of both the U.S. and British governments have raised questions about it.[11]

A recent letter from U.S. Representatives Nadler and Johnson to Spotify CEO Daniel Ek worries that the platform's new Discovery Mode program will result in "a race to the bottom [that] threatens to weaken the core goal of copyright and intellectual property—incentivizing creativity by offering a fair return on one's work."[12] Others have suggested that these practices "potentially discriminate[] against smaller labels and artists who don't have that kind of money to spend . . . . "[13] They worry that streaming payola will further undermine competition in the music industry, aiding established artists and labels at the expense of small, independent, and diverse voices. Still other commentators worry that streaming pay-for-play will subject listeners to inferior quality music, because

BERK. TECH. L.J. 1 (2013); Kristelia A. García & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351 (2019).

8. We refer herein to both of these practices collectively as "streaming payola" or "streaming pay-for-play."

9. *See* Communications Act of 1934, 47 U.S.C. § 317(a)(1) ("All matter broadcast by any *radio station* for which any money, service or other valuable consideration is directly or indirectly paid . . . shall . . . be announced as paid for . . . . " (emphasis added)).

10. *See* FCC Broadcast Radio Services, 47 C.F.R. § 76.1615 (2021) (requiring that cable operators disclose payola) and 47 C.F.R. § 73.1212 (2021) (doing the same for broadcast).

11. *See* Press Release, Jerrold Nadler, Chairman, House Judiciary Comm., Nadler & Johnson Request Information on Spotify's "Discovery Mode" Feature (June 3, 2021) [hereinafter Nadler & Johnson Letter], https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394661 [https://perma.cc/GNA3-NHGR]; DIGIT., CULTURE, MEDIA & SPORTS COMM., U.K. HOUSE OF COMMONS, MUSIC STREAMING MUST MODERNISE. IS ANYBODY LISTENING? (2021), https://ukparliament.shorthandstories.com/music-streaming-must-modernise-DCMS-report/index.html [https://perma.cc/CP3J-ZE9W].

12. Nadler & Johnson Letter, *supra* note 11.

13. Elias Leight, *A New Tool from Spotify Walks the Line Between Advertising and Pay-For-Play*, ROLLINGSTONE (Dec. 2, 2019, 2:29 PM) [hereinafter Leight, *A New Tool*], https://www.rollingstone.com/pro/features/spotify-marquee-ad-cost-5000-915990/ [https://perma.cc/Q6XY-ZCJW].

playlists will be filled with songs that paid for a spot rather than earning one via their own intrinsic merit.

In this Article, we consider the normative arguments in favor of regulating streaming payola and find them largely unpersuasive, at least vis-à-vis third-party playlisters and influencers. Neither the claim that listeners will be drowned by a deluge of "bad" music nor that pay-for-play undermines competition are borne out by either historical experience or social scientific analysis. In general, people's musical tastes are fairly malleable, so many listeners find that they happen to like the music that they hear, whether or not its performance was paid for and whether or not they are aware that it was. More importantly, should listeners find a playlister's or influencer's choices unpalatable, they have at their disposal a low-cost option: they can simply switch to one of the other music streaming options available.[14]

With the possible exception of reverse payola, most other versions of streaming payola are also unlikely to harm competition in the music industry. On the contrary, paying for plays has been one of the most effective means for independent musicians to connect with mainstream audiences. Historically, established industry actors have objected most strenuously to payola, presumably because it introduces an additional cost for something that they already enjoy—access to a large audience. In this Article, we offer a model of streaming payola as a low-cost lottery that enables musicians to pay for access to audiences that they might otherwise not reach. Much like a lottery for spots at a selective school, the streaming payola lottery may help otherwise excluded voices find opportunities that traditional means would deny them.

But not all lotteries are fair or are likely to produce socially beneficial results. While we are not particularly concerned about paying influencers to dance to pop songs, we are more anxious about the ability of a small number of streaming platforms to manipulate prices and access. Unlike the Powerball lottery, Discovery Mode doesn't have a predetermined pot or stated odds. Accordingly, a platform like Spotify could use its power to alter the level of additional access or promotion that they provide without notice. Further consideration of these risks is warranted.

This Article begins with a brief account of the history of payola and its legal regulation in the United States. Part I tracks the development of payola practices from sheet music through radio, and it discusses both the laws requiring disclosure of broadcast payola and copyright law's treatment of sound recordings. Part II discusses reverse payola programs like Discovery Mode, as well as streaming payola practices involving influencers, playlisters, and third-party marketing companies that help musicians find audiences—for a price. To do so, it draws on a novel set

14. As discussed further *infra* Section IV.B., while a few music streaming options are currently available in the United States, Spotify enjoys a strong first-mover advantage in a field with substantial barriers to entry.

of qualitative interviews that we conducted with a diverse group of artists and music industry professionals during the summer and fall of 2020. In Part III, we recount the normative arguments in favor of regulating payola, focusing in particular on harms to consumers and harms to competition, and in Part IV we address these arguments and explain why we believe that most streaming payola does not currently require regulation. We conclude with some potential lessons for policymakers and courts confronting unauthorized uses of copyrighted works in streaming media.

I. PAYOLA AND ITS REGULATION IN THE UNITED STATES

For as long as Americans have been selling music, they have been paying people to help them promote it. As with many products, people don't always know what music they want to consume in advance or even what their options are. So, music sellers—whether of sheet music, vinyl albums, or streams—must advertise to consumers.[15] But advertising music is different from advertising dish soap or half-ton pickup trucks. Instead of telling consumers about the product's valuable qualities (real or imagined), advertising a song—whether by radio, tour, or influencer—boils down to playing the song for listeners who can then decide whether they would like to consume more of it.[16]

As a result, then, music sellers have long sought ways to encourage those who play music for others—band leaders, at first, and later radio DJs—to perform their songs.[17] Often, the best encouragement was cash, although it might also include gifts, drugs, or a share of copyright royalties. Unsurprisingly, other parties—including competitors, regulators, and the public—have sometimes found the practice of pay-for-play objectionable.[18]

In this Part, we describe the history and eventual regulation of payola in the United States, from the late nineteenth century to the present. We begin by briefly recounting the various attempts by music sellers to encourage band leaders and radio DJs to perform their songs, including the scandal involving Dick Clark and other DJs in the middle of the twentieth century that led to the FCC's modern payola regulations. Next, we explain the current state of payola regulation in the United States, most importantly, the FCC's regulations on sponsorship disclosure.

Notably, payola regulation does not make the practice illegal; instead, it simply requires that any such payments to broadcasters or their employees be disclosed to the listening public. This disclosure requirement is further limited by the fact that it applies only to radio and television broadcasters but not to music streaming services.

15. ALAN PEACOCK & RONALD WEIR, THE COMPOSER IN THE MARKET PLACE 65–66 (1975).

16. Randal C. Picker, *Copyright as Entry Policy: The Case of Digital Distribution*, 47 ANTITRUST BULL. 423, 432 (2002).

17. Kerry Segrave tracks the history of pay-for-play from the nineteenth century to the late twentieth century. *See* KERRY SEGRAVE, PAYOLA IN THE MUSIC INDUSTRY: A HISTORY, 1880–1991 (1994).

18. *Id.* at vii.

A. Music Publishers, Vaudeville, and the Payment System

Tin Pan Alley, the name given to the section of West 28 Street between 5th and 6th Avenues in New York City in the late nineteenth and early twentieth century, is known as the birthplace of the U.S. music publishing industry.[19] It is less commonly, but no less accurately, attributed as the place where "payola"—a contraction of the words "pay" and "Victrola"—got its start in the United States.[20]

Beginning in the late 1800s, music publishers often slipped a few dollars to piano players inside Woolworth department stores in exchange for them playing certain songs in an effort to boost the sales of piano rolls for those compositions.[21] Publishers also paid silent film production companies to use their music.[22] But among the largest audiences of the early twentieth century were those who attended vaudeville acts or went to dance halls.[23] To increase performance of their songs, the publishers employed "pluggers" who encouraged bands to play their employer's songs.[24]

Of course, band leaders were generally all too happy to accept cash and gifts to play particular songs.[25] Pluggers also used subtler methods for paying performers. In many cases, a bandleader who agreed to perform a song would receive a separate fee for creating an "arrangement" of the song for his band.[26] These fees could be substantial, even though the creative work could have been anything but.[27] In addition, performers might be "cut in" on a song's royalties, either as a direct payment for performing the song or because they were given an interest in the song's copyright.[28] With a cut-in on royalties, performers were even further incentivized to encourage listeners to purchase copies of the sheet music.

19. Logan Culwell-Block, *Tin Pan Alley Buildings, Birthplace of American Popular Music Publishing, Designated Landmarks*, PLAYBILL (Dec. 12, 2019), https://www.playbill.com/article/tin-pan-alley-buildings-birthplace-of-american-popular-music-publishing-designated-landmarks [https://perma.cc/D4WV-THND].

20. Ronald Coase notes a London music publishing house that engaged in various attempts to promote the sales of its sheet music as early as the 1850s. R. H. Coase, *Payola in Radio and Television Broadcasting*, 22 J.L. & ECON. 269, 270 (1979).

21. SEGRAVE, *supra* note 17, at 20.

22. *Id.* at 19. In the 1930s and 1940s, Warner Brothers began creating cartoons—Looney Tunes and Merrie Melodies—to promote the catalogue of songs that it had recently purchased. *See Looney Tunes*, WIKIPEDIA, https://en.wikipedia.org/wiki/Looney_Tunes#cite_note-bcdb-2 [https://perma.cc/YF8X-TRNB] (last visited Feb. 7, 2021).

23. *See generally* SEGRAVE, *supra* note 17, at 5–21.

24. *Id.* According to a contemporary account, "[the Plugger] is the publisher's lobbyist wherever music is played. He it is who, by all the arts of persuasion, intrigue, bribery, mayhem, malfeasance, cajolery, entreaty, threat, insinuation, persistence and whatever else he has, sees to it that his employer's music shall be heard." ISAAC GOLDBERG, TIN PAN ALLEY: A CHRONICLE OF THE AMERICAN POPULAR MUSIC RACKET 203 (1930).

25. Coase, *supra* note 20, at 272–73.

26. SEGRAVE, *supra* note 17, at 34–35.

27. *Id.*

28. Coase, *supra* note 20, at 277, 285 n.70.

Although pay-for-play, cut-ins, and copyright royalties were valuable business strategies for both music publishers and performers, they were also the target of vociferous complaints and coordinated attacks from the very beginning.[29] As early as the 1890s, some music publishers attempted to band together to eliminate payments to performers.[30] These efforts continued with the formation of the Music Publishers Protective Association in 1917.[31] Violation of the Association's ban on paying performers could result in a $5,000 fine on the music publisher.[32]

From this early effort to prohibit pay-for-play, a number of themes that recur throughout the twentieth century are already apparent: First, the established publishers were the ones leading the efforts to ban payola.[33] Second, the principal harm they associated with pay-for-play was the cost to consumers who would be forced to listen to "bad" music.[34] Instead of playing the songs that people wanted to hear, performers would, according to the publishers, play those they had been paid to play. Ultimately, the effort to quash payments to performers failed.[35]

B. Radio, Disc Jockeys, and the Rise and Regulation of Payola

The advent of phonograph records and the emergence of broadcast radio in the second quarter of the twentieth century revolutionized the music industry.[36] Pay-for-play certainly didn't vanish; if anything, it expanded and became a matter of national discourse and congressional action. But records and radio changed both the payers and the payees in payola transactions. From the 1940s, record companies, in addition to the music publishers, were the ones seeking music promotion.[37] But instead of paying band leaders or vaudeville acts to perform songs, they were now paying radio DJs to spin their records.[38] This ultimately inspired the FCC's payola regulations which remain in place today.

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29. *Id.* at 274–76.

30. *Id.* at 273.

31. *Id.* at 276; *see also* SEGRAVE, *supra* note 17, at 16–17.

32. SEGRAVE, *supra* note 17, at 16.

33. Segrave notes that the association was formed by twenty-five of the "biggest and most influential" publishers in the country. *Id.* at 16–17; *see also* J. Gregory Sidak & David E. Kronemyer, *The "New Payola" and the American Record Industry: Transactions Costs and Precautionary Ignorance in Contracts for Illicit Services*, 10 HARV. J.L. & PUB. POL'Y 521, 521–22 (1987) ("[S]ince at least the 1890s, movements to prohibit payola have been used as competitive weapons by record and music publishing firms. Those firms have acted, sometimes in concert, not only to reduce their own advertising costs, but also to restrict the advertising alternatives by which new entrants could expose to the public their sound recordings and copyrighted compositions.").

34. *See* SEGRAVE, *supra* note 17, at 22.

35. *See* Coase, *supra* note 20, at 276–77.

36. *See, e.g.*, Aaron Hawley, Radio's Influence on Music from 1919 to 1926, at 119 (May 5, 2000) (Honors thesis, Ouachita Baptist University) (Scholarly Commons @ Ouachita) (offering an account of the impact changes in technology wrought on audience behavior).

37. Coase, *supra* note 20, at 286.

38. *Id.*

By the 1930s, more and more Americans were listening to and learning about music primarily from broadcast radio.[39] Music publishers began paying radio stations to play their songs, usually with the station's band performing the tune on a broadcast. Some publishers reported paying more in payola to the stations than the stations returned to them in royalties.[40] Such transactions were presumably beneficial to the music publishers who made their money selling sheet music. Nonetheless, the established publishers tried to quash pay-for-play—this time enlisting the Federal Trade Commission (FTC)—but again, they failed.[41]

Two major changes during this period fundamentally altered the way that most Americans consumed music. First, with the end of the Great Depression, Americans had more disposable income, and they spent generous amounts of it on recorded music.[42] Many households had record players, and, by 1942, Americans purchased more than 140 million records.[43] Second, radio stations increasingly switched formats from live performances to recorded music, with records chosen by men[44] who became tastemakers and celebrities. Disc jockeys like Alan Freed and Dick Clark became household names, and spins on their programs could generate enormous record sales.[45] Accordingly, DJs became the key to selling records in the middle of the twentieth century and, as a result, the principal recipients of payola. DJs at stations with smaller audiences might take in $25–$50 a week in payola, while those at the major stations in the big cities could bring in many multiples of their incomes in cash and gifts.[46] As payola historian Kerry Segrave notes, "For the first time in the music industry payola was paid to people who had nothing to do with the music, except to introduce it."[47]

At the time, these payments were, for the most part, entirely legal.[48] Section 317 of the Communications Act of 1934 required radio stations to announce any "money, service, or other valuable consideration" that they received as payment to their audiences,[49] but, in general, payola went to DJs, not to the stations

39. By the late 1920s, Columbia Records was issuing over a thousand new discs per year in the United States. Pekka Gronow, *The Record Industry: The Growth of a Mass Medium*, 3 POP. MUSIC, 1983, at 53, 65.

40. SEGRAVE, *supra* note 17, at 37.

41. *Id.* at 49–50.

42. WILLIAM H. YOUNG & NANCY K. YOUNG, MUSIC OF THE GREAT DEPRESSION 21 (David J. Brinkman ed., 2005) ("[N]ot until 1934 did record sales again begin a long, slow climb to their former levels.").

43. *Id.*

44. Almost all of the early disc jockeys were men. DONNA L. HALPER, INVISIBLE STARS: A SOCIAL HISTORY OF WOMEN IN AMERICAN BROADCASTING 260 (2d ed. 2015).

45. Coase, *supra* note 20, at 287.

46. SEGRAVE, *supra* note 17, at 80–84.

47. *Id.* at 56.

48. Some states had commercial bribery statutes that may have outlawed some payola practices, but they were never enforced. *See, e.g.*, N.Y. PENAL LAW § 180.00 (McKinney 2021); *see also* SEGRAVE, *supra* note 17, at 105.

49. 47 U.S.C. § 317.

themselves. The FCC, the regulatory agency in charge of the Communications Act, thus had no oversight.[50]

But just as payola at the beginning of the century had raised the ire of established music publishers, the staggering growth of pay-for-play to radio DJs eventually attracted the attention of established record labels intent on putting a stop to it. Once again, they claimed that the brunt of payola's harms was borne by listeners forced to listen to inferior music. This time, however, the arguments against payola took place in an explicit political, moral, and racial context, as payola was blamed for the popularity of rock & roll and rhythm & blues music—i.e., "Black music."

Throughout the 1940s, the American Society of Composers, Authors and Publishers (ASCAP) found itself in a pitched battle with an upstart rival, Broadcast Music, Inc. (BMI). Both still in operation today, ASCAP and BMI are performance rights organizations. They are responsible for collecting royalties owed to music publishers and songwriters whenever their compositions are publicly performed.[51] ASCAP, the earlier entrant into the market, was the dominant organization throughout the first half of the twentieth century. In a typical week in the 1950s, ninety-seven songs on a Top 100 chart were licensed through ASCAP, with just three BMI tunes.[52] By the middle of the 1950s, however, the ratios were reversed.[53] As a new entrant, BMI wasn't in a position to sign established songwriters who wrote popular ballads sung by nectar-voiced crooners. Instead, BMI secured the rights to publish the songs of increasingly popular rock & roll and rhythm & blues musicians.[54]

What might otherwise be explained as a natural evolution in musical tastes was, to ASCAP, the result of a payola conspiracy by BMI and the rock, "hillbilly," and "race" (as records intended for Black audiences were called) record companies.[55] Articles in industry publications lamented payola's magnitude and its deleterious effect on music quality. According to one columnist, "[o]ur level of popular music has become abysmal, and the bottom appears to be fathomless . . . not because of the public primarily, but because of the recording directors, the song publishers, and especially, the disk jockeys."[56] DJs, who often had complete control over the songs they played, were playing rock & roll music or

50. Coase, *supra* note 20, at 296.

51. Maria A. Pallante, *ASCAP at 100*, 61 J. COPYRIGHT SOC'Y U.S.A. 545 (2014); Peter DiCola & Matthew Sag, *An Information-Gathering Approach to Copyright Policy*, 34 CARDOZO L. REV. 173, 182 (2012).

52. SEGRAVE, *supra* note 17, at 120.

53. *Id.*

54. *Id.*

55. *Id.* at 82.

56. Nat Hentoff, *DJs Too Powerful?*, DOWN BEAT, Mar. 21, 1952, at 11.

songs by Black artists like Little Richard not because of their intrinsic merit, critics argued, but because they were paid to do so.[57] As Seagrave explains, this

> laid the groundwork for shifting much of the blame for payola away from its source—large, white publishers and record companies—onto weaker elements—small, black indies and deejays—with emphasis on the black spinners. By targeting rhythm and blues and country, focus was also switched to the smaller and weaker BMI licensing agency away from the powerful, white ASCAP.[58]

Throughout the late 1950s, ASCAP and the major record labels used their political power to force a series of state and federal inquiries into payola practices. In 1958, at the behest of ASCAP, Senator George Smathers introduced a bill that would prohibit music publishers and record companies from owning licenses for broadcasting stations.[59] Discussion of the bill would include testimony about payola practices by BMI and its associated companies.[60] By 1959, the New York District Attorney's Office, the FTC, the FCC, and the House of Representatives had separately opened investigations into payola and related practices.[61]

Much of the focus of these investigations was directed toward the two most prominent DJs of the era: Alan Freed and Dick Clark.[62] Alan Freed, the maverick DJ and promoter widely considered to be the father of rock & roll in the United States, was dragged in to testify before the House as was America's media darling, Dick Clark. While Clark got off with a slap on the wrist,[63] Freed—who refused to sign an affidavit declaring that he'd never accepted payola—received much worse treatment. Freed was one of the men charged with commercial bribery by the state of New York, to which he pled guilty. He was also indicted on federal tax fraud charges by the IRS, but he died, broke and alone, before his case concluded.[64] Dick Clark, of course, recovered from his brush with payola. After being declared "a fine young man" by Oren Harris, Chair of the House Special Subcommittee on Legislative Oversight,[65] Clark went on to produce and host American Bandstand for nearly thirty years after the conclusion of the hearings.[66]

57. Coase, *supra* note 20, at 288.

58. SEGRAVE, *supra* note 17, at 82.

59. Coase, *supra* note 20, at 287.

60. For details, see SEGRAVE, *supra* note 17, at 94–99.

61. *Id.* at 107–15. Some of these inquiries were related to the contemporaneous quiz show scandals. *See* Coase, *supra* note 20, at 288–90.

62. SEGRAVE, *supra* note 17, at 109.

63. At the time of the investigation, Clark's companies were listed as owners of the copyrights to 160 songs, which, coincidentally, were played on his programs substantially more often after he acquired the rights. *Id.* at 147.

64. *Id.* at 153.

65. *Id.* at 148.

66. *See American Bandstand*, DICK CLARK PRODS., https://www.dickclark.com/shows/american-bandstand [https://web.archive.org/web/20210121011149/https://www.dickclark.com/shows/american-bandstand/] (last visited Jan. 21, 2021).

Some attribute the difference in treatment between Clark and Freed to Freed's abrasiveness and refusal to cooperate.[67] Others explain the disparity differently: Freed "consorted" with Black musicians. He used Black slang and hosted interracial shows. He was notorious for playing Black records on radio stations that prohibited them and at a time when mainstream broadcasters always played white covers of Black songs.[68]

Commentary from the time of the congressional payola hearings supports the notion that the impetus of the United States' newfound moral outrage against the decades-long practice of payola stemmed less from a desire to preserve ethical business practices and more from a desire to preserve traditional class and race divisions, as well as to avoid a competitive threat to mainstream—i.e., "white"—music. Emanuel Cellar, chairman of the House Judiciary Committee, derisively called rock & roll the "natural expression of [Black people's] emotions and feelings."[69] Songwriter Billy Rose testified that "[n]ot only are most of the [rock & roll] songs junk, but in many cases they are obscene . . . . [I]t is a set of untalented twitchers and twisters whose appeal is largely to the zoot suiter and the juvenile delinquent."[70] In other words, "[a]s long as it remained marginal, artistically and economically, rock was little more than an irritation . . . [, b]ut as rock's infiltration of the mainstream grew, it represented a powerful threat to longstanding notions of what was culturally acceptable, even sparking government interest."[71]

Although most congressmen, the regulatory agencies, and the public seemed to accept that payola was harmful, there were occasional voices of protest. Smaller, independent labels generally preferred payola to the alternative, namely because they had no other opportunity to get their songs played on the radio.[72] While smaller labels had less money than the majors to pay for access, they were at an even greater disadvantage when it came to the subtler influence that majors could exert on radio station owners. As Segrave notes, "It was easier and cheaper to reach a jockey than someone higher up at the station."[73] And while the independent labels might not

67. *See, e.g.*, Lydia Hutchinson, *Alan Freed and the Radio Payola Scandal*, PERFORMING SONGWRITER (Aug. 20, 2015), https://performingsongwriter.com/alan-freed-payola-scandal/ [https://perma.cc/CUN9-S6RK].

68. Bernard Weinraub, *The Man Who Knew It Wasn't Only Rock 'n' Roll*, N.Y. TIMES, Oct. 14, 1999, at E1 , https://www.nytimes.com/1999/10/14/arts/the-man-who-knew-it-wasn-t-only-rock-n-roll.html [https://perma.cc/D95Q-PFKL] ("It was a common occurrence in the 50's—Little Richard had a song and then Pat Boone would redo the song and the radio station would play the white version . . . Alan Freed refused to do that. If Chuck Berry made it first, he wouldn't play anyone else doing that song. He made enemies because of it.").

69. Pete Grendysa, *The Forty Year War: The Story of Music Licensing Societies*, GOLDMINE, Feb. 1978, at 22, 23.

70. *Monopoly Problems in Regulated Industries: Hearings Before the Antitrust Subcomm. No. 5 of the H. Comm. on the Judiciary*, 84th Cong. 4425–26 (1957) (testimony of Billy Rose).

71. JOHN C. HAJDUK, MUSIC WARS: MONEY, POLITICS, AND RACE IN THE CONSTRUCTION OF ROCK AND ROLL CULTURE, 1940–1960, at 147 (2018).

72. SEGRAVE, *supra* note 17, at 93.

73. *Id.* at 93.

have had the money to buy favor with the likes of Freed or Clark, by spending money with local DJs in smaller markets, they could hope to crack Top 100 lists and ultimately get air time on the major stations.[74] For this reason, many smaller record labels argued that rather than being anticompetitive as the FTC claimed, payola actually enabled them to compete with market incumbents.

The fruits of multiple investigations from 1958 to 1960 were substantial. In addition to numerous indictments and convictions for commercial bribery in New York, the FTC ultimately accused dozens of radio stations and record distributors of unfair and deceptive trade practices.[75] According to the FTC, payola deceived the public and suppressed competition.[76] For its part, the FCC proposed various pieces of legislation to combat payola, and it clarified that radio stations receiving free records were obliged to disclose them.[77]

Ultimately, and most significantly, the 1960 congressional hearings resulted in amendment of the Communications Act of 1934 to require disclosure to listeners if a song was aired in exchange for money or other valuable consideration, including consideration paid to DJs (as opposed to the stations themselves).[78] Section 508 of the Communications Act now requires station employees to disclose any payments they received to their employers, who, in turn, would disclose them to listeners. Failure to disclose can lead to a fine of up to $10,000, or a year in jail, or both.[79] These new regulations put the brakes on the payola train, but only long enough for the music industry to catch its breath, regroup, and go into business with the mob.

Beginning in earnest in 1979 and continuing through the "new payola" scandal of 1986, record labels utilized independent promoters to insulate themselves from liability under the new payola regulations.[80] The rise of the indie[81] promoter is believed to originate from a 1979 FCC administrative ruling determining that "social exchanges between friends are not 'payola.'"[82] This so-called "friendship exception"

74. Coase, *supra* note 20, at 315–16. During the 1980s another payola scandal erupted over the purchasing of "paper adds," where a radio station accepts money to falsely assert that it played a song, thereby boosting the song's ranking on Top 100 lists. *See* SEGRAVE, *supra* note 17, at 206–09.

75. SEGRAVE, *supra* note 17, at 116, 153.

76. *Id.* at 116.

77. Coase, *supra* note 20, at 296. This interpretation was subsequently changed with the 1960 amendments to the Communications Act.

78. 47 U.S.C. § 317.

79. 47 U.S.C. § 508. In addition, the FCC adopted a rule, Section 73.1212, setting forth the broadcasters' responsibility to make this sponsorship identification in the radio broadcast context. 47 C.F.R. § 73.1212 (2021). FCC Rule 76.1615 sets the same responsibility in the cable television context, where the practice assumes the name "plugola." 47 C.F.R. § 76.1615 (2021).

80. We borrow the term "new payola" here from Sidak & Kronemyer, *supra* note 33, at 525.

81. To be clear, "indie" here means promoters who were independent contractors rather than employees of the record labels. This is different from the "indie" record labels that are separate from the "Big Three" major labels.

82. Dena Pictures, Inc., 71 F.C.C.2d 1402, 1408 (1979).

allowed independent promoters to lavish extravagant gifts upon their DJ "friends" with impunity.[83]

Importantly, the indie promoter model worked via exclusive arrangements; that is, each independent promoter represented himself (they were all men) as the sole means of connecting with certain stations.[84] This arrangement lent itself nicely to the eventual monopolization of independent promotion by a handful of actors who called themselves "The Network" and their respective mob bosses.

This development distinguished the payola scandal of the 1980s from its predecessors. For one thing, "independent promoters had the ability to exclude records from receiving radio airplay at major . . . stations."[85] In addition, the widespread "perception that independent promoters were engaging in extortion . . . did not prompt any government inquiry," allegedly because prospective witnesses "refused to testify because of fear of physical retaliation."[86] One of the most notorious of the independent promoters and member of the infamous Network—Joe Isgro—was allegedly involved with the Gambino crime family.[87]At the height of his influence, and before his indictment by the FBI, Isgro counted Columbia Records, Warner Records, RCA Records, and Polygram Records among his clients.[88]

C. Contemporary Payola Regulation

The payola scandals of the 1950s to 1980s and the accompanying legislative response established the federal rules governing pay-for-play that exist to this day. At least as a federal matter, the rules are fairly simple. The Communications Act does not prohibit record companies from paying, or radio stations from accepting, money in exchange for spinning particular records. The Act simply requires that these activities be disclosed.[89] As long as a radio station informs its listeners that it or one of its employees has been paid to play a tune, it may do so.

Throughout the remainder of the twentieth century and into the twenty-first, federal and state governments have continued to investigate and prosecute the

83. Sidak & Kronemyer, *supra* note 33, at 531–32.
84. *Id.* at 533–35.
85. *Id.* at 550.
86. *Id.* at 550–51.
87. *See, e.g.*, SEGRAVE, *supra* note 17, at 197.
88. Larry Rohter, *Payola Trial Is Opening Today for Successful Record Promoter*, N.Y. TIMES, Aug. 21, 1990, at C13, https://www.nytimes.com/1990/08/21/arts/payola-trial-is-opening-today-for-successful-record-promoter.html [https://perma.cc/85Z5-VU7Z]. Isgro protégé Ralph Tashjian enjoys the unique distinction of being the first independent record promoter convicted under the payola laws in 1989. In the summer of 2018, Tashjian started a new digital promotion company, Intercept Music. With this turn to the internet, Mr. Tashjian has finally gotten out from under the FCC's thumb. Julian Mark, *Legendary SF Mission Record Promoter Ralph Tashjian Turns to Tech at 70*, MISSION LOC. (June 18, 2018), https://missionlocal.org/2018/06/legendary-sf-mission-record-promoter-turns-to-tech-at-70 [https://perma.cc/DP3Z-JAC3].
89. 47 U.S.C. §§ 317, 508.

nondisclosure of payola. In 1986, Senator Al Gore began an investigation into what he termed "the new payola," including the practice of radio stations being paid to falsely claim that they had aired songs in order to boost the songs' rankings in the charts.[90] These so-called "paper adds" made a song look popular, so that other stations would be induced to add it to their respective rotations.[91]

In 2004, New York returned to the payola enforcement arena. Then-state Attorney General Eliot Spitzer conducted investigations into the four major record companies, each of whom quickly and quietly settled for multimillion-dollar sums.[92] The FCC followed suit with its own investigation beginning in 2006, wherein at least one FCC commissioner was seeking fines as high as $10 million.[93]

Most recently, in late 2019, FCC Commissioner Michael O'Rielly instigated new investigations into illegal payola practices on both broadcast TV and radio. The investigation began as a request from the FCC to the Recording Industry Association of America (the RIAA) to look into "possible violations of federal laws and regulations that expressly prohibit."[94] After an RIAA response deemed "underwhelming,"[95] O'Rielly reached out to the record labels directly.[96] As of April 2020, Sony, Warner, and Universal had all responded denying any and all undisclosed pay-for-play arrangements.[97]

Because payola is regulated primarily by the FCC—at least at the federal level—payola regulation currently applies only to radio and television broadcasting. The Communications Act does nothing to regulate pay-for-play over the internet.

90. SEGRAVE, *supra* note 17, at 204. Although it might seem meaningless to a record label to have a radio station only pretend to play its song, paper adds could be an enormously valuable strategy for manipulating Top 100 charts. Because the charts used data they received from stations to determine song rankings, appearing in the listings for smaller stations could help a song bubble up to the major stations. And, of course, it was much cheaper to buy access to a station in Springfield than in Los Angeles. It was, in other words, a foot in the (previously locked) door.

91. *See* Rohter, *supra* note 88.

92. Jeff Leeds, *Spitzer Sues Radio Chain as Part of Music Inquiry*, N.Y. TIMES, Mar. 9, 2006, at C4, https://www.nytimes.com/2006/03/09/business/spitzer-sues-radio-chain-as-part-of-music-inquiry.html [https://perma.cc/3QXM-625V].

93. Jeff Leeds, *U.S. Presses Payola Inquiry After Settlement Talks Stall*, N.Y. TIMES, Apr. 21, 2006, at C5, https://www.nytimes.com/2006/04/21/business/media/us-presses-payola-inquiry-after-settlement-talks-stall.html [https://perma.cc/EN9C-96C6].

94. Letter from Michael O'Rielly, Comm'r, Fed. Commc'n Comm'n, to Mitch Glazier, Chairman & CEO, Recording Indus. Ass'n of Am. (Sept. 4, 2019), https://docs.fcc.gov/public/attachments/DOC-359469A1.pdf [https://perma.cc/8X59-MX53].

95. Mike O'Rielly (@MPORielly), TWITTER (Oct. 8, 2019, 7:51 AM), https://twitter.com/MPORielly/status/1181582829110644736 [https://perma.cc/T45U-E3E2].

96. Letter from Mike O'Rielly, Comm'r, Fed. Commc'n Comm'n, to Wade Leak, Senior Vice President, Deputy Gen. Couns., Chief Compliance, Ethics & Priv. Officer, Sony Music Ent., Saheli Datta, Head of Glob. Compliance, Universal Music Grp., and Trent Tappe, Senior Vice President, Deputy Gen. Couns., & Chief Compliance Officer, Warner Music Grp. (Jan. 16, 2020), https://docs.fcc.gov/public/attachments/DOC-361998A1.pdf [https://perma.cc/XRN2-26MU].

97. Mike O'Rielly (@MPORielly), TWITTER (Apr. 21, 2020, 11:18 AM), https://twitter.com/MPORielly/status/1252662966647914505 [https://perma.cc/GT5Y-6KYR].

Although state commercial bribery laws or FTC advertising rules may be implicated by pay-for-play online, the FCC's payola disclosure requirements do not apply to online music streaming. As we detail in the next Part, however, allegations of streaming payola abound.

* * *

Several important points emerge from this history of payola and its regulation. First, pay-for-play is not now, and never has been, illegal. According to Congress, the FCC, and the FTC, only undisclosed payola presents a problem. Second, the parties complaining loudest about payola are typically established market actors. Although they assert that they are defending consumers' interests, major publishers and record labels have been payola's most vociferous critics. Finally, public performance of copyrighted works has generally been enormously beneficial, rather than harmful, to copyright owners. In fact, as we have seen, having one's songs performed publicly—whether by a vaudeville act or a radio station—often proves so valuable that copyright owners have been willing to pay for the privilege. This dynamic remains unchanged in the new streaming era as the next Part details.

II. STREAMING PAYOLA

As this Part will show, streaming payola looks a lot like traditional broadcast payola, only with less racism and less regulation. The former distinction is a welcome development; the desirability of the latter is less settled, and we'll address that uncertainty in Part IV. Section A of this Part briefly describes the technological changes that have dragged the music industry (sometimes kicking and screaming) into the modern streaming era. Section B discusses how those changes have impacted streaming promotional opportunities and details how they work. Finally, Section C considers how streaming payola is similar to and different from traditional broadcast payola.

A. Changes in Music Consumption: From Sheet Music to Playlists

The last century has seen dramatic changes, not only in how people listen to music but also in how they discover and pay for it. As Part I described, at the beginning of the twentieth century, people primarily listened to music live at clubs, shows, and dance halls. They also typically learned about new music through those venues, and they purchased sheet music there to continue listening to it at home. Today, people increasingly listen to music via streaming platforms like Spotify and YouTube. They learn about new music from various playlists on those platforms and from social media platforms like TikTok.

To the extent consumers buy (or access)[98] music, they often do so via platform accounts and monthly subscriptions. In the time period between dance halls and

98. *See* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 83 (2016) (discussing the "buy now" lie).

streaming, the era of radio and record stores dominated music promotion and consumption. This Section briefly describes the changes over time that have impacted how people consume music and how they pay for access to listen to songs over and over again.[99] In the next Section, we explore the strategies that artists and labels have developed to promote music on streaming platforms and how those strategies have evolved.

For most of human history, if you wanted to hear a piece of music, you had to listen to someone perform it live or play it yourself.[100] Beginning in the middle of the nineteenth century, music publishing houses began to specialize in the printing and sale of sheet music for popular consumption.[101] By the beginning of the twentieth century, people could purchase pre-recorded music for the first time in the form of player piano rolls. Advancements in the development and popularization of records and record players post-World War II made in-home music consumption more accessible to the general population.[102] Introduction of the 8-track tape and the integration of 8-track players into car decks beginning in the late 1960s further encouraged the ubiquity of music in popular culture. The newfound portability of music afforded by the advent of cassette tapes and portable cassette players beginning in the late 1970s,[103] followed by the domination of CDs and portable CD players throughout the 1990s and 2000s, predictably increased music consumption dramatically.[104]

By the late 1990s, the growing popularity of digital music files (MP3s) and portable devices capable of playing them shifted record labels' business model from one focused on selling music predominantly in physical album format to one focused on selling digital tracks.[105] Consumers' dalliance with file-sharing platforms like Napster and Kazaa served to reinforce the preference for individual tracks-on-demand, while simultaneously lowering the price point for legitimate track sales.

99. We are not currently concerned with live music, although we mention the importance of concerts for promotion in Section II.C.

100. *See generally* F.M. SCHERER, QUARTER NOTES AND BANK NOTES: THE ECONOMICS OF MUSIC COMPOSITION IN THE EIGHTEENTH AND NINETEENTH CENTURIES (2004).

101. Ruth Towse, *Economics of Music Publishing: Copyright and the Market*, 41 J. CULTURAL ECON. 403, 410 (2017).

102. *See* Gronow, *supra* note 39, at 55.

103. Sony's Walkman was first released in 1979. Carl Franzen, *The History of the Walkman: 35 Years of Iconic Music Players*, VERGE (July 1, 2014, 1:15 PM), https://www.theverge.com/2014/7/1/5861062/sony-walkman-at-35 [https://web.archive.org/web/20140701212917/https://www.theverge.com/2014/7/1/5861062/sony-walkman-at-35].

104. Devin Coldewey, *30 Years Ago, the CD Started the Digital Music Revolution*, NBC NEWS (Sept. 28, 2012, 12:59 PM), https://www.nbcnews.com/tech/gadgets/30-years-ago-cd-started-digital-music-revolution-flna6167906 [https://perma.cc/9XM7-AZCZ].

105. *See generally* STEPHEN WITT, HOW MUSIC GOT FREE: A STORY OF OBSESSION AND INVENTION (2016) (describing the development of the MP3 format).

When streaming platforms like Spotify began gaining popularity around 2008, record labels had to again pivot to a new consumption model—one with a less certain path to monetization. From a sales perspective, the music industry saw its revenues slashed dramatically as price-per-unit sales fell from an average of $16.99 (for the sale of a physical album)[106] to $12.99 (for the sale of a digital album)[107] to $0.99 (for the sale of a digital track)[108] to $.0006 (average royalties earned on a digital stream).[109]

But these lower rates don't necessarily mean that record labels are suffering. The major record labels are collectively generating over $24 million per day in streaming revenues.[110] The latest IFPI Global Report[111] shows that streaming consumption now accounts for 77.8% of the North American market, up from 74.2% the year before.[112] Global recording revenues for 2019 included $11.4 billion from streaming (all platforms), $4.4 billion from sales of physical albums (largely owing to a recent resurgence in vinyl), and $1.5 billion from digital downloads.[113]

Importantly, only a handful of platforms provide the lion's share of access to music streaming. As of 2020, Spotify reports 299 million monthly active Spotify users. Of those, 138 million pay for the service; the remainder use the freemium version.[114] Pandora's share of the streaming market is shrinking, down to about 60 million monthly active users in 2020.[115] Listener stats for YouTube and its parent

106. Neil Strauss, *Pennies that Add Up to $16.98: Why CD's Cost So Much*, N.Y. TIMES, July 5, 1995, at C11, https://www.nytimes.com/1995/07/05/arts/pennies-that-add-up-to-16.98-why-cd-s-cost-so-much.html [https://perma.cc/V7K5-JVFB].

107. Kristin Thomson & Brian Zisk, *iTunes and Digital Downloads: An Analysis*, FUTURE MUSIC COAL. (June 15, 2003), http://futureofmusic.org/article/article/itunes-and-digital-downloads-analysis#.Yj-YO24sKJI.link [https://perma.cc/2ZTK-W3E3].

108. *Id.*

109. Ephrat Livni, *Mariah Carey's Record-Breaking Day Shows how Little Musicians Make from Spotify*, QUARTZ (Dec. 10, 2021), https://qz.com/1507361/mariah-careys-record-breaking-day-shows-how-little-musicians-make-from-spotify- [https://perma.cc/8UZ6-4LQ8].

110. Tim Ingham, *The Pandemic Has Hit the Major Labels This Year . . . But They're Still Generating over $1M per Hour from Streaming*, MUSIC BUS. WORLDWIDE (Aug. 21, 2020), https://www.musicbusinessworldwide.com/stat-of-the-week-the-pandemic-has-hit-the-major-labels-this-year-but-theyre-still-generating-over-1m-per-hour-from-streaming [https://perma.cc/LE57-MMDK].

111. IFPI is the International Federation of the Phonographic Industry, a non-profit organization that represents the recording industry worldwide. IFPI, https://www.ifpi.org [https://perma.cc/HXA9-8JTQ] (last visited Mar. 26, 2022).

112. INT'L FED'N OF THE PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT: THE INDUSTRY IN 2019, at 17 (2020), https://www.ifpi.org/wp-content/uploads/2020/07/Global_Music_Report-the_Industry_in_2019-en.pdf [https://perma.cc/WLP6-5DHW].

113. *Id.* at 13.

114. Mansoor Iqbal, *Spotify Revenue and Usage Statistics (2022)*, BUS. APPS, https://www.businessofapps.com/data/spotify-statistics [https://perma.cc/W7R7-WF8Q] (last updated Jan. 19, 2022).

115. Murray Stassen, *SiriusXM's Annual Revenues Were Up 35% in 2019, but Pandora's Monthly Active Users Fell by Nearly 6M*, MUSIC BUS. WORLDWIDE (Feb. 4, 2020), https://www.musicbusinessworldwide.com/siriusxms-annual-revenues-were-up-35-in-2019-but-pandoras-monthly-active-users-fell-by-nearly-6m [https://perma.cc/K4Y6-FD9W].

company Alphabet, however, appear to be improving. YouTube Music and Premium have over 20 million subscribers, and hundreds of millions more people use the service to stream music videos.[116] Both Apple Music and Amazon Music are in the neighborhood of 60 to 80 million subscribers.[117]

Among the most important developments in contemporary music consumption is the emergence of the playlist as one of the principal means by which people listen to and discover music. Playlists resemble earlier forms of music consumption like radio countdowns or mix tapes.[118] Generally, playlists are comprised of songs by various artists combined according to some governing theme, such as "contemporary R&B" or "classical music for studying."[119] Rather than listening to different albums or selecting individual songs, users can passively listen to music that has been chosen for a particular purpose. Users infrequently make intentional choices about which albums or songs to listen to; rather, they rely on selections made for them by others. Recently, playlists have become one of the most important ways in which people access music on platforms like Spotify and YouTube.[120]

Playlists differ in terms of who creates them and how they are compiled. On Spotify, for example, playlists are created by individual users, by record labels, and by Spotify itself. Users' and labels' playlists are selected by curators based on their own judgment and criteria. Any Spotify user can make their own playlist and share it with other listeners.[121] We call these third-party, individually curated playlists "independent playlists." Some of these independent playlists have thousands—or even tens of thousands—of followers,[122] and, especially in particularly niches, they

116. Stuart Dredge, *Alphabet Reveals YouTube Revenues and Subscription Figures*, MUSIC ALLY (Feb. 4, 2020), https://musically.com/2020/02/04/alphabet-reveals-youtube-revenues-and-subscription-figures [https://perma.cc/4UAH-ZPK5].

117. Stuart Dredge, *How Many Users Do Spotify, Apple Music and Other Music Streaming Services Have?*, MUSIC ALLY (Feb. 3, 2022), https://musically.com/2020/02/19/spotify-apple-how-many-users-big-music-streaming-services/ [https://perma.cc/FA9X-WS8K].

118. Maria Eriksson, *The Editorial Playlist as Container Technology: On Spotify and the Logistical Role of Digital Music Packages*, 13 J. CULTURAL ECON., 415, 415 (2020) ("Building on older practices of queuing tracks before they are broadcasted (as has long been the habit in radio broadcasts and cassette mixtaping for example), playlists were originally introduced to assist fans in the personal organization of musical archives.").

119. Tori Misrok, Note, *How Playlists Broke the Internet: An Analysis of Copyright in Playlist Ownership*, 40 CARDOZO L. REV. 1411, 1426–29 (2019).

120. Spotify's editorial playlists alone account for about thirty percent of streams on the platform. Eriksson, *supra* note 118, at 416.

121. Misrok, *supra* note 119, at 1413.

122. Elias Leight, *There's So Much Music on Spotify, Artists Are Paying for You to (Hopefully) Find Them*, ROLLINGSTONE (July 28, 2020, 4:05 PM) [hereinafter Leight, *There's So Much Music*], https://www.rollingstone.com/music/music-features/spotify-streams-third-party-playlisting-1033700 [https://perma.cc/G9AR-SLXR] ("Some of these rankings have built up healthy followings—right now, for example, there are a pair of user-generated playlists devoted to TikTok songs with over 700,000 followers each, and several more with over 100,000 followers.").

can serve as significant tastemakers.[123] But users wanting to find these independent playlists on Spotify must search for them; Spotify doesn't showcase them on its home screen.[124]

In addition, the three major record labels curate their own playlists that, unsurprisingly, promote music owned by those labels. Warner produces the Digster series of playlists, Universal's playlist series operates under the name Topsify, and Sony playlists are labeled as originating from Filtr.[125] Spotify features some of these label-made playlists in the Featured Playlists and Genres & Moods aspects of its interface.[126]

By far the most important, however, are the playlists that Spotify itself maintains. All of the top 25 playlists are Spotify's own.[127] These playlists fall into one of two categories: (i) editorial, or curated by tastemakers employed by the platform, and (ii) algorithmic, or populated by a proprietary algorithm based on listeners' activity, among other things.[128] Some of Spotify's most popular editorial playlists, for example, include Today's Top Hits (~27 million followers) and RapCaviar (~13.5 million followers).[129] Here, curators choose which songs to include in the playlist and in what order they will be presented. Some of these curators, like RapCaviar's former curator Tuma Basa, have become widely known, even revered for their taste.[130]

Playlists with names like Daily Mix and Discover Weekly comprise the algorithmic offering at Spotify. While the precise mechanics are proprietary, the idea behind the algorithmic playlists is to collect data on listener behavior—which playlists they follow, which songs they skip, which they repeat, which they "like," etc.—and use it to serve similar fare for the user to discover. Unlike editorial playlists which could appear at best subjective, and at worst paid for, algorithmic

123. Luis Aguiar & Joel Waldfogel, *Platforms, Promotion, and Product Discovery: Evidence from Spotify Playlists* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24713, 2018) https://www.nber.org/system/files/working_papers/w24713/w24713.pdf [https://perma.cc/7PR6-6QFN] (noting that one user is credited with helping promote Lorde to international stardom).

124. *See generally* Eriksson, *supra* note 118.

125. Aguiar & Waldfogel, *supra* note 123.

126. *See generally* Eriksson, *supra* note 118.

127. Aguiar & Waldfogel, *supra* note 123, at 7.

128. *See Types of Spotify Playlists*, SPOTIFY FOR ARTISTS, https://artists.spotify.com/help/article/types-of-spotify-playlists?category=promos-and-playlists [https://perma.cc/3CJR-G78L] (last visited Mar. 26, 2022).

129. *Today's Top Hits*, SPOTIFY, https://open.spotify.com/playlist/37i9dQZF1DXcBWIGoYBM5M [https://perma.cc/5CU9-S5BN] (last visited Jan. 12, 2022); *RapCaviar*, SPOTIFY, https://open.spotify.com/playlist/37i9dQZF1DX0XUsuxWHRQd [https://perma.cc/4CBC-4ZGZ] (last visited Mar. 26, 2022).

130. Andy Gensler, *Spotify's Tuma Basa on Curating RapCaviar, What Not to Do When Pitching and why He's No 'Gatekeeper*,*'* BILLBOARD (July 14, 2017), https://www.billboard.com/articles/business/7865934/spotify-tuma-basa-curating-rapcaviar-pitching-playlists [https://perma.cc/J86F-XG2J].

playlists present as objective and "non-discriminatory."[131] Users who listen to a lot of the Frozen soundtrack are going to be served a lot of the Moana soundtrack—not because Disney has paid for it, but because the algorithm has predicted that the users (or their children, as the case may be) will like it.[132]

Placement of a song on any of these playlists, with their millions of followers, is enormously valuable to labels and artists since it generally leads to lots of streams, even (perhaps especially) from passive listeners.[133] Indeed, Spotify's decision to take "several decisive steps toward the establishment of a 'lean-back' customer experience where users are encouraged to consume editorial playlists rather than actively browsing for tracks" has served to further cement playlists' domination of contemporary streaming marketing strategy.[134]

The value of placement on these playlists cannot be overstated. Spotify's top playlists reach larger audiences than major radio stations in top markets, and the effects of placement on a list are staggering.[135] According to recent research by Luis Aguiar and Joel Waldfogel, being added to Spotify's Today's Top Hits raises a song's streams by almost 20 million.[136] Placement on Global Top 50 raises a song's streams by about 3 million, and #1 placement on the U.S. New Music Friday playlist raises a song's streams by about 14 million.[137] Aguiar and Waldfogel estimate that being added to Today's Top Hits is worth between $116,000 to $163,000 in revenues.[138] In sum, "Spotify . . . has substantial effects on which new artists and songs become discovered."[139]

The platform's ability to do so stems, in large part, from its algorithmic testing: "By the time a song lands on Today's Top Hits or other equally popular sets, Spotify has so relentlessly tested it that it almost can't fail."[140] Both the algorithmic playlists and those from individual creators generate data about which

131. Eriksson, *supra* note 118, at 420.

132. *See* Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555 (2019).

133. A passive listener on a streaming service is comparable to a listener of a radio station. The latter picks a genre of station to tune into; the former picks a playlist. In both cases, no further affirmative action is required on the part of the listener; they simply listen to whatever is played to them. *Cf.* An active listener is someone who searches a particular artist, album, or song to listen to, or who puts together their own playlists for streaming. The majority of streaming users are passive listeners, and passive listeners tend to stream more (since music for them is just background to whatever they're really doing).

134. Eriksson, *supra* note 118, at 415.

135. *Id.* at 5.

136. Aguiar & Waldfogel, *supra* note 123, at 3.

137. *Id.*

138. *Id.* at 26.

139. *Id.* at 3.

140. 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 [https://perma.cc/DWV6-RRHH].

songs are performing well. Spotify's human curators can use this data to supplement their judgments about which songs to include on the top editorial playlists.

B. Streaming Music Promotion

Music promotion is a matter of audience persuasion. When selling physical records in brick-and-mortar stores like Best Buy or Tower Records, music sellers relied on the "end cap," or the end-of-aisle real estate facing the consumer walkway. End cap space was scarce, so record labels competed fiercely for the opportunity to be in the most accessible parts of the store.

These days, fewer people are buying physical copies of music. Instead, they access music through one of numerous streaming services, including Spotify, YouTube, Apple Music, Pandora, and Amazon.[141] Music producers no longer chase album sales, but rather streams. While the availability of extensive music catalogs is a boon for listeners, the sheer volume of music makes it even harder for music sellers to command users' attention.[142]

This Section explores music promotion in the streaming era. In addition to analyzing publicly available information and documentation on the various promotional tactics used in the industry, our research includes in-depth qualitative interviews with a dozen industry insiders.[143] These interviewees include heads of independent music promotion companies, label executives, distribution directors, and artist managers. The artists represented by our interview sample range from relatively unknown, developing artists to up-and-coming breakout artists to superstars. The genres of these artists include hip-hop, rock, country, classical, electronic, and pop. Where relevant, their insights have been de-identified and included in the analysis that follows.[144]

Drawing on this research, we describe two principal music promotion strategies in the streaming environment: (1) via playlists and (2) via influencers. The first strategy involves placing songs on influential platform playlists through which many users learn of new music. The second strategy involves engaging and developing fans via social media in hopes of driving those fans to stream. Both of these promotional approaches share a couple of common features. First, they both focus on maximizing the number of streams across consumers (and not necessarily

141. *See generally supra* Introduction.

142. *See generally* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2017).

143. Our interviews were conducted via Zoom or telephone and were recorded and transcribed. Our research was approved by the Institutional Review Boards of the University of Colorado and Yeshiva University. Because our interviewees were providing sensitive information, we promised to preserve their anonymity. Accordingly, we have de-identified the particular individuals who we interviewed. Throughout the Article they are referred to using de-identified letters of the alphabet.

144. For more on research methods, see generally Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, *in* OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Peter Cane & Herbert M. Kritzer, eds. 2010).

the number of consumers). Second, they both offer either or both of explicit advertising (i.e., ads that are marked or tagged as paid advertising) and implicit endorsement (i.e., more ambiguous, "faux-organic" promotion that may be mistaken as authentic) options.

1. Via Playlists

As we explained above, streaming platforms are now many people's primary means for accessing and discovering music. And while it's trivially easy for artists to place their music on streaming platforms, getting it heard by listeners is much more complicated. Playlists, and especially the platforms' editorial playlists, are the key to reaching an audience. Accordingly, the playlists' editors serve as gatekeepers who determine which songs get played to the largest audiences, just as radio DJs did before them. The question for artists and record labels, then, is how to get the gatekeepers' attention.

Of course, all of the platforms, their editors, and the music industry professionals we talked to disclaim any role for payola in streaming music promotion. According to one of our interviewees,

> You cannot control editorial. And you can't buy your way into editorial. None of the existing platforms allow you to purchase your way in. You can run advertising against it, and the platforms allow different forms of advertising on their own platform, but you can't buy your way into editorial playlists. So you have to tell a story, you have to get an editor excited.[145]

Although it would be legal for Spotify's playlist editors to accept payments for placements without disclosing them, both Spotify and the editors go out of their way to establish their freedom from monetary influence.[146] We have no way of knowing whether this is true or not, but the principal actors assert that it is, and our interviewees concur.

So, what legitimate options are available to obtain spots on coveted playlists? Spotify, for example, encourages artists and labels to utilize its "Spotify for Artists" platform in order to pitch tracks directly to its editorial staff for consideration.[147] Pitching is free and requires nothing more than clicking the "Pitch A Song" link on an artist's profile page and providing some basic information, including release

145. Virtual Interview with Interviewee E (Aug. 5, 2020).

146. For example, Spotify writes in its Artist FAQ that "[a]ny service that claims to offer guaranteed placement on playlists on Spotify in exchange for money are in violation of our terms & conditions" and "[w]hen we identify or are alerted to potential or confirmed cases of stream manipulation, we take action that may include the withholding of royalties, the correction of streaming numbers, and measures to ensure the artist or song's popularity is accurately reflected in our charts. Spotify reserves the right to remove manipulated content from the platform." *Paid 3rd-Party Services that Guarantee Streams*, SPOTIFY FOR ARTISTS, https://artists.spotify.com/help/article/third-party-services-that-guarantee-streams [https://perma.cc/6JEH-4KSJ] (last visited Mar. 26, 2022).

147. SPOTIFY FOR ARTISTS, https://artists.spotify.com [https://perma.cc/B7DU-4LCN] (last visited Mar. 26, 2022).

date.[148] It is unclear how effective this approach is; several of our interviewees compared "form pitching" to sending an unsolicited demo to a radio station. The Spotify for Artists FAQ effectively supports this analogy: "Pitching [a song] doesn't guarantee a playlist placement . . . . You can make sure you stay on our editors' radar by building your fanbase and engaging with your audience on Spotify."[149] In other words, feel free to send us an automated form alerting us to your new release, but we're still going to give coveted playlist spots to tracks that demonstrate they already have an audience.

We spoke to some music industry professionals who explained that they treated promoting new music to Spotify editors much as they had treated promoting new music to radio DJs or record store buyers in the past. Record labels—at least the major ones—have regularly scheduled meetings with Spotify's editorial teams where the labels' representatives pitch their upcoming "priority" releases and attempt to garner the interest of the editor in considering them for placement on a coveted playlist. One of our interviewees compared the editorial pitch process to storytelling:

> You have to tell a story. You have to get an editor excited. You have to have them feel part of what's going on. So, in that storytelling process for us, sometimes it involves the artists telling their story, or playing music early for one of the editors to get them excited about a project that they're working on or something that's coming up. Having them feel part of the process, maybe we talk to an editor and they get to help us choose what the first song is that we're going to put into the marketplace. It's all really part of the overall storytelling that we do.[150]

That said, several of our interviewees—particularly those representing artists not signed to a major label—reported better, more reliable results when buying ads on Spotify:

> We always see a spike in . . . the song [we bought ads for] being added to like, Daily Discovery [an algorithmic Spotify playlist], and [we] even see a jump in the next single . . . every time we run one [of these ads] we always see an uptick . . . we keep running these ads [which otherwise have a very low click-thru rate and wouldn't be worth it] for that very reason . . . . [151]

Spotify's Ad Studio tells artists, labels, and promoters that they aren't paying for plays—only for ads—but our interviewees called this a matter of semantics: "Spotify says it's not pay-for-play . . . because pay-for-play is a dirty word,"[152] and

148. *Pitching Music to Our Playlist Editors*, SPOTIFY FOR ARTISTS, https://artists.spotify.com/help/article/pitching-music-to-playlist-editors [https://perma.cc/DNV2-THZ8] (last visited Mar. 26, 2022).

149. *Id.*

150. Virtual Interview with Interviewee A (July 21, 2020).

151. Virtual Interview with Interviewee E, *supra* note 145.

152. *Id.*

> even though [Spotify is] not FCC regulated and the term payola might not be . . . incredibly accurate . . . I mean, it's the same . . . it's the same muscle, right? . . . it's the same thing as radio payola . . . I think you see some people . . . feel like it's less of a, you know, quote unquote unethical practice or crime because you're not violating any FCC regulation, but you know . . . .[153]

Many commentators agree that the line between advertising and pay-for-play is disappearing.[154] In June 2020, Spotify announced a new advertising program called Marquee. On the program's web site, Marquee is described as

> a full-screen, sponsored recommendation of your new release to Spotify Free and Premium listeners who have shown interest in your music and have the potential to listen more. When a listener clicks on a Marquee [ad], they are guided to your new release—and your release alone. This means they can focus solely on your music and discover more of you.[155]

In a case study from folk rock band Mt. Joy's experience with Marquee, Spotify reported an 18% conversion rate return on the band's investment.[156] As part of Mt. Joy's release strategy for their new album, Spotify described the program as "increas[ing] their visibility, warm[ing] up their fans, and get[ting] a chance to *gain visibility on algorithmic and editorial playlists*."[157] In a pitch deck, Spotify advises artists and labels to spend at least $5,000 on Marquee campaigns.[158] According to *Rolling Stone*, "[a]ll this does is continue what payola always has done—the major labels, which have the most money and the most frequent releases, get the most play, consolidating the amount of art that is put out there."[159]

YouTube has a similar ad program, TrueView, that enables an artist or label to have their music video run as an advertisement in front of the video actually requested by the user.[160] This kind of ad is commonly known as a "pre-roll."[161] If

153. Virtual Interview with Interviewee H (Aug. 6, 2020).

154. *See, e.g.*, Leight, *A New Tool*, *supra* note 13.

155. *Campaign Tools: Turn Listeners into Fans with Marquee*, SPOTIFY FOR ARTISTS, https://artists.spotify.com/marquee [https://perma.cc/7PEY-AN7K] (last visited Mar. 26, 2022).

156. *How Mt. Joy Used Marquee's New Audience Segments to Grow Their Fan Base*, SPOTIFY FOR ARTISTS (Nov. 12, 2020), https://artists.spotify.com/blog/mt-joy-marquee-audience-segments [https://perma.cc/9CUM-VTU6]. This is quite high compared to an already "good" ad conversion rate of ten percent. *See* Sarah Berry, *What Is a Good Conversion Rate? (And How Does Yours Compare?)*, WEBFX: MKTG. BLOG (Apr. 15, 2020), https://www.webfx.com/blog/marketing/what-is-a-good-conversion-rate/ [https://perma.cc/L2Y7-7DYB].

157. *How Mt. Joy Used Marquee's New Audience Segments to Grow Their Fan Base*, *supra* note 156 (emphasis added).

158. Leight, *A New Tool*, *supra* note 13.

159. *Id.*

160. *About TrueView Video Campaigns*, GOOGLE ADS HELP, https://support.google.com/google-ads/answer/6381008 [https://perma.cc/P2XX-S852?type=image] (last visited Mar. 26, 2022).

161. Brian Carter, *Why YouTube Pre-Roll Ads Rock & How to Take Advantage of Them*, CONVINCE & CONVERT, https://www.convinceandconvert.com/content-marketing/why-youtube-pre-roll-ads-rock-how-to-take-advantage-of-them [https://perma.cc/M4GH-SQZW] (last visited Mar. 26, 2022).

the user then watches the pre-roll for a certain number of seconds, YouTube adds a "view" to the advertised song's video count.[162] The additional views are valuable to artists and labels because they help demonstrate a song's popularity both to audiences directly and to algorithms and tastemakers who will use data on popularity to make their own decisions.[163]

When it comes to Spotify's algorithmic playlists—those chosen based on data about users' listening habits—there is no human editor to pitch.[164] Part of the perceived value of the algorithmic playlists is their objectivity and freedom from bias.[165] But that doesn't mean there is no way to improve one's chances of getting onto an algorithmic playlist. Spotify has recently announced "Discovery Mode," an alternative promotional opportunity that won't require any upfront costs, but which will only be available in exchange for an artist or label agreeing to accept a lower-than-market royalty payment.[166] A press release from the company describes the new program as an "experiment" in which

> artists and labels can identify music that's a priority for them, and our system will add that signal to the algorithm that determines personalized listening sessions . . . . To ensure the tool is accessible to artists at any stage of their careers, it won't require any upfront budget. Instead, labels or rights holders agree to be paid a promotional recording royalty rate for streams . . . where we provide this service.[167]

This latest forego-pay-for-play offering has been criticized by the Union of Musicians and Allied Workers, who claims that "artists continue to be underpaid, misled, and otherwise exploited by [Spotify]."[168] As we mentioned in the

162. *About TrueView Video Campaigns*, *supra* note 160.

163. On the role of perceived popularity influencing listeners' opinions of quality, see our discussion *infra* notes 223–224.

164. *See, e.g.*, *How Does Spotify's Algorithm Work? Streaming Hacks for Musicians*, DITTO MUSIC: UNSIGNED ADVICE BLOG (July 15, 2020), https://www.dittomusic.com/blog/how-does-spotifys-algorithm-work-streaming-hacks-for-musicians [https://perma.cc/BY9H-RLK6] (identifying important statistics for Spotify's algorithm to include: listening history, skip rate, listening time, and playlist features); Eric Boam, *I Decoded the Spotify Recommendation Algorithm. Here's What I Found.*, MEDIUM (Jan. 14, 2019), https://medium.com/@ericboam/i-decoded-the-spotify-recommendation-algorithm-heres-what-i-found-4b0f3654035b [https://perma.cc/ZZ48-W6A2] (suggesting that, unlike music recommendations coming from a human, "[r]ecommendations coming from machines have a steadier and predictable cadence").

165. Eriksson, *supra* note 118, at 419–20.

166. Ashley King, *Is Spotify's 'Discovery Mode' Worth It? Why It's Not Working Out for Artists, Listeners, or Anyone Who's Not Spotify*, DIGIT. MUSIC NEWS (Sept. 14, 2021), https://www.digitalmusicnews.com/2021/09/14/spotify-discovery-mode-artists-reduce-revenue [https://web.archive.org/web/20210915033218/https://www.digitalmusicnews.com/2021/09/14/spotify-discovery-mode-artists-reduce-revenue/].

167. *Amplifying Artist Input in Your Personalized Recommendations*, SPOTIFY FOR RECORD (Nov. 2, 2020), https://newsroom.spotify.com/2020-11-02/amplifying-artist-input-in-your-personalized-recommendations/ [https://perma.cc/7Y9H-MDGY].

168. *Justice at Spotify*, UMAW, https://www.unionofmusicians.org/justice-at-spotify-demands [https://perma.cc/X2KW-ECNE] (last visited Mar. 26, 2022).

introduction, Discovery Mode has also recently drawn congressional scrutiny.[169] In some respects, this latest version of reverse payola is not much different from giving DJs songwriting credits in exchange for radio plays. Despite the professed outrage, the concept is not new. Pandora made the same agreement with Merlin back in 2014 and faced the same criticisms.[170]

Because the algorithmic playlists are driven by data about prior streaming behavior, artists who want to get picked up by popular algorithmic lists try to boost their performance in other areas of the platform. Several of our interviewees, as well as recent press coverage, emphasize the importance of independent playlisters in providing a valuable path to those coveted placements.

For example, Lance Allen, an independent acoustic guitar player from Nashville, describes "look[ing] at all the artists on Peaceful Guitar, [his coveted playlist] and look[ing] at what other [user-generated] playlists they were on, and [ ] reach[ing] out to those curators."[171] Despite their lack of affiliation with Spotify, the streams generated by these independent playlisters add up—so much so as to register with Spotify's proprietary algorithms. As Allen explains,

> To get on the big playlists, you really have to target the little playlists created by regular consumers. So I would look to see if there was a name and picture associated with the creator, and I would look that person up on Facebook, Instagram, or Twitter. I just took a friendly approach to reaching out to people, so they didn't think I was trying to phish or spam them. I would set aside an hour a day doing this, and eventually got added to all these small playlists.[172]

Although many of the independent playlists Allen solicited may have been relatively small, with only several thousand followers each, the streams add up. And while the artists receive royalties from streams on independent playlists, the real value arises from the data that those streams provide as inputs for the platform's bigger algorithmic playlists. Streams from the independent playlists bubble up to the genre playlists, then to the regional playlists, then (ideally) to the editors and curators of Spotify's most influential playlists. Streams beget streams beget streams. Here, the effect is similar to phenomena like paying off small town DJs or paying for "paper adds" discussed above.[173] By demonstrating success at those venues,

169. *See, e.g.*, Nadler & Johnson Letter, *supra* note 11.

170. *See* Glenn Peoples, *How a Licensing Deal Between Merlin and Pandora Cast a Tall Shadow Over New Webcasting Rates*, BILLBOARD (Feb. 25, 2016), https://www.billboard.com/articles/business/6889363/merlin-pandora-webcasting-iv-copyright-royalty-board-warner-iheartradio [https://perma.cc/8HKW-X8UC].

171. Stuart Berman, *Lance Allen and the New Secrets of DIY Success*, SPOTIFY FOR ARTISTS (May 1, 2018), https://artists.spotify.com/blog/lance-allen-and-the-new-secrets-of-diy-success [https://perma.cc/9WJ4-RDTN].

172. *Id.*

173. *See* SEGRAVE, *supra* note 17.

songs could work their way slowly up the national charts until they were noticed by big city DJs. Spotify's algorithms respond in a similar way as the DJs:

> Marketers believe that happens when a track starts to exhibit characteristics that Spotify's algorithm deems desirable — maybe a low skip rate or a high percentage of listeners saving the track to their personal library. Then marketers say that Spotify's algorithm begins to serve up your song automatically to people who like similar styles of music through recommendation features like Discover Weekly and Daily Mix. The white whale that all the artists and marketers are hunting is a chance to eventually get slotted into one of Spotify's official "editorial" playlists.[174]

This comports with what several of our interviewees told us, namely, that the manipulability of algorithmic playlists extends (albeit less directly) to curated playlists. These streaming music marketing professionals explained that while Spotify's official, curated playlists are indeed programmed by actual humans, experience and experimentation demonstrates that streaming numbers stemming from independent playlists increase the likelihood of a track making it onto a curated playlist. In other words, streams stemming from independent playlists can impact not only algorithmic playlists, like United States Top 50,[175] but can also improve an artist's chances of scoring a placement on Spotify's coveted editorial playlists like New Music Friday.[176] In Spotify's own words, "[t]hese [independent] playlists can carry huge influence and potential for your music."[177]

For artists who don't have the time, inclination, or know-how to pitch independent playlisters themselves, a variety of third-party companies now exist to connect artists with independent playlisters across various platforms and at various price points. One prominent company in this space, Playlist Push, describes itself as "help[ing] independent artists get their music on playlists and giv[ing] playlist curators a way to discover new music."[178] As of this writing, Playlist Push focuses its playlisting efforts on Spotify, specifically catering to both (i) artists and record labels looking to promote their music and (ii) owners of popular independent playlists on Spotify.[179] For artists and record labels, the company offers to send their

174. Leight, *supra* note 122.

175. *Top 50 – USA*, SPOTIFY, https://open.spotify.com/playlist/37i9dQZEVXbLRQDuF5jeBp [https://perma.cc/N8AG-TH45] (last visited Sept. 12, 2021) (counting 3,369,344 playlist followers as of Sept. 12, 2021).

176. *New Music Friday* Playlist, SPOTIFY, https://open.spotify.com/playlist/37i9dQZF1DX4JAvHpjipBk [https://perma.cc/W99A-9KH7] (last visited Sept. 12, 2021) (counting 3,801,049 playlist followers as of Sept. 12, 2021).

177. *How Do I Get My Music on a Spotify Playlist?*, SPOTIFY FOR ARTISTS: FAQ, https://artists.spotify.com/faq/promotion#how-do-i-get-my-music-on-a-spotify-curated-playlist [https://web.archive.org/web/20210205070823/https://artists.spotify.com/faq/promotion#how-do-i-get-my-music-on-a-spotify-curated-playlist] (last visited Feb. 5, 2021).

178. *What We Do: Connecting Artists to Playlist Curators*, PLAYLISTPUSH, https://playlistpush.com/ [https://perma.cc/Q6UB-9ST9] (last visited Mar. 26, 2022).

179. The latter two categories will be alternately referred to as "influencers" throughout.

music to independent playlisters that curate playlists in the relevant genre, and it charges the artist only when an independent playlister agrees to add the artist's music to a playlist.[180] Playlist Push pays independent playlisters on Spotify up to $12 per song just for listening and considering its placement on a playlist.[181]

Notably, the terms of service for Spotify explicitly prohibit this monetization by their users. Paragraph seven of Spotify's terms of service specifies that "[t]he following is not permitted for any reason whatsoever . . . selling a user account or playlist, or otherwise accepting or offering to accept any compensation, financial or otherwise, to influence the name of an account or playlist or the content included on an account or playlist[.]"[182] On its "Spotify for Artists" platform, the company goes so far as to warn artists and their representatives to "[a]lways avoid services that guarantee streams or playlist placement. Their illegitimate practices could result in your music being removed from Spotify. It's important to know you're putting your career at risk any time you engage with one of these bad actors."[183]

Nonetheless, according to our interviewees, artists can expect to budget $500 to $1,500 per song for independent playlisting. Playlist Push's website reports a similar range: "The average Spotify campaign cost is around $450. However, pricing can range from as low as $300 to $1,000+ depending on which genres and matching you select."[184]

An independent playlister campaign on Spotify purchased through Playlist Push offers an artist or label two things: First, it offers the hope that a prominent playlister (or two or three) will pick up the track and add it to one (or more) of their popular playlists, thereby racking up streams and streaming royalties. Secondly, and more importantly, it increases the chances of getting the track in front of an official Spotify editor (for the reasons we describe above).

Given the lack of publicly available information about how Spotify's algorithms work, we can only speculate as to the precise mechanism by which this happens, but the consensus among our interviewees is that the quantity of streams generated from the independent playlists somehow triggers Spotify's algorithm to tip off official curators to a hot new track. As one interviewee explained it: "We're basically just paying to fast-forward the algorithm . . . . It's like a fast pass at

180. *Artists and Record Labels: Reach Playlist Curators*, PLAYLISTPUSH, https://playlistpush.com/artists [https://perma.cc/TT86-GR6S] (last visited Mar. 26, 2022).

181. *For Playlist Owners: Discover New Music for Your Playlists*, PLAYLISTPUSH, https://playlistpush.com/curators [https://perma.cc/SL4G-5NUP] (last visited Mar. 26, 2022).

182. *Spotify User Guidelines*, SPOTIFY, https://www.spotify.com/us/legal/user-guidelines [https://perma.cc/YN6X-SS3Z] (last visited Mar. 26, 2022).

183. *Guide*, SPOTIFY FOR ARTISTS, https://artists.spotify.com/guide/promotion [https://web.archive.org/web/20210122071741/https://artists.spotify.com/guide/promotion] (last visited Jan. 22, 2021).

184. Steve Kim, *How Much Does a Campaign Cost?*, PLAYLISTPUSH, http://help.playlistpush.com/en/articles/1888782-how-much-does-a-campaign-cost [https://perma.cc/WM2F-9T4Z] (last visited Mar. 26, 2022) (explaining that variation depends on how many playlists a campaign targets).

Disneyland . . . . We're manipulating the algorithm. We're paying to cut in line."[185] In other words, songs doing well on independent playlists are more likely to be surfaced to editorial for placement on the most coveted playlists. Without the independent playlisters, these same songs might never attract an editor's attention. This predicament mirrors the one that indie musicians found themselves in vis-à-vis radio DJs in the era of broadcast payola.

2. Via Influencer

The second category of streaming music promotion involves the engagement of intermediary tastemakers with an established audience. The enormous amount of music on streaming services presents a challenge, not just for artists and labels who want to reach listeners but also for listeners themselves who must decide how to spend their time. Listeners rely on tastemakers to cut through the morass of content available on the internet today and surface the "best" or most relevant content for a particular user. Listeners trust tastemakers' judgment, and, as we have seen, they may be skeptical when they think that judgment has been corrupted by advertisers. Accordingly, both influencers and the record labels that rely on them for promotion try to ensure that pay-for-play endorsements come across as organic and convey genuine enthusiasm.

The sheer volume of content on the internet has created opportunities for people who can reliably point others toward works they may like. These people are often referred to as influencers, and they exist in every product category.[186] Because other users trust influencers' judgment, companies with products to sell pay influencers to advertise their goods.[187] And just as a makeup brand might hire a Kardashian or a Hadid to convince consumers to purchase its products, so too will record labels broker deals with influencers to promote their music. The logic behind influencer marketing is basically the same as traditional celebrity endorsements. People trust the Kardashians, the Hadids, and smaller nano-influencers alike as tastemakers, so when they promote a product, consumers are more willing to purchase it.[188]

While Facebook and Instagram are the most popular platforms for advertising retail goods, TikTok, a social media platform featuring very short videos, has quickly become one of the leading influencer platforms for musicians and their representatives.[189] The platform, which got considerable public attention from the

185. Virtual Interview with Interviewee E, *supra* note 145.

186. *See generally* Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81 (2020).

187. *Id.* at 83 (estimating influencer marketing budgets at $10–20 billion a year).

188. Sapna Maheshwari, *Are You Ready for the Nanoinfluencers?*, N.Y. TIMES (Nov. 11, 2018), https://www.nytimes.com/2018/11/11/business/media/nanoinfluencers-instagram-influencers.html [https://perma.cc/735D-DAX4].

189. *See* Louis Staples, *Instagram Insiders Reveal Its Growing TikTok Turmoil*, WIRED (Sept. 14, 2021, 6:00 AM), https://www.wired.co.uk/article/instagram-identity-crisis-tiktok [https://perma.cc/C8FR-8HRU].

Trump administration's threats to ban it,[190] is emerging as a popular means of discovering—and rediscovering—music. TikTok claims 800 million worldwide users, and it was the most downloaded app of 2020.[191]

In a recent report released by the company, TikTok touts its successes promoting music.[192] More than 175 songs appeared in videos that were seen one billion times each during 2020.[193] These views came from more than 125 million separate user-generated videos.[194] Ninety songs that trended on TikTok made the Billboard Hot 100, and five of them reached number one.[195] Of course, some of this is the result of the pop culture echo chamber: people like to use popular songs in their videos, so the popularity predates the song. But that certainly isn't always the case.

Consider TikTok's greatest success story to date: Lil Nas X's 2019 hit "Old Town Road." After uploading the song to Spotify, Lil Nas X worked tirelessly to promote the song via TikTok. He ultimately found success when a clip from the song got turned into the #YeeYeeJuice meme. TikTok user @nicemichael (2 million followers) created a video in which, through a jump cut, he magically transforms from a goofy kid wearing a hoodie and basketball shorts into a "cowboy." From there, other users originated a routine in which they (or their pets) consumed a beverage called "yee yee juice" that turned them into cowboys.[196] Within weeks, Lil Nax X had recorded a remix of the song with country music star Billy Ray Cyrus that was viewed over 700,000 times on YouTube on the first day of its release.[197] Ultimately, Lil Nas X rode his social media success to a record-breaking nineteen consecutive weeks at number one on the Billboard Hot 100 chart.[198]

190. David McCabe, *TikTok Is Poised to Outlast Trump, and to Test Biden*, N.Y. TIMES https://www.nytimes.com/2021/01/15/technology/tiktok-biden.html [https://perma.cc/6DGP-6ZZX] (last updated June 9, 2021). TikTok is owned by the Chinese company ByteDance, which is estimated to be worth $140 billion. Will Schube, *What TikTok's 2020 Says About the State of the Music Industry*, RINGER (Jan. 12, 2021, 7:00 AM), https://www.theringer.com/music/2021/1/12/22225880/tiktok-annual-report-streaming-services [https://perma.cc/7ANG-C8G5].

191. *Id.*

192. *See Year on TikTok: Music 2020*, TIKTOK (Dec. 16, 2020), https://newsroom.tiktok.com/en-us/year-on-tiktok-music-2020 [https://perma.cc/TJ6U-K86Q].

193. *Id.*

194. *Id.*

195. *Id.*

196. *Old Town Road*, KNOW YOUR MEME, https://knowyourmeme.com/memes/old-town-road [https://perma.cc/D9PX-4WZE] (last updated Feb. 20, 2020, 11:40 AM; Lauren Strapagiel, *How TikTok Made "Old Town Road" Become Both a Meme and a Banger*, BUZZFEED NEWS (Apr. 9, 2019, 4:27 AM), https://www.buzzfeednews.com/article/laurenstrapagiel/tiktok-lil-nas-x-old-town-road [https://perma.cc/AM82-UBW8].

197. *Old Town Road*, *supra* note 196.

198. Andrew Unterberger, *19 Weeks of 'Old Town Road': A Week-by-Week Look Back at Lil Nas X's Historic Run at No. 1 on the Hot 100*, BILLBOARD (Aug. 20, 2019), https://www.billboard.com/articles/columns/chart-beat/8524232/lil-nas-x-old-town-road-week-by-week-number-one [https://perma.cc/4PVM-GZ73].

Seeing Lil Nas X's success, other artists and labels have tried to promote their songs on TikTok as well. "Old Town Road" succeeded for a number of reasons, including Lil Nas X's efforts and detailed knowledge of social media, the creativity employed by other users to develop the song into a meme, and the fact that, put simply, it slaps. Other artists less gifted with this collection of resources have relied on influencers to help their songs find audiences on TikTok. For example, in early 2019, aspiring rapper Flo Milli paid TikTok user @nicemichael, the same guy who helped break "Old Town Road," to do a dance for Flo Milli's track "Beef Flomix."[199] After the clip garnered over 100,000 likes, Flo Milli was signed to RCA Records—not a bad result for a $200 marketing spend.[200]

Of course, TikTok's biggest influencers can command much higher payments. *Rolling Stone*'s Elias Leight reports that the platform's biggest sensations, Charli D'Amelio, Addison Rae, and others, charge tens of the thousands of dollars to post videos dancing to songs.[201] Moreover, the influencers aren't even responsible for choreographing new moves—they simply post videos of themselves performing trending dances.[202] Once the mega-influencers perform the dance, other users (and would-be influencers) take it up and continue the trend.

According to Billboard, Haley Sharpe, a high schooler from Alabama, is one of TikTok's top ten most popular accounts with 1.6 million followers.[203] In her videos, Sharpe dances—disco-style—in her white-tiled bathroom.[204] Her dance to Doja Cat's song "Say So" garnered over 10 million "hearts" (or "likes"), sending the track rocketing onto the Top 100 charts. Recording artist Doja Cat was so appreciative that she flew the influencer out to meet her personally. Sharpe's promotion of Doja Cat's track is said to have been genuinely organic.[205] Sharpe just happened to be a big fan, dancing to a song she loved. This dynamic is the appeal of TikTok, certainly, but it isn't always the case.

199. Elias Leight, *Want a TikTok Hit? Have $30,000?*, ROLLINGSTONE (June 11, 2020, 12:47 PM) [hereinafter *Want a TikTok Hit?*], https://www.rollingstone.com/music/music-features/tiktok-promotion-costs-1012697 [https://perma.cc/937Z-8HTE].

200. *Id.*

201. *Id.*

202. *See* Amelia Tait, *Meet the Choreographers Behind Some of TikTok's Most Viral Dances*, WIRED (Aug. 8, 2020, 6:00 AM), https://www.wired.co.uk/article/tik-tok-dances [https://perma.cc/QQK7-T9A5].

203. Mia Nazareno, *10 TikTok Music Influencers You Need to Know*, BILLBOARD (June 22, 2020), https://www.billboard.com/articles/columns/viral-videos/9404320/10-tiktok-music-influencers [https://perma.cc/ZGV2-RB4N].

204. Amy Francombe, *Doja Cat is Doing It for the Fans*, FACE (Mar. 2, 2020), https://theface.com/music/doja-cat-say-so-music-video-tiktok-haley-sharpe [https://perma.cc/Q8VD-TCCM].

205. Why exactly was Sharpe's video such a big hit? Sharpe says it's because "the dance is easy, cute and fun while the song is happy." *Id.* Now, with all the new followers she has amassed (currently over 3.5 million), see Haley Sharpe (@yodelinghaley), TIKTOK, https://www.tiktok.com/@yodelinghaley?lang=en [https://perma.cc/9JGU-6SVE] (last visited Mar. 26, 2022), Sharpe is on the lookout for new tracks to concept a dance to (in the hope it goes viral on TikTok). Francombe, *supra* note 204.

It's not just new music that benefits from TikTok promotion. Perhaps the most profound, yet inscrutable, viral moment of 2020 came from Nathan Apodaca—@Doggface208 on social media—who recorded a video of himself skateboarding while drinking cranberry juice with Fleetwood Mac's 1977 song "Dreams" playing in the background.[206] The song was a number one hit over 40 years ago, but, on the back of Apodaca's video and the thousands of similar ones created by other users, "Dreams" reentered the charts and peaked at number twelve—in 2020! Normally, a track becomes part of a record label's "catalogue" within eighteen months of its release, where most songs then get little or no promotional support.[207] But streaming services, in particular TikTok, have shown that catalogue music can retain enormous value in the streaming age.[208] In 2020, older songs by The Black Eyed Peas, Run DMC, John Lennon, and—our favorite—Boney M all made a comeback.[209] Given recent purchases of publishing catalogues by investors, we anticipate greater investment in promoting this content on streaming services.[210]

It is clear that labels are increasingly focusing on TikTok and setting aside budgets for influencer promotion. Jacob Pace, the twenty-one-year-old CEO of multi-platform media brand Flighthouse—which is owned by Create Music Group and has 24.8 million followers on its official TikTok—says that the Los Angeles-based company is now getting an "overwhelming" number of requests from labels to help them prepare music releases for TikTok and connect with influencers.[211] For example, in 2019 the company was engaged to promote the song "Sunday Best" on TikTok.[212] Flighthouse "paid a group of influencers including Charli D'Amelio . . . to use [the song] in videos showcasing memories from the past

206. Laura Zornosa, *Nathan Apodaca is the Skateboarding, Fleetwood Mac-Loving TikTok Star that 2020 Needs*, L.A. TIMES (Oct. 2, 2020, 4:30 PM), https://www.latimes.com/entertainment-arts/story/2020-10-02/nathan-apodaca-is-the-skateboarding-fleetwood-mac-loving-tiktok-star-that-2020-needs [https://perma.cc/TN96-WLH8].

207. Will Page, *Does the Music Industry's Definition of 'Catalogue' Need an Upgrade?*, MUSIC BUS. WORLDWIDE (Dec. 5, 2017), https://www.musicbusinessworldwide.com/music-industrys-definition-catalogue-need-upgrade/ [https://perma.cc/4PW6-6DRG]; Randy Miramontez, *Fleetwood Mac's 'Dreams' Hits Number 1 on the Charts Thanks to Viral TikTok*, 107.5 MIX (Oct. 9, 2020), https://www.heymix.com/2020/10/09/fleetwood-macs-dreams-hits-number-1-on-the-charts-thanks-to-viral-tiktok [https://perma.cc/3G7A-NNFX].

208. Will Page, *Taylor Swift, Bob Dylan and the Future of Streaming*, FIN. TIMES (Dec. 17, 2020), https://www.ft.com/content/deaf2fbf-ab2f-4d1a-b870-7fab104c122f?segmentid=acee4131-99c2-09d3-a635-873e61754ec6. [https://perma.cc/5NNF-BTNT].

209. *Year on TikTok: Music 2020*, *supra* note 192.

210. *See, e.g.*, Ben Sisario, *This Man Is Betting $1.7 Billion on the Rights to Your Favorite Songs*, N.Y. TIMES (Dec. 23, 2020), https://www.nytimes.com/2020/12/18/arts/music/merck-mercuriadis-hipgnosis.html [https://perma.cc/WEP5-WM4J].

211. Tatiana Cirisano, *The Real TikTok Challenge? Turning Influencer Status into Hitmaker Clout*, BILLBOARD, (June 22, 2020), https://www.billboard.com/articles/news/9402883/tiktok-influencers-music-hits-report [https://web.archive.org/web/20200628133345/https://www.billboard.com/articles/news/9402883/tiktok-influencers-music-hits-report].

212. *Id.*

year."[213] By year's end, the song had been used in over 763,000 TikTok videos and counting. Those TikTok videos led to real streams on music streaming platforms like Spotify.[214] According to Nielsen Music/MRC Data, "[t]otal on-demand audio streams of 'Sunday Best' jumped from 2.1 million in the week ending Nov. 21, 2019, to 11.5 million in the week ending Jan. 30, 2020."[215]

Warner Records' Senior VP of Fan Engagement and Digital Marketing, Elissa Ayadi, says that the most successful campaigns happen when she gives influencers creative control over how they use a song: "We try and give them the least amount of direction possible, honestly . . . . When we go to influencers, we're really going after their expertise. We want them to come up with content that is going to speak to their base."[216] Ultimately these influencers, much like the DJs of the broadcast payola era, are becoming music industry powerhouses and leading tastemakers.

Just as with playlister promotion, this new influencer-driven form of pay-for-play is so attractive that an entire industry has formed to facilitate it. One of the most prominent companies in the influencer marketing space today is called Influencer Marketing Hub. Its business model, like that of its competitors, is simple: they play matchmaker to brands, creators, and influencers.[217] Playlist Push pitches new music not just to playlisters but also to social media influencers. Playlist Push charges musicians a minimum of $300 for a TikTok promotion campaign.[218] For that price, Playlist Push will add a musician's song to a catalog that they distribute to influencers. The influencers can select a track they'd like to make a video with and earn payouts starting at $10 per video for each song used.[219] A recent *Forbes* piece listed the top six TikTok influencers as earning between one to five million dollars each from 2019 to 2020.[220] Aspiring influencers can use tools such as Influencer Marketing Hub's Instagram Money Calculator[221] to estimate how much they could earn by monetizing their account through a third-party service.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Influencer Marketing News and Resources*, INFLUENCER MKTG.HUB, https://influencermarketinghub.com/influencermarketing [https://perma.cc/3TXN-ZZLN] (last visited Mar. 26, 2022).

218. Kim, *supra* note 184 (describing the variation in cost as being attributable to how many playlists a campaign targets).

219. George Goodrich, Alex Mitchell-Hardt & TJ Jones, *How to Make Money from Your TikTok Account*, PLAYLISTPUSH (July 16, 2020), https://playlistpush.com/blog/how-to-make-money-from-your-tiktok-account [https://perma.cc/Q3P3-B986].

220. Abram Brown, *TikTok's 7 Highest-Earning Stars: New Forbes List Led by Teen Queens Addison Rae and Charli D'Amelio*, FORBES (Aug. 6, 2020, 6:30 AM), https://www.forbes.com/sites/abrambrown/2020/08/06/tiktoks-highest-earning-stars-teen-queens-addison-rae-and-charli-damelio-rule/?sh=164ebb0b5087 [https://perma.cc/LYK6-38BT].

221. Werner Geyser, *Instagram Influencer Sponsored Post Money Calculator*, INFLUENCER MKTG.HUB, https://influencermarketinghub.com/instagram-money-calculator [https://perma.cc/4NFJ-GW9L] (last updated Sept. 7, 2021).

Notably, the terms of service for TikTok explicitly prohibit this monetization by their users. According to TikTok's terms of service, users

> have no right to receive any income or other consideration from any User Content . . . or your use any musical works, sound recordings or audiovisual clips made available to you on or through the Services, including in any User Content created by you, and . . . are prohibited from exercising any rights to monetize or obtain consideration from any User Content within the Services.[222]

YouTube's terms prohibit this conduct as well. Specifically, users are not allowed to "cause or encourage any inaccurate measurements of genuine user engagement with the Service, including by paying people or providing them with incentives to increase a video's views, likes, or dislikes, or to increase a channel's subscribers, or otherwise manipulate metrics in any manner;" nor to "use the Service to . . . sell any advertising, sponsorships, or promotions placed on, around, or within the Service or Content."[223]

For some commentators, TikTok influencers and the payments they command are the twenty-first century version of radio DJs and the payola they accepted. Complaints about streaming payola abound.[224] However, as we explore in the next Section, there are important distinctions between these promotional practices that may merit different treatment.

C. Traditional v. Streaming Pay-for-Play: A Comparison

Throughout decades of change in the production, delivery, and consumption of music, the concept of pay-for-play has remained remarkably constant. As discussed in Part I, traditional broadcast payola attracted the attention of regulators because of its marked disruption of the status quo. Unlike the pianists paid to play in Woolworth's, or the Vaudeville performers paid to sing certain songs—both of which served to maintain the dominance of mainstream music—broadcast payola opened the door to marginalized music, thereby displacing formerly popular music and putting many of ASCAP's songwriters out of work.[225]

Streaming payola has likewise disrupted the mainstream music industry's conventional approach to marketing—namely, release a single to radio, work it until

222. *Legal*, TIKTOK, https://www.tiktok.com/legal/terms-of-use?lang=en [https://perma.cc/9MK8-572Y] (last updated Feb. 2019).

223. *Terms of Service*, YOUTUBE (Jan. 5, 2022), https://www.youtube.com/static?template=terms [https://perma.cc/3JYE-QWTL].

224. Chris Stokel-Walker, *Tiktok's Payola Problem: Who's Being Paid, for What?*, TELEGRAPH (Aug. 19, 2020, 11:23 AM), https://www.telegraph.co.uk/music/news/tiktoks-payola-problem-paid [https://perma.cc/GWS3-TRFZ].

225. *See* DAVID OZMUN, MUSIC, MONEYMAKERS, MINORITIES, AND MARGINALIZATION: A STATISTICAL LOOK AT AFRICAN-AMERICAN POP MUSIC SUCCESS BEFORE AND AFTER THE RADIO PAYOLA SCANDAL 4 (2019), https://scholarlycommons.obu.edu/cgi/viewcontent.cgi?article=1013&context=lecture [https://perma.cc/4DFN-AE4B].

it hits the charts, release a second single, work it, release an album, go on tour. In the streaming era, the concept of a "release" has been diluted. A track can be set to go live on a platform on a certain date, but due to the diffuse listener base dispersed across platforms, the marketing plan of "release date as an event" no longer works for any but the very biggest artists.[226] Instead, the goal is to attract the attention of a playlister or in-house editor in hopes that they will "work the track" by adding it to popular playlists.

There are distinct similarities between the processes that artists and labels used in the twentieth century and those that they use today to promote new music. Of course, they could try to directly pay the most influential tastemakers, DJs like Dick Clark or Spotify playlisters like Tuma Basa. But access to elite intermediaries is often impossible and always expensive. Alternatively, artists and labels have sought subtler means to build audiences. As we saw in Part I, in the radio era, labels paid lower-tier DJs for "paper adds" that would improve their numbers in national charts. Today, we see artists and labels using YouTube's True View feature to boost purported "views" of their videos.[227] Or they work to get added to Spotify's popular, user-created playlists so their songs are eventually noticed by Spotify's algorithms or curators. All of these strategies entail expending money and/or effort to manipulate "objective" indicators of success. Just like the "paper adds" of radio's heyday, "playlist adds" function like a popularity contest: a song is popular not because it is objectively "good" but because a popular playlister says it is.

Across time and platforms, pay-for-play—be it broadcast or streaming—also functions as an unexpected access point. Namely, smaller, less well-connected and less well-funded artists, labels, and distributors can pay to break into a field previously reserved only for the majors. In the context of broadcast payola, that meant a Black artist paying for airtime on a station they were otherwise barred from. In the context of streaming payola, it means an independent artist like Lance Allen nickel-and-diming his way onto various small-time playlists until Spotify's algorithm finally picks him up and puts his tracks on one or more of its coveted playlists.[228] Or it can mean engaging with social media influencers as Lil Nas X and others have done to break into the mainstream.[229]

In other words, streaming payola may offer the smaller indie artist a chance to achieve—through payment—the exposure that a major label artist might be able to get through his label's cache and connections. While it's true that these pay-for-play payments might be better borne by a major label with deep pockets, many of them are at least contemplatable even for a developing artist. It is conceivable, for example, for an indie artist or label to budget $500 to buy video of a new single on

226. One of the authors admits to waiting up until midnight for the releases of the latest Taylor Swift and Lady Gaga albums, which, given his age, was rather impressive.

227. *See* discussion *supra* Section II.A.1.

228. Berman, *supra* note 171.

229. *Id.*

TikTok. It is much less conceivable for these parties to compile the millions of dollars required to rent a Times Square billboard.[230]

In the days of traditional broadcast payola, independent promoters like Alan Freed and groups of independent promoters like The Network ran the pay-for-play business.[231] Likewise, independent promoters like Playlist Push facilitate the streaming payola game. As with traditional payola promoters, streaming payola promoters' efforts primarily target young people.[232] Where famous DJs like Freed accepted payment to arrange and promote impromptu rock & roll concerts attracting hundreds of young attendees, TikTok influencers accept payment to create and promote short dance moves set to a particular tune and then encourage their replication by millions of young followers.[233]

There are, of course, differences between traditional broadcast payola and streaming payola. The first is impetus. Unlike the negative attention and punitive treatment received by radio payola, the opposition to streaming payola does not appear to be a cover for racism. Rather, the critiques of influencers, playlists, and the like stem from concerns—perhaps misplaced—about extant and worsening inequalities in an increasingly consolidated music industry.[234]

A second difference is the diffusion of promotional channels available to musicians. Although there are only a handful of music streaming platforms, each platform has millions of would-be influencers who can promote music to their followers. There are, at most, ten radio stations with at least 3 million weekly

230. Jim Edwards, *Here's How Much It Actually Costs to Buy One of Those Times Square Billboards*, BUS. INSIDER (Dec. 31, 2012, 7:45 AM), https://www.businessinsider.com/what-it-costs-to-advertise-in-times-square-2012-12 [https://perma.cc/7L7Y-UBVF] (listing the annual cost of a Times Square billboard between $1.1–4 million, or $5,000/day).

231. *See supra* Part I.

232. Perhaps due to the fact that many young people have limited disposable income, they tend to be attracted to platforms that offer a free tier. Over half of Spotify listeners are under 35, for example. *See* Iqbal, *supra* note 114. Similarly, 60% of TikTok users are aged 16–24. *See* Mansoor Iqbal, *TikTok Revenue and Usage Statistics (2022)*, BUS. APPS, https://www.businessofapps.com/data/tik-tok-statistics/#:~:text=TikTok%20demographics,%20and%2025%2D34%20year%20olds [https://perma.cc/QX2K-RF5G] (last updated Feb. 24, 2022).

233. The largest demographic on TikTok is sixteen to twenty-four-year-olds, the prime target for music marketers. Salman Aslam, *TikTok by the Numbers: Stats, Demographics & Fun Facts*, OMNICORE (Mar. 13, 2022), https://www.omnicoreagency.com/tiktok-statistics/#:~:text=TikTok%20Demographics,26%25%20between%2018%20and%2024 [https://perma.cc/S7H9-ZT7J].

234. *See generally* Brian Penick, *Post-Pandemic Music Industry Predictions: The Consolidation of Power*, FORBES (May 29, 2020, 1:59 PM), https://www.forbes.com/sites/brianpenick/2020/05/29/post-pandemic-music-industry-predictions-the-consolidation-of-power/?sh=13b6a0f96ffb [https://web.archive.org/web/20210216233016/https://www.forbes.com/sites/brianpenick/2020/05/29/post-pandemic-music-industry-predictions-the-consolidation-of-power/?sh=13b6a0f96ffb] ("Based on the increased investment interest, the movement from the major labels and publishers and the historical context of event acquisitions . . . will lead to further consolidation in the music industry.").

listeners in the United States.[235] The most listened to station, WLTW in New York, has about 5 million daily listeners.[236] By contrast, the hundredth most popular TikTok account has over 13 million followers.[237] And the twentieth most popular Spotify playlist has more followers than the most popular radio station in the country.[238] Thus, for music promoters there are substantially more channels of influence available in the streaming world. In addition, from the listener's perspective, there are far more gatekeepers and intermediaries who can direct you to enjoyable music.

The final difference is regulation. Broadcast radio falls under the jurisdiction of the FCC.[239] As detailed in Part I, this allowed the agency to promulgate and enforce payola regulations beginning in the 1960s (and again as recently as 2019).[240] Streaming music platforms like Spotify and YouTube, along with social media platforms like TikTok and Instagram, do not fall under the FCC's jurisdiction. For this reason, payola regulations do not apply to them. This difference is only a concern, of course, if streaming payola causes harm. The next Part will discuss this possibility.

III. TRADITIONAL JUSTIFICATIONS FOR REGULATING PAYOLA

Recently, music industry participants and scholars have begun calling for regulation of streaming pay-for-play practices comparable to those applicable to broadcast pay-for-play practices, and the American and British governments may be willing to look more closely at some of these practices.[241] The United States has

235. Marie Charlotte Götting, *Leading Radio Stations in the United States as of July 2017, by Unique Weekly Listeners*, STATISTA (Jan. 8, 2021), https://www.statista.com/statistics/707055/leading-radio-stations/[https://perma.cc/UT5X-B3Y9].

236. *Id.*

237. *Top 100 TikTok Influencers: Ranked by Followers*, OBVIOUSLY, https://www.obvious.ly/top-100-tiktok-influencers-by-followers [https://web.archive.org/web/20210216233203/https://www.obvious.ly/top-100-tiktok-influencers-by-followers] (last updated July 14, 2020).

238. Bruce Houghton, *20 Most Popular Playlists on Spotify*, HYPEBOT (Nov. 12, 2020), https://www.hypebot.com/hypebot/2020/11/20-most-popular-playlists-on-spotify.html [https://perma.cc/DHN3-D5YY].

239. *What We Do*, FED. COMMC'N COMM'N, https://www.fcc.gov/about-fcc/what-we-do [https://perma.cc/2W7P-TBPU] (last visited Mar. 26, 2022).

240. *See supra* Part I.

241. *See* Noah Yoo, *Could Spotify's New Discovery Mode Be Considered Payola*, PITCHFORK (Nov. 9, 2020), https://pitchfork.com/thepitch/could-spotifys-new-discovery-mode-be-considered-payola [https://perma.cc/4RJT-Y3T4]; Luke Girgis, Opinion, *What People Are Missing on Spotify's Payola Debacle*, INDUS. OBSERVER (May 11, 2020), https://theindustryobserver.thebrag.com/spotifys-payola-debacle [https://perma.cc/UVV9-3J7H] (cataloging complaints about Spotify); Dylan Smith, *Songwriters Slam Spotify for Openly Practicing Payola*, DIGIT. MUSIC NEWS (Nov. 16, 2020), https://www.digitalmusicnews.com/2020/11/16/spotify-ecsa-payola-criticism [https://web.archive.org/web/20201116204138/https://www.digitalmusicnews.com/2020/11/16/spotify-ecsa-payola-criticism/]; Murray Stassen, *Could an Overhaul of Payola Rules Be on the Horizon? Majors Asked to Explain Anti-Payola Practices to FCC*, MUSIC BUS. WORLDWIDE (Jan. 22, 2020), https://

been regulating at least some aspects of pay-for-play in the music industry since 1934.[242] Throughout the years, industry participants, legislators, and regulators have put forward various normative arguments about what's wrong with payola. In this Part, we canvas those arguments and explain the perceived harms that payola regulation is meant to prevent. We draw on both historical research on the industry scandals of the twentieth century and our own interviews with contemporary music industry professionals. Only by understanding why the government might be justified in regulating payola can we determine whether the streaming payola practices described in Part II might pose risks that warrant legislative intervention.

A. Harms to Consumers

When justifying the regulation of broadcast payola, proponents have frequently asserted that it is bad for music consumers. This argument generally has two parts: First, proponents of payola regulation argue that monetary motives corrupt editorial judgment, leading to inferior music. Second, they argue that if listeners are going to be subject to musical choices that have been paid for, they have a right to know about the payment (presumably, to adjust their susceptibility accordingly). Thus, failing to disclose sponsorship impairs consumers' ability to make informed consumption decisions.[243]

The most oft-repeated argument during the mid-century payola scandal was that pay-for-play corrupts DJs' editorial choices, with the result that listeners are subject to lower quality music than they would be if songs competed on "merit" alone.[244] Only by offering DJs money and gifts, the argument goes, could the likes of Elvis Presley and Little Richard find an audience for their tunes.[245] The FCC seems to have embraced the merit argument in the past, noting that music selections "must be guided by intrinsic merit."[246] In other words, when DJs' or playlisters' selections are dictated by payment, their recommendations cannot be trusted.

Similar arguments are now being made in the context of streaming payola. Especially popular is the notion that editorial selections are—or at least ought to be—"untouchable." Editors are paid to "speak the truth," not to say whatever they're paid to say. As one interviewee put it, musicians and labels do not pay the bills: "I'm a writer at Rolling Stone. I'm employed by Rolling Stone. I get paid by Rolling Stone to write about [music]."[247] Instead of payment, RapCaviar's Basa says

www.musicbusinessworldwide.com/could-an-overhaul-of-payola-rules-be-on-the-horizon-majors-asked-to-explain-anti-payola-practices-to-fcc [https://perma.cc/GY6L-7UAL].

242. 47 U.S.C. § 151; *see supra* Section I.B.

243. *See generally* Zahr K. Said, *Mandated Disclosure in Literary Hybrid Speech*, 88 WASH. L. REV. 419 (2013).

244. *See supra* notes 57–59.

245. *Id.*

246. Metroplex Commc'ns, Inc., 4 F.C.C.R. 8149, 8153 (1989) (asserting that selections of music for broadcast "must be guided by intrinsic merit").

247. Virtual Interview with Interviewee E, *supra* note 145.

he relies on "gut and data" when selecting songs to playlist[248]: "Stimulation informs my personal tastes . . . . If music stimulates me somehow, I mess with it on a personal level. I keep up through people whose tastes I trust or whose knowledge base I respect—mostly in real life, but sometimes on social media—and that's all we talk about!"[249]

Interestingly, the "money corrupts" argument assumes that songs have some inherent and objectively measurable "merit." All of the research that we could find, along with a combined century of experience tolerating people with poor musical taste, suggests quite the opposite. Not only do musical tastes differ (they obviously do) but musical affinity is also greatly influenced by circumstance, age, context, mood, and timing. When it comes to music, people are also highly susceptible to suggestion and network effects.[250] For example, in a series of experiments, sociologists Matt Salganik and Duncan Watts asked listeners to log in to a website offering samples of songs with the opportunity to download some of the songs for free.[251] When logged in, and prior to making their download selections, participants could see how each song ranked in terms of how many times it had been downloaded by prior participants.[252] The first 750 participants saw the actual download tallies.[253] The subsequent 6,000 subjects saw an inverted tally of download rankings (i.e., rankings that put the least popular song at the top and the most popular song at the bottom).[254] In the second group, the least popular song (which they thought was the most popular) did surprisingly well in terms of download counts, and the most popular song (which participants thought was least popular) performed dismally, thus demonstrating that the perception that a song is popular has a profound effect on its popularity.[255]

While some may object to the corrupting influence of money in matters of musical taste, U.S. law has never prohibited pay-for-play. The Communications Act

248. Sowmya Krishnamurthy, *Spotify's Tuma Basa Shares How Artists Can Get on the RapCaviar Playlist*, XXL (Jan. 25, 2018), https://xxlmag.com/tuma-basa-rapcaviar-shot-callers-podcast/ [https://perma.cc/UW53-DQP3?type=image].

249. Miles Marshall Lewis, *Meet Tuma Basa, the Mastermind Behind Spotify's 'Rap Caviar' Playlist*, GENIUS (Mar. 8, 2017), https://genius.com/a/meet-tuma-basa-the-mastermind-behind-spotify-s-rap-caviar-playlist [https://perma.cc/ACF2-ZGHH].

250. *See* Freda B. Lynn, Mark H. Walker & Colin Peterson, *Is Popular More Likeable? Choice Status by Intrinsic Appeal in an Experimental Music Market*, 79 SOC. PSYCH. Q. 168 (2016) (finding that song popularity boosts the appeal of "low" quality songs); Azadeh Nematzadeh, Giovanni Luca Ciampaglia, Filippo Menczer & Alessandro Flammini, *How Algorithmic Popularity Bias Hinders or Promotes Quality*, 8 SCI. REPS., Oct. 29, 2018, at 1; Duncan J. Watts & Peter Sheridan Dodds, *Influentials, Networks, and Public Opinion Formation*, 34 J. CONSUMER RSCH. 441 (2007).

251. Matthew J. Salganik & Duncan J. Watts, *Leading the Herd Astray: An Experimental Study of Self-Fulfilling Prophecies in an Artificial Cultural Market*, 71 SOC. PSYCH. Q. 338, 340–44 (2008).

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

only prohibits undisclosed pay-for-play,[256] so radio stations are free to ignore so-called "merit" in favor of money as long as they disclose that they are doing so. When the FCC was considering legislation that would become the 1960 amendment to the Communications Act, ASCAP objected (unsuccessfully) that allowing disclosure of payment was the equivalent of sanctioning payola.[257] But the government has never required that broadcast media—never mind the free range of the internet—be uncontaminated by market motives.

Given this legal reality, the FCC has justified the need for regulation on somewhat different grounds, namely, that "the public is entitled to know when and by whom it is being persuaded."[258] Because the Communications Act only prohibits nondisclosure of payment rather than payment itself; the harm to consumers must entail risks stemming specifically from nondisclosure. In this way, justifications for payola regulation tend to track those for sponsored content regulation more broadly.[259]

Consider a situation involving a magazine about food and wine. The FTC prohibits the magazine from secretly promoting products for compensation.[260] It is allowed to run advertisements, of course, but they must be clearly indicated as such.[261] In other words, readers must be told which content is advertising and which isn't.[262] The concern is that readers could be harmed if they purchased wine because of the high score it received in the magazine, thinking that the score was based on legitimate aesthetic judgment, when it was actually the result of a large advertising buy from the producer.[263]

The disclosure requirement is meant to solve this problem in two ways: First, when advertisements are disclosed, readers may treat claims about products more skeptically.[264] They may engage "coping tactics" that mitigate the effects of persuasion, including heightened skepticism, resistance, and counterarguing.[265] Second, if consumers know that advertisements will be labeled as such, they can be

256. 47 U.S.C. § 317.

257. SEGRAVE, *supra* note 17, at 135.

258. Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations, 1927–1963*, 56 FED. COMMC'NS L.J. 329, 332 (2004).

259. *Id.*

260. 15 U.S.C. § 45.

261. 16 C.F.R. § 255 (2019).

262. *Id.*

263. *Id.*

264. Nathaniel J. Evans, Joe Phua, Jay Lim & Hyoyeun Jun, *Disclosing Instagram Influencer Advertising: The Effects of Disclosure Language on Advertising Recognition, Attitudes, and Behavioral Intent*, 17 J. INTERACTIVE ADVERT. 138, 139–40 (2017) ("The consequence of recognition of the content (i.e., a persuasive episode) as advertising entails the use of coping strategies, such as heightened skepticism, resistance, and counterarguing, which in turn have the potential to negatively affect brand- and advertising-related attitudes as well as behavioral intent.").

265. *Id.*

more trusting of unlabeled content.[266] This reduces cognitive load on consumers and strengthens trust between communicators and audiences.

The argument is similar for payola: listeners trust Dick Clark and Tuma Basa to inform them about new hits and hot music. They trust that the DJ or playlister has picked the best of the currently available records, alleviating them from having to search for better options.[267] When listeners learn that the tunes they are hearing are based not upon the independent judgment of the intermediary tastemaker, but instead upon the pocketbooks of advertisers, they can confront the attempted persuasion with the same skepticism they bring to viewing advertisements for other goods. Knowing whether Clark or Basa are being paid to promote a track allows audiences to determine whether and how much they should discount their recommendations.[268] In this way, listeners are less likely to labor under the mistaken belief that a playlisted song has been deemed "good" by the almighty Basa; instead, they will understand that a record label paid for a spot on a playlist and adjust their expectations accordingly.[269]

B. Harms to Competition

The second set of arguments in support of regulating pay-for-play focuses primarily on (a) its potential harm to competition in the music industry (and only indirectly on its harm to consumers) and (b) the potential for anticompetitive behavior among music streaming platforms. With regard to the former, the arguments typically take the following form: where content only gets played if someone has been paid, then only those artists who can afford to purchase airtime will get it.[270] When considering the 1960 amendments to the Communications Act, Congress worried that payola would "drive out of business small firms who lack the means to survive this unfair competition."[271] Songs need airtime in order find an audience, and potential hits by smaller, independent labels may be snuffed out if the well-funded major labels buy or drive up the price all of the airtime.

According to this argument, in the absence of pay-for-play, songs will find audiences solely due to their respective "merit."[272] Although wealthier labels may be able to invest more in employing talented producers to manufacture hits, nothing would prevent an upstart label from introducing a hit and finding an audience. Radio stations or playlisters would be indifferent between major labels and

266. *Id.* This doesn't mean that their trust is well-placed. *See* Bong-Hyun Kim, Yorgo Pasadeos & Arnold Barban, *On the Deceptive Effectiveness of Labeled and Unlabeled Advertorial Formats*, 4 MASS COMMC'N & SOC'Y 265 (2001).

267. Coase, *supra* note 20, at 310.

268. We do not mean to imply that Basa has taken money for his selections. Indeed, he appears to be above reproach.

269. Coase, *supra* note 20, at 310.

270. *See generally* Ellen P. Goodman, *Stealth Marketing and Editorial Integrity*, 85 TEX. L. REV. 83 (2006).

271. *Id.* at 100.

272. *See supra* notes 33–35.

independent labels, caring only about the "quality" of the music. But when pay-for-play is possible, undercapitalized labels might not be able to find airtime for their songs, because the valuable audience real estate will be bought by the major labels.[273]

Some commentators see streaming payola as similarly exacerbating inequalities between major and independent artists. YouTube's True View system has been accused of "basically legitimiz[ing] buying views."[274] As with Spotify's Marquee, YouTube's TrueView ad program spurs the platform's otherwise impenetrable algorithm: "Once you start getting some views [via TrueView], YouTube starts recommending the video, putting it up in the sidebar . . . . If you don't spend money on video[] [ads], it's very hard to get them picked up by the algorithm, because everyone else is doing it."[275] Detractors lament that this exacerbates extant inequalities in the industry: "It becomes another vicious cycle like all these promo things in the music industry . . . . Instead of evaluating artists according to their talent, it becomes: who spends more?"[276]

Ultimately, the anticompetitive effects of payola could lead to a diminished musical landscape for listeners. According to this argument, as smaller, independent record labels and artists are driven out of business, consumers' options will narrow to a finite group of music sellers.[277] Fewer music providers may mean that consumers will have a harder time finding music that satisfies their preferences and will have to pay higher prices when they do. Thus, the competition argument, as it presents in the music industry, is fundamentally a consumer harm argument as well.

The concerns about anticompetitive behavior on the part of music streaming platforms are summarized in the recent Nadler/Johnson letter to Spotify:

> [A]ny plan that could ultimately lead to further cut pay for working artists and ultimately potentially less consumer choice raises significant policy issues. This is particularly true under Spotify's current model, where artists' returns are already low, with Spotify reporting to pay artists less than a cent per song streamed (estimated in the $.003 to $.005 range) and Spotify has challenged an administrative ruling setting a higher royalty rate for songwriters. Core copyright industries like music play an integral role in the U.S. economy, and the vitality of the industry is undermined when artists' hard work is undervalued. Such a race to the bottom threatens to

273. *See generally* Goodman, *supra* note 270, at 103.

274. Elias Leight, *'They Legitimized Buying Views': YouTube Ads Divide Latin Music Industry*, ROLLINGSTONE (Sept. 4, 2019, 2:06 PM) [hereinafter *'They Legitimized Buying Views'*], https://www.rollingstone.com/pro/features/buying-youtube-views-trueview-ads-adwords-878239 [https://perma.cc/CFV2-V457].

275. *Id.*

276. *Id.*

277. Nick 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=28b94c68519f [https://perma.cc/KG6C-XHLM].

weaken the core goal of copyright and intellectual property—incentivizing creativity by offering a fair return on one's work.[278]

As we explain below, the arguments about payola's potential harms to consumers is largely unpersuasive, particularly in the streaming context. Instead, the regulation of traditional payola appears to have originated as a form of systemic racism that evolved, over time, into a straw man argument about market power and consolidation. Its potential to enable and exacerbate anticompetitive behavior in the streaming context, however, gives us pause and is also addressed in the next Part.

IV. Should We Regulate Streaming Payola?

We believe that the conventional consumer harm arguments made in favor of payola regulation are largely unpersuasive in the streaming environment, although that may be changing, particularly with regard to reverse payola. First, we argue that direct harms to consumers associated with lower-quality songs being favored due to undisclosed payments are likely to be minimal in an environment with thousands of choices and negligible switching costs. It is possible, however, that consumers might experience some psychic harm in situations where they realize that an influencer whom they thought they could trust turns out to be on the take. Ultimately, we believe this harm is likely to be small and unworthy of regulation, especially when compared to the costs of compelling speech and the potential competitive benefits that payola may produce.

As a matter of competition, historical experience suggests that pay-for-play can serve as an unexpected access point for smaller, often diverse artists with fewer resources. The same counterintuitive access dynamics are likely at work in the streaming context, with perhaps even stronger effects. Payola enables parties to pay for access to distribution channels they might otherwise not have access to. While it might seem like richer parties would tend to benefit from a regime in which access is determined by wealth, we suggest that payola offers poorer parties an opportunity to buy into the music distribution system. We offer a simple model of payola as a lottery that provides access payouts to participants.

Given the surreptitious nature of undisclosed payola, we are unable to empirically assess our model. Instead, we offer suggestions for why we believe that most forms of streaming payola are enhancing the diversity of musical offerings. It is possible that the picture may not be as rosy when we are able to evaluate the ability of platforms like Spotify to manipulate the terms of the payola lottery in ways that might harm diversity and only benefit the platforms.

To be clear, our arguments against regulating payola are offered as a second-best alternative in a world of high and increasing media concentration. With ever greater concentration among both content creators and content distributors, including vertical expansion, independent artists may increasingly resort to

278. *See* Nadler & Johnson Letter, *supra* note 11.

pay-for-play just to find a foothold. We believe that a less concentrated music ecosystem would be socially beneficial. To the extent that regulatory effort is called for, we believe it could be better directed toward the increasingly dominant hold that three major labels and a handful of platforms have over the music industry. Until that occurs, allowing unregulated payola, at least vis-à-vis third-party payola, may prove beneficial.

Our analysis of the streaming music promotion landscape also highlights the different roles, and concomitant differences in copyright protection, across different platforms. Currently, a platform like TikTok plays essentially the same role that radio did in the twentieth century; it is a means by which listeners discover new music, among other things. TikTok does not compete with streaming or downloading any more than radio did with record sales. The offerings are complements, not substitutes. Instead, TikTok offers a promotional channel for which some artists and their labels are increasingly willing to pay. Importantly—and in contrast with radio—platforms like TikTok also serve as a means for the distribution of separately copyrightable, user-generated content. In this Part, we offer critical analysis of the conventional arguments in support of payola regulations when applied in the streaming context.

A. Streaming Payola and Consumer Harm

Some creators, intermediaries, and legislators have suggested that pay-for-play shouldn't be tolerated in the music industry at all.[279] Instead, they argue that songs should succeed or fail on their intrinsic merit, not on the size of the check that has been cut to a tastemaker, regardless of disclosure.[280] When payments determine which songs get promoted on playlists or TikTok, critics protest, listeners may be subjected to objectively inferior music—music that wouldn't otherwise succeed on its own.[281]

For some, this argument seems to arise from an aspiration for pristine, unbiased music discovery and dissemination, where listeners find the songs that they prefer without intermediaries or tastemakers influencing their choices. No such world has ever existed, and we doubt it ever will. There has always been more music produced than any person could sort through in a lifetime, and we don't imagine that anyone would like to try.[282] Accordingly, consumers have long sought the advice of experts, and those with music to sell have always tried to improve the

279. This claim has been made since the earliest days of radio payola, and it has been made ever since. *See* discussion *supra* Part III; *see also* Lauren J. Katunich, Comment, *Time to Quit Paying the Payola Piper: Why Music Industry Abuse Demands a Complete System Overhaul*, 22 LOY. L.A. ENT. L. REV. 643, 644 (2002) ("[T]he legal loopholes within these laws have effectively created a generation of payola more dangerous than what the laws sought to prevent.").

280. *See supra* Section III.A.

281. *Id.*

282. Lots of music is, after all, very bad.

chances that their music gets listened to. In short, a world of unconstructed musical preferences does not exist.

Moreover, as a legal matter, the strong form of the anti-advertising argument has never gained purchase in the United States, where pay-for-play is not and never has been illegal, as long as recipients disclose it. The sponsorship disclosure laws that regulate broadcast, and which some would like to see apply to the internet, simply do not prohibit payola.[283] Playing a song on the radio, on a playlist, or on TikTok is a means of advertising for the song, and American law generally doesn't prevent sellers of products from advertising them.[284] Accordingly, the appropriate question seems to be whether influencers, playlisters, or platforms should have to disclose to their audiences when they have accepted money to promote songs.

Consider, for example, a TikTok post by influencer Charli D'Amelio in which D'Amelio dances to a new song while showing off a new nail polish kit to her followers.[285] Let's assume that she has received money from both the song's record label and the nail polish company. If D'Amelio were a radio DJ, her 103 million TikTok followers would outpace the top ten radio programs in the United States combined. And if she were a radio DJ, she would be required by the FCC to disclose that she had received money to play the song.[286] Similarly, FTC guidelines would require D'Amelio to disclose the payment that she received to promote the nail polish kit.[287] Clearly, the paid promotion of the song on TikTok seems like a loophole and a rather large one at that.

Now consider the differences between D'Amelio's promotion of the nail polish and her promotion of the song, from the perspective of consumer harm. Imagine that D'Amelio doesn't include the FTC-required disclosure that she accepted money to promote the nail polish kit. Let's say that, because of the lack of disclosure, an additional 0.01% of her followers purchase the nail polish thinking that D'Amelio genuinely believes that it is a high-quality product. They trust her, and in the absence of disclosure that this is really an advertisement, they do not engage coping tactics that engender skepticism.[288] Some 10,000 people would have been tricked into parting with $75 each for the nail polish kit.[289] If the nail polish kit turns out to be garbage—say, the colors don't provide good coverage or chip after only a day—those buyers would have suffered financial (and perhaps aesthetic and social) harm. In the case of some products—e.g., so-called "diet pills" or chemical face peels—a consumer might even suffer physical harm. The "#ad"

283. 47 U.S.C. § 151.

284. *See generally* Eric Goldman, *A Coasean Analysis of Marketing*, 2006 WIS. L. REV. 1151 (2006).

285. *See Want a TikTok Hit?*, *supra* note 199.

286. 47 U.S.C. § 317.

287. Roberts, *supra* note 186, at 86.

288. *See* Evans et al., *supra* note 264, at 140.

289. *Pure Cover Nail Paint*, OROSA BEAUTY, https://orosabeauty.com/products/coastal-craze-set-by-charli-dixie-damelio [https://web.archive.org/web/20201122235844/https://orosabeauty.com/products/coastal-craze-set-by-charli-dixie-damelio] (last visited Nov. 22, 2020).

disclosure is meant to engage consumers' skepticism about products, helping them make better decisions about what to purchase.[290]

Now, consider the song. In the same video where D'Amelio is shilling for the nail polish kit, she is also promoting the song. Because she is being paid, she wants her fans to like the song and to stream it on Spotify or download it on iTunes—and, of course, to record and post themselves dancing to it as well. While skepticism about advertising might lead consumers to question whether they should trust D'Amelio's claim that the nail polish kit is "an innovative formula that brings you professional quality nail polish with the ease of an at-home mani," it is not clear how any such skepticism will affect listeners' judgment of the song's quality.[291]

In economic terms, the nail polish and the song are both "experience goods"—consumers can only discover their quality once they experience them.[292] But the costs of experiencing the nail polish versus those of the song are vastly different.[293] While D'Amelio's followers must shell out cash before they can experience the nail polish kit, they have already experienced the song (at least in significant part) by the time D'Amelio's video is over. If it turns out that they don't like the song, they have wasted, at most, a few minutes.[294]

Recorded music has always been a unique kind of experience good because consumers are afforded ample opportunity to experience it before making a purchase decision.[295] Dick Clark might have been promoting both Wrigley's gum and the songs whose copyrights he owned surreptitious shares in. But, in contrast with the gum, his listeners didn't need to buy the song to decide if they liked what they heard. Perhaps they would have to wait another hour to hear the tune again before they made up their minds, but either way, their marginal expenditures were zero. This is just as true in the streaming era. If D'Amelio's fans want to listen to the entire song that she samples, they can simply stream it for free from whatever service they use, again facing a marginal cost of zero.[296]

290. *See* Salganik & Watts, *supra* note 251, at 338 (explaining self-fulfilling prophecies to be a false definition of a situation which evokes a new behavior that makes the original false conception true).

291. *See Pure Cover Nail Paint*, *supra* note 289.

292. Cass R. Sunstein, *Rear Visibility and Some Unresolved Problems for Economic Analysis (with Notes on Experience Goods)*, 10 J. BENEFIT-COST ANALYSIS 317, 328 (2019).

293. Because of this, music streams are virtually "search" goods, rather than experience goods, because their quality is almost immediately apparent to the listener.

294. Aisha Malik, *TikTok Expands Max Video Length to 10 Minutes, up from 3 Minutes*, TECHCRUNCH, (Feb. 28, 2022, 7:26 AM) https://techcrunch.com/2022/02/28/tiktok-expands-max-video-length-to-10-minutes-up-from-3-minutes/ [https://perma.cc/Q2MV-84WL] (last visited Mar. 26, 2022).

295. Picker, *supra* note 16 ("[M]usic is one of the rare goods for which you really do get to try it before buying.").

296. In both cases, there is arguably an upfront hardware expense—the cost of the radio or the device on which the streaming app is operating—but amortized across content and time, the marginal cost of listening to any one snippet or song quickly approaches zero.

1. "Bad Music"

Perhaps most significant, from the perspective of direct consumer harm, is that no matter how bad pay-to-play music might be, listening to it doesn't meaningfully harm the listener. It may waste a few minutes of their time—or it might not, seeing as they can easily switch platforms—but we have not been able to find any documented incidents of actual harm stemming from voluntary music exposure.[297] Unlike products regulated by FTC disclosure requirements, songs don't have secret risks that consumers may learn about only when it's too late. Listeners don't need to engage sophisticated skepticism about a message's source to know whether or not they like what they're listening to. We are not aware of anyone ever claiming to have been tricked into actually liking a song that they wouldn't have liked otherwise.[298]

Moreover, for better or worse, the very nature of influence in the social media era does much to diminish risks that listeners will be subjected to bad music because of unregulated payola. In many cases, a song becomes popular because influencers like D'Amelio say that it is; this is the case whether or not the blessing is paid for. As discussed in Section III.A, studies like Salganik's have demonstrated strong network effects in music preferences. Thus, the fact that D'Amelio danced to a song, or that Basa chose it for the RapCaviar playlist, is *itself* evidence of the song's popularity via the self-fulfilling prophecy that is popular culture. In other words, these influencers are kingmakers. They aren't duping listeners into thinking uncool songs are cool; rather, they are bestowing the "cool" title to songs that become so *ipso facto*.

There are other reasons for believing that listeners won't suffer the indignity of being subject to an onslaught of atrocious music if pay-for-play remains unregulated on the internet. Economists since Nobel laureate Ronald Coase have

297. Involuntary music exposure, however, is a different beast. *See* Christopher Buccafusco & David Fagundes, *The Moral Psychology of Copyright Infringement*, 100 MINN. L. REV. 2433, 2471 (2016) (describing the US government's use of heavy metal music by Skinny Puppy and Rage Against the Machine during interrogations at the Guantanamo Bay prison camp). See also any psychologically damaged parent of a young child forced to endure hour after hour of "Baby Shark."

298. Even in fraudulent situations involving bands like Milli Vanilli that were caught lip-synching to pre-recorded music, it's hard to claim that listeners who enjoyed their songs before the fraud was discovered did not actually like the music. On the Milli Vanilli saga and aesthetic policing of authenticity, see Ted Friedman, *Milli Vanilli and the Scapegoating of the Inauthentic*, BAD SUBJECTS, November 1993, http://bad.eserver.org/issues/1993/09/friedman.html [https://web.archive.org/web/20160806213004/http://bad.eserver.org/issues/1993/09/friedman.html]. Friedman writes:

> Why do I love Milli Vanilli's *Girl, You Know It's True*? I can go on all day long about its neo-soul songcraft, its soaring synth-strings, its shimmering percussion. But do I think it's great because the people involved were 'talented'? Who the hell cares? It's not like I'm inviting them to dinner. Plenty of the greatest music ever made has been created by hacks, slackers, and no-names, who for whatever reasons stumbled into a little bit of genius. I should point out that just because Rob and Fab didn't have much to do with the creation of Milli Vanilli's music, it's not like nobody else did. The genius behind the Milli Vanilli sound, if you want to know, is producer Frank Farian, also responsible for disco pioneers Boney M.

Id.

argued that radio stations and other tastemakers have sufficient market incentives outside of legal liability to ensure the quality of their broadcasts.[299] From the listener's perspective, radio is an entertainment medium, but from the record label's perspective, radio is an opportunity to advertise the availability of songs that will satisfy consumers' preferences.[300] Record labels, in competition with each other, desire airtime and are willing to pay for it in order to promote album sales and streams. But radio stations also face competitive pressures. If the DJs on Station Q accept payola to play songs that listeners truly don't like, then those listeners will simply switch to Station Z. While there may be agency issues if stations' and their DJs' incentives are misaligned, in general, competition in the market should prevent the possibility that a radio station would adopt, for example, a 24/7/365 Rebecca Black format.[301]

These arguments against the need for payola regulation certainly hold in the streaming era, where competition between tastemakers is fierce. As interest in influencer marketing has grown, so too has interest in being an influencer.[302] In the radio era, listeners in a big city might have a handful of stations from which to choose. Now, the range of sources for music promotion seems infinite and the costs of changing the station (i.e., playlist) are negligible.[303] If playlisters accept money to add songs that their listeners affirmatively dislike, they'll quickly find themselves with a smaller audience. While it's true that the leading Spotify playlists maintain enormous market share,[304] consumers should not find switching especially difficult if they no longer enjoy the content.[305]

2. Deception by Nondisclosure

We've stated that undisclosed pay-for-play is unlikely to harm consumers by virtue of subjecting them to bad music. Perhaps, returning to our hypothetical, Charli D'Amelio's followers have been tricked in some other way. They look to her as a tastemaker to inform them about which songs will be popular, and they trust

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299. Coase, *supra* note 20, at 316; Sidak & Kronemyer, *supra* note 33, at 542.

300. Coase, *supra* note 20, at 316.

301. *See* rebecca, *Rebecca Black—Friday*, YOUTUBE (Sept. 16, 2011), https://www.youtube.com/watch?v=kfVsfOSbJY0 [https://perma.cc/3MNU-2GL9] (the track, while popular for a brief time, was critically shunned).

302. Sam Blum, *The Fatigue Hitting Influencers as Instagram Evolves*, BBC (Oct. 21, 2019), https://www.bbc.com/worklife/article/20191022-the-fatigue-hitting-influencers-as-instagram-evolves [https://perma.cc/F4PY-SBZJ].

303. *See supra* Sections II.B.1–2.

304. Aguiar & Waldfogel, *supra* note 123, at 7.

305. According to the best empirical evidence, people's musical preferences are malleable, and they respond to their sense of what other people—especially tastemakers—think is appealing. But this doesn't mean that their preferences are infinitely malleable or that a tastemaker is capable of turning any song into a hit. *See, e.g.*, u/Iamwallpaper, *Are There Any Examples of Artists that Were Heavily Promoted that Turned Out to be Flops?*, REDDIT, https://www.reddit.com/r/popheads/comments/ccw5t8/are_there_any_ examples_of_artists_that_were/ [https://perma.cc/C4KN-ACPM].

her judgment. In that case, D'Amelio's followers may feel like they have been defrauded if they learn that her recommendations aren't authentic, but instead, paid for. They may experience a feeling of disappointment upon realizing that their favorite tastemaker was just a shill for the record label that paid her off.

Furthermore, as Ellen Goodman has suggested, undisclosed pay-for-play might cause broader social harm to the extent that patterns of deception undermine social trust in tastemakers generally.[306] We might call this an expressive harm—a harm whose "primary effect is not as much the tangible burdens they impose on particular individuals, but the way in which they undermine collective understandings."[307] Streaming payola might implicate expressive harms by violating the public's trust in tastemakers to tell them what is "really," or authentically, cool or popular.[308]

To the extent that listener deception may result in psychic harm, the question is whether those harms would be meaningful, and if so, whether they can be prevented with regulation.[309] Estimating the magnitude of consumer deception would involve knowing what most listeners think about influencer decision-making. Do followers of Charli D'Amelio or Tuma Basa believe that they choose songs that reflect their unbiased aesthetic judgment, or do they anticipate that financial motivations may affect their selections? We suspect that the answer differs from platform to platform and that this is ultimately an empirical question. Research suggests that although perceptions of authenticity are important to influencer marketing on social media,[310] many users understand that influencers' suggestions are based on payments or other in-kind consideration received from companies with something to promote.[311] Young listeners in particular are conditioned to assume and accept that everyone is on the take.[312] And lest we think this makes

306. Goodman, *supra* note 270, at 86.

307. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 507 (1993).

308. *See* Goodman, *supra* note 270, at 87 (arguing that stealth marketing harms society by undermining trust in editorial judgments).

309. Note that the situation here is different from the one associated with the infamous fraudulent act Milli Vanilli. There, consumers were deceived into tickets to shows believing they were paying for a live performance when, in fact, the singing had been pre-recorded by other people. New Hampshire even passed a law requiring venues using prerecorded performances to notify concertgoers. Michael C. Bennett, Comment, *Lip Sync Disclosure Legislation*, 3 DEPAUL J. ART, TECH. & INTELL. PROP. L. 22, 23 (1992). Speaking from our own experience, it was devastating to learn that Milli Vanilli were frauds, but that knowledge in no way made listening to their music any less pleasurable before or since.

310. Roberts, *supra* note 186.

311. *See* Evans et al., *supra* note 264, at 140.

312. JEFF FROMM & ANGIE READ, MARKETING TO GEN Z: THE RULES FOR REACHING THIS VAST AND VERY DIFFERENT GENERATION OF INFLUENCERS (2018).

them view influencing as somehow "bad," as many as 86% of them want to become influencers themselves.[313]

It's possible, however, that listeners think differently about Spotify-sponsored editorial playlists than they do about social media influencers. Perhaps followers of Tuma Basa's RapCaviar playlist on Spotify view his picks as unquestionable and above reproach. In that case, they may be more likely to feel meaningfully deceived if they learn that placements on the playlist can be had for cash. Unfortunately, this is pure speculation. It's unclear how many listeners understand anything about the mechanics of Spotify's various playlist formats, much less whether or not they associate the playlists with any particular curator's judgment.

Even if we assume psychic harm from deception, we cannot assume that regulation is the optimal response. In fact, platforms' behaviors suggest that the market may already be working to minimize them. For example, Spotify has prohibited playlisters from accepting payment to place songs on their lists.[314] Many playlisters and influencers have sworn off payola, and virtually all of the music industry professionals that we spoke to said that they did not offer nor accept payments for music promotion.[315] Despite the legality of pay-for-play on the internet, none of the major players in the industry want to (publicly) acknowledge any role for it.[316] The implications of this behavior are clear: they understand that their role in the industry is based on consumer trust. If consumers no longer believed in the legitimacy of their recommendations, then their influence would suffer. And what's an influencer without influence?

B. Streaming Payola and Competition

At first glance, it seems obvious that pay-for-play should be detrimental to competition in the music industry. If access is based solely on ability to pay, then those artists and record labels with the deepest pockets should be able to command the largest audience. The intuitive appeal of this argument is strong, and it was mentioned by several of our interviewees.[317] But historical practice and the structure of the contemporary music industry suggest that it is probably not true, at least in most variants of streaming payola.[318] Access to audiences is not strictly a matter of ability to pay; other factors are also at play.

While there are lots of reasons to be concerned about concentration and competition in music,[319] the existence of pay-for-play isn't one of them. Instead,

313. MORNING CONSULT, THE INFLUENCER REPORT: ENGAGING GEN Z AND MILLENNIALS 20, https://morningconsult.com/wp-content/uploads/2019/11/The-Influencer-Report-Engaging-Gen-Z-and-Millennials.pdf [https://perma.cc/99KY-UJPY] (last visited Mar. 26, 2022).

314. *See* discussion *supra* Section II.B.

315. *Id.*

316. *See supra* note 167.

317. *See* discussion *supra* Section II.B.

318. *See infra* Section IV.B.1.

319. *Id.*

and counterintuitively, payola is one of the better options available to small, independent, and diverse artists looking to break in to an otherwise large, interdependent, and homogenous market. In other words, streaming payola often works as an access point, not a barrier to entry.[320] To be clear, we are not arguing that the current scenario of high market concentration plus the kinds of streaming payola we discussed in Part III makes for the best possible world. Rather, we believe that, given a music distribution market with very few major record labels and platforms, regulating payola would be more likely to decrease, rather than to increase, the diversity of musical offerings.[321]

To support this claim, we first discuss the historical evidence implying that pay-for-play has generally helped independent artists and labels find access to listeners. Then, we present a simple theoretical model of streaming payola behavior that analogizes payola to lottery tickets. Finally, we introduce some recent econometric evidence that supports our argument.

1. Historical Evidence

As we've noted, the strong form of the competition argument isn't countenanced by current U.S. law. The Communications Act does not prohibit record labels from paying, nor radio stations from receiving, money to promote a song. It only prohibits the failure to disclose the existence of such payments.[322] Accordingly, as Ellen Goodman points out, payola regulation does not directly solve a purported problem with money in music because well-capitalized labels can still outspend their competitors.[323] She explains, "[i]f these transactions suppress competition and alter media output, they presumably do so regardless of disclosure."[324] Nonetheless, disclosure regulation is likely to reduce the overall occurrence of payola because parties may be reticent to admit that they have either paid, or accepted, money to play songs. Among the most consistent responses that we received from our interviewees was the notion that paying for promotion was unseemly and could be damaging to the reputation of the payee and the payor.[325] Ultimately, U.S. law only seems to address fundamental competition concerns in a roundabout and inefficient way.

320. *See* Ozmun, *supra* note 225.

321. We take increased diversity of musical availability to be a social good not requiring substantial argument. Our commitment to the value of musical diversity rests not on the notion that independent or diverse music is somehow "better" than mainstream music provided by major record labels. Rather, we believe that greater diversity means that listeners have an easier time satisfying their preferences or tastes. Short of a hedonometer that can measure listeners' happiness, maximizing opportunities for preference satisfaction seems like a valid approach to improving listener welfare.

322. 47 U.S.C. § 317.

323. Goodman, *supra* note 270, at 100.

324. *Id.*

325. Virtual Interview with Interviewee A *supra* note 150; Virtual Interview with Interviewee E *supra* note 145; Virtual Interview with Interviewee H *supra* note 153.

The evidence from historical experience is even more compelling. The most vociferous complaints about the evils of payola have always come from established actors who view pay-for-play as a threat to their dominant market position.[326] The same is true of streaming payola. In a recent, highly publicized spat, hip-hop incumbent Nicki Minaj attributed the whirlwind success of newcomer Cardi B to "sympathy and payola."[327]

Historically, ASCAP and the major publishers and labels have pushed hardest for congressional inquiries, prosecutions, and stronger regulations. And why not? The major publishers and labels already have access to the largest audiences—that's what makes them majors. They have the catalogs and masters for the established stars, and, in many cases, they own or have business relationships with content distributors.[328] When new, independent artists come along, they often find the standard paths of access are blocked. But by paying DJs, promoters, influencers, or playlisters, they can be heard.[329] Once the independent artists and labels start paying for airtime though, gatekeepers will expect payments from everyone, the majors included. For the major labels, payola put a price tag on access—something they were accustomed to getting for free.

2. Modeling Pay-for-Play as a Lottery

To better understand our counterintuitive conclusion that allowing a payment-based option for obtaining music distribution might be good for poorer parties, it is helpful to conceptualize pay-for-play as a lottery. In particular, we can conceive of payola for music promotion as functioning much like a lottery for admission spots at a selective high school. In this Section, we lay out the lottery model of payola and examine its implications for diversification in music distribution.

Imagine a selective high school where demand for spots far exceeds supply. Historically, the school has used a secret admissions formula to determine who gets the coveted seats. Unsurprisingly, those seats have overwhelmingly gone to the children of alumni and other well-connected and well-resourced people.

Now imagine that the school introduces a lottery which will determine placement for 10% of its incoming class. Lottery tickets are available for a low price, such that almost anyone can afford to purchase one. People are allowed to buy as many tickets as they want, so buying more tickets increases a person's chances of

326. *See supra* Part I.

327. *Cardi B, Nicki Minaj, and the Music Industry's Longstanding Penchant for Payola*, TFL (Oct. 31, 2018), https://www.thefashionlaw.com/cardi-b-nicki-minaj-and-the-music-industrys-longstanding-penchant-for-payola [https://perma.cc/UD9H-ADCH].

328. Coase, *supra* note 20, at 316.

329. *See* Marie Connolly & Alan B. Krueger, *Rockonomics: The Economics of Popular Music*, *in* 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE 667, 706 (Victor A. Ginsburgh & David Throsby eds., 2006).

being selected. Importantly, though, the total number of tickets isn't specified or limited, making it impossible either (i) to know the precise odds of winning, or (ii) to buy up all of the available tickets.

What happens to the diversity of the school after the creation of the lottery? Surely, many wealthy parents will buy up lots of lottery tickets to continue to improve their children's chances of obtaining a spot.[330] Many other wealthy people, however, will not participate in the lottery. They may believe that their children's chances of admission are already sufficiently high through the standard formula. Others may think that participating in the lottery is vulgar and would be embarrassed if people learned that their paid for their children to get into school. Thus, although wealthy parents might buy up many of the lottery tickets, they wouldn't buy all of them. And, because the size of the lottery isn't fixed and grows with demand, wealthy parents also *couldn't* buy up all the tickets. The school can always issue more, increasing its revenues bit by bit. This would leave some number of tickets available for middle class and poorer people, and some of those tickets would win. Depending on the portion of tickets purchased by wealthy parents, the children of poorer people could win a large share of the lottery seats, resulting in a more diverse class. And the more seats given by lottery rather than by secret formula, the more diverse the class.

We believe pay-for-play in the streaming context is analogous to the school lottery, although in some respects there is perhaps even stronger reason to think that it will diversify musical offerings relative to the status quo. Continuing our comparison, the three major record labels are analogous to the wealthy parents in the school lottery hypothetical. Their "children"—the artists with whom they have signed recording contracts—receive the lion's share of music distribution. The "secret formulas" that determine which records get played on radio stations and which get streamed on the most popular playlists consistently favor these artists.

The types of streaming payola that we catalogued in Part II offer opportunities for independent artists and labels to enter a "lottery" for coveted Spotify-owned editorial playlist spots like Today's Top Hits or RapCaviar. In our hypothetical, TikTokers, third-party playlisters, and other influencers function as the "lottery tickets" that can generate recognition for a song and boost its chances of ultimately being selected for an editorial playlist. As we noted, influencer marketing campaigns are relatively inexpensive, starting at as little as $500. We can think of this as buying a handful of lottery tickets. Of course, paying Charli D'Amelio or @nicemichael to dance to your song is significantly more expensive because you're buying more influence. We can think of this as buying a ton of lottery tickets. But because this is a lottery, and the winning ticket is the winning ticket, even the holder of a single

330. Kate Taylor, *Lori Loughlin Pleads Guilty via Zoom in College Admissions Case*, N.Y. TIMES (Dec. 28, 2020), https://www.nytimes.com/2020/05/22/us/lori-loughlin-pleads-guilty.html [https://perma.cc/L6JR-34WF].

ticket may hit the jackpot. As we've seen, getting picked up by smaller independent playlists is often the key to being seen by the bigger algorithmic and editorial playlists. Finally, the ebb and flow of the pool of influencers reflects the extent to which the total number of tickets is unknown, changing, and constantly growing (or shrinking) with demand.

Our sense is that artists and labels treat the pay-for-play lottery much like our hypothesized school lottery: many wealthy and established artists and their major record labels will engage in some form of pay-for-play. In our hypothetical, Justin Bieber is the equivalent of Lori Loughlin.[331] The major record labels may strike deals with influencers, playlisters, or Spotify itself to promote their music. But they were doing this anyway; the major record labels already had influence through the secret formula.

Other major artists may choose not to play the lottery at all—i.e., not to engage in pay-for-play. Taylor Swift, for example, doesn't need to pay TikTok influencers to dance to her songs in order for them to succeed. More significantly, some major artists will eschew payola because of its bad reputation. Payola is openly eschewed in the music industry, as virtually all of our interviewees attested.[332] Musicians value their integrity and authenticity, and being discovered "purchasing" fans could be enormously damaging to their reputations.

Ultimately, though, major artists and record labels couldn't buy up all of the pay-for-play opportunities even if they wanted to. On platforms like TikTok, every user is a potential influencer, and the supply of people willing to dance to songs is approaching infinite. This means that influencer lottery tickets will always remain available for independent artists, and, as we've discussed above, some of those tickets will hit it big.

Given the specifications of our analogy, we suspect that a world with a pay-for-play lottery will demonstrate more distribution diversity than one in which distribution is determined entirely by secret formulas. The opportunity to purchase influencer lottery tickets for relatively little money will mean that many more musicians will go from having zero chance of being discovered to having *some* chance of being discovered. Moreover, the greater the share of music distribution that is converted from secret formulas to pay-for-play lotteries, the more independent artists we can expect to hear.

331. Paul Resnikoff, *Payola? Spotify Calls Justin Bieber's Latest Single a 'Viral Hit*,' DIGIT. MUSIC NEWS (Sept. 1, 2015), https://www.digitalmusicnews.com/2015/09/01/payola-proof-spotify-calls-justin-biebers-latest-single-a-viral-hit/ [https://web.archive.org/web/20200922164741/https://www.digitalmusicnews.com/2015/09/01/payola-proof-spotify-calls-justin-biebers-latest-single-a-viral-hit/]; Derwyns, *Justin Bieber and Scooter Braun Accused of Committing Payola*, MUSIC MUNDIAL (Jan. 19, 2022), https://www.musicmundial.com/en/2021/01/08/justin-bieber-and-scooter-braun-accused-of-committing-payola [https://perma.cc/XR4G-GCJ4].

332. *See, e.g.*, *supra* Section II.B.1 (quoting interviewees referring to payola as, e.g., a "dirty word" and a "quote unquote unethical practice").

There is, of course, much that our simple model cannot tell us about the winners and losers, or about the sizes of the wins and losses relative to a world in which pay-for-play is regulated. For example, we cannot currently make any judgment about whether paying influencers or third-party playlisters is a good decision for a given artist. It might be the case that the average returns to streaming pay-for-play are negative, just as the average return from playing the lottery is negative. We also cannot say much about which independent artists the influencer lottery helps the most.

It's also important to recognize that not all lotteries are equally likely to be fair or to produce socially beneficial outcomes. We see little reason to be concerned about paying TikTok influencers to dance to songs. Reputation and contract mechanisms should do a sufficient job of ensuring that musicians know, more or less, what they are getting when they make these deals. But the situation could be different for large-scale distribution platforms like Spotify and its Discovery Mode. Recall that with Discovery Mode, musicians agree to accept less royalty money in exchange for better placements on playlists. But given the inherent accounting challenges of tracking streams and placements on Spotify, it may be hard for musicians to know how much access they're really buying. As one of very few distribution platforms, Spotify may be able to manipulate both the price of lottery tickets and their expected payouts without musicians knowing. Programs like Discovery Mode have already drawn congressional attention,[333] and we believe that if streaming payola may cause problems, this is where they are likely to occur.

3. Emerging Empirical Evidence

Ultimately, whether pay-for-play increases or decreases the diversity of music distributed in the streaming era will be determined by empirical data. Unfortunately, as with most clandestine practices, data on payola are difficult to come by. In this Section, we present some recent research on the economics of streaming that lends support to our proposal that regulating payola would be bad for competitive diversity as the market is currently structured.

Compared to the heyday of radio payola, the contemporary music marketplace is substantially less competitive, as the formal channels for reaching an audience have narrowed dramatically over the past fifty years. On the content side, streaming technology has made it much cheaper and easier to both make and distribute music.[334] Independent artists don't need studio time or a factory to press records or CDs. They can make music with their laptops and upload it to the internet instantaneously.[335] But in a world where 60,000 hours of music are added to Spotify

333. *Supra* notes 11–13 and accompanying text.

334. Picker, *supra* note 16, at 431; Joel Waldfogel, *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television*, 31 J. ECON. PERSPS., Summer 2017, at 195.

335. Waldfogel, *supra* note 334.

every month,[336] the challenge for independent musicians isn't creating the music but finding an audience for it. The conventional way to do that is through a major record label, but this side of the industry has seen considerable consolidation.[337] There are only three major record labels—Sony, Warner, and Universal—down from six in the 1980s.[338] And fewer labels can mean fewer opportunities for more unusual, riskier, and less mainstream artists.[339]

Similar patterns emerge on the platform side of the market. A handful of leading streaming services account for an enormous share of listeners, and that share is growing.[340] Spotify's place in this group is significant because since its formal launch, the major record labels have owned equity in the company.[341] Commentators have long argued that the major labels will use their power within the company to promote their own content at the expense of others'.[342] Similarly, Vevo, a music video service that runs on Google's YouTube platform and receives as many as one billion daily views,[343] is solely owned by the three major labels.[344]

Within each of these services, there are a multitude of ways for listeners to discover new music, but some have a disproportionate share. As economists Luis Aguiar and Joel Waldfogel show, the top twenty-five most-followed playlists on Spotify are all owned and operated by Spotify.[345] All but one of them are curated by Spotify employees rather than selected algorithmically, so Spotify is choosing what

336. Tim Ingham, *Nearly 40,000 Tracks Are Now Being Added to Spotify Every Single Day*, MUSIC BUS. WORLDWIDE (Apr. 29, 2019), https://www.musicbusinessworldwide.com/nearly-40000-tracks-are-now-being-added-to-spotify-every-single-day/ [https://perma.cc/ZS97-66V9].

337. Paul D. Lopes, *Innovation and Diversity in the Popular Music Industry, 1969 to 1990*, 57 AM. SOC. REV., Feb. 1992, at 56, 60 (elucidating on examples such as WCI, CBS, RCA, MCA, Capitol-EMI, and Polygram).

338. *Id.*

339. *See generally* Richard A. Peterson & David G. Berger, *Entrepreneurship in Organizations: Evidence from the Popular Music Industry*, 10 ADMIN. SCI. Q. 97 (1971) (concluding that innovative independent record companies led to the innovation and diversity of popular music in the 1950s and '60s).

340. *See supra* notes 133–336; Dredge, *supra* note 117.

341. Eriksson, *supra* note 118. The majors initially owned about 18% of Spotify, but their shares have been diluted by subsequent rounds of venture capital. Their share may be about half as much now. 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/ [https://perma.cc/AEQ8-97SL].

342. *See generally* Eriksson, *supra* note 118 (showing how major record companies owning shares in Spotify complicates discussions about fair compensation for artists, songwriters, and independent labels).

343. Erik Gruenwedel, *Vevo: Global Music Streaming Views Up 30% in 2020*, MEDIA PLAY NEWS (Dec. 15, 2020), https://www.mediaplaynews.com/vevo-global-music-video-streaming-views-up-30-in-2020/ [https://perma.cc/QPM6-SRLL].

344. *Vevo*, WIKIPEDIA, https://en.wikipedia.org/wiki/Vevo [https://perma.cc/4WJU-DCFL] (last visited Mar. 26, 2022).

345. Aguiar & Waldfogel, *supra* note 123, at 7.

subscribers hear.[346] According to Aguiar and Waldfogel's data, Spotify's playlists account for more than 80% of the followers of the top 1,000 playlists on the platform, and playlists operated by the major record labels add an additional 6.7% of followers.[347] And being on these playlists is enormously important. Having a song featured on the Today's Top Hits playlist is, according to the authors, "worth almost 20 million additional streams, which translates to $116,000 and $163,000 in additional revenue from Spotify alone."[348]

In light of the shareholder relationship between the major labels and Spotify, it isn't surprising that songs released by majors do especially well on the platform. Although independently released songs make up almost half of the songs in Aguiar and Waldfogel's data, they account for only about a third of the listings and a quarter of the streams on Spotify's top playlists.[349] And every one of the ten most-streamed hip-hop albums on Spotify's RapCaviar playlist for 2020 were released by major labels.[350] The rare success of an independent artist like Lil Nas X shows just how difficult it can be for them to break into the top of the streaming ranks. His efforts on TikTok, a platform without a formal relationship with the major record labels, enabled his song to go viral in 2019.[351]

A new empirical paper by Luis Aguiar, Joel Waldfogel, and Sarah Waldfogel suggests that one version of streaming payola may be increasing musical diversity on Spotify.[352] The authors attempt to test whether Spotify's editorial New Music playlists are systematically biased against independent and female musicians, as many writers have suggested.[353] To estimate possible bias, the authors implement an outcomes-based measure that tests whether, conditioned on editors' judgments of how well songs should perform, independent and/or female artists do better than expected.[354] Specifically, they ask whether, given a song's ranking on a New

346. *Id.*

347. *Id.*

348. *Id.* at 26.

349. *Id.* at fig.7.

350. Z (@BrianZisook), TWITTER (Dec. 22, 2020, 11:57 AM), https://twitter.com/djboothEIC/status/1341473018472779778 [https://perma.cc/9ETE-6U8W]. While it's not surprising that the major labels—which produce the majority of all publicly-available content—would also enjoy a majority of the earnings on a platform that pays pro rata, commentators have suggested that there may be more equitable ways of divvying up the pie. *See* Will Page & David Safir, *Money In, Money Out: Lessons from CMOs in Allocating and Distributing Licensing Revenue*, MUSIC & COPYRIGHT NEWSL., Aug. 29, 2018, at 23, 27 (explaining that, in contrast to Spotify's current pro rata distribution model, under a user-centric model, "each user's subscription revenue . . . is allocated exclusively to the tracks streamed; hence the artiste's remuneration comprises only revenue from that artiste's listeners").

351. Strapagiel, *supra* note 196.

352. Luis Aguiar, Joel Waldfogel & Sarah B. Waldfogel, *Playlisting Favorites: Measuring Platform Bias in the Music Industry* (Nat'l Bureau Econ. Rsch., Working Paper No. 29017, 2021), https://www.nber.org/papers/w29017 [https://perma.cc/8XSY-FDTW].

353. *Id.*

354. *Id.*

Music playlist, the song does better or worse than expected in subsequent weeks if it is by an independent and/or female musician.[355]

Unexpectedly, Aguiar, Waldfogel, and Waldfogel find that independent and/or female musicians perform substantially *worse* than do major and male artists, indicating an editorial bias *in favor* of these groups. The identified bias is especially strong for independent music.[356] Why might this be? One possibility is that playlist editors care about more than simply maximizing predicted streams and affirmatively choose to promote musicians from some marginalized groups. Another possibility, relevant to our arguments, is that Spotify may favor promotion of independent musicians to the extent that it can pay lower royalties through its Discovery Mode program.[357] As long as the songs aren't of such low quality that they threaten the integrity of the playlist's reputation, Spotify spends less money promoting these songs than it does promoting those by major labels. This is some evidence, then, that the streaming payola practices we described in Part II may be enhancing musical diversity and competition.

The data can't tell the whole story about the role of industry concentration in music distribution, but, at least so far, they do not indicate that pay-for-play is problematic for competition. If we are worried about competition in this industry, then the problem appears to be that too few entities control access to audiences rather than that some artists can occasionally buy or manipulate their way into fame. As we explained in Part II, with considerable effort and some cash, lesser-known artists can work their way up the charts with the help of third-party tastemakers. Just as in the twentieth century, pay-for-play likely benefits diverse, independent artists because, although it's a cost, it at least gives them a chance to be heard.

CONCLUSION

We are yet in the early days of streaming payola, and its effects on music consumption and competition remain unknown. We look forward to seeing these issues addressed with robust empirical evidence, although it may take congressional inquiries to mandate its production. Streaming payola is not simply an issue of consumer choice or music competition, however. It can also inform our understanding of contemporary copyright law, and we use the conclusion to highlight some of these issues.

Our findings on the practice and potential impact of streaming payola offers some valuable insight about the scope of copyright protection that different types of works may or may not need. The existence of streaming payola challenges copyright law's general adherence to the premise that unauthorized uses of a work

355. *Id.*

356. *Id.* at 2–4 ("Curators behave as if they maximized weighted streams, where the weights are 40 percent higher for independent-label music, and 10 percent higher for music by women.").

357. For more on how Discovery Mode works, see discussion *supra* Introduction and *supra* Section II.B.1.

are always undesirable to the rightsholder.[358] As the examples we've presented demonstrate, it's clear that having one's songs featured on TikTok or Instagram is valuable for some musicians. There are currently few better ways to amass streams, especially for lesser-known artists, than to have one's work memed online. Given this state of affairs, it might be counterintuitive to require a royalty be paid on a concededly promotional and noncompeting use of music.

This doesn't foreclose voluntary, private dealmaking between content owners and platforms, of course. Instagram, owned by Facebook, already has agreements in place with various record labels,[359] and TikTok, as we've noted, has already secured short-term deals with the three major record labels.[360] Such private deals tend to afford various advantages—including, at times, lower-than-market rates—over the statute,[361] and so are unlikely to be greatly impacted by regulatory restraint in this area.

In addition, we believe that many promotional uses of songs on platforms like TikTok are supported by fair use. The two most important of the four fair use factors would seem to favor TikTok users and the platforms.[362] TikTok-style videos often contribute new creativity that transforms the value of the underlying song (Factor 1).[363] For example, the jump cuts and "yee yee juice" that turned people and pets into cowboys were essential to the virality of "Old Town Road", yet these contributions came from users, not from Lil Nas X. And as our foregoing analysis makes clear, TikTok videos do not substitute for streaming or purchasing the featured track and therefore do not harm, but rather enhance, the market for the copyrighted work. This is the fourth, and most important, fair use factor.[364]

Streaming payola may also serve to better align the incentives between licensees like record labels and licensors like online radio stations. The statutory

358. For other examples, see Kristelia García, *Monetizing Infringement*, 54 U.C. DAVIS L. REV. 265 (2020).

359. *See* Chris Welch, *Facebook Now Has Music Licensing Deals with All Three Major Labels*, VERGE (Mar. 9, 2018, 11:46 AM), https://www.theverge.com/2018/3/9/17100454/facebook-warner-music-deal-songs-user-videos-instagram [https://web.archive.org/web/20220319231456/https://www.theverge.com/2018/3/9/17100454/facebook-warner-music-deal-songs-user-videos-instagram].

360. Colin Stutz, *TikTok Now Has Short-Term Licensing Deals with the Major Labels*, BILLBOARD (Mar. 31, 2020), https://www.billboard.com/articles/business/digital-and-mobiel/9347970/tiktok-now-has-short-term-licensing-deals-with-the-major-labels/[https://perma.cc/XCG8-LBJU].

361. *See, e.g.*, Kristelia García, *Super-Statutory Contracting*, 95 WASH. L. REV. 1783, 1800–13 (2020) (discussing various examples of voluntary agreements in copyright that exceed statutory obligations).

362. 17 U.S.C. § 107.

363. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (introducing the transformative use test as the key to fair use factor one).

364. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) (describing the fourth fair use factor as "undoubtedly the single most important element of fair use"); *see also* David Fagundes, *Market Harm, Market Help, and Fair Use*, 17 STAN. TECH. L. REV. 359 (2014).

license for the digital performance of sound recordings[365] sets a per-play rate that misaligns these incentives. Record labels, for example, want their songs played as often as possible across all platforms in order to promote their artists and boost sales, while a per-play digital performance royalty encourages online platforms to minimize costs by playing as little music as possible.[366] As a result of this inefficiency, private ordering in the space has proliferated.[367] Given the potential downsides of wholly unregulated private deal-making,[368] legislators would be well-advised to avoid compounding this phenomenon by expanding the statutory license to promotional uses.

365. 17 U.S.C. § 114.

366. *See* Ed Christman, *Exclusive: Clear Channel, Big Machine Strike Deal to Pay Sound-Recording Performance Royalties to Label, Artists*, BILLBOARD (June 5, 2012), https://www.billboard.com/articles/business/1094776/exclusive-clear-channel-big-machine-strike-deal-to-pay-sound-recording [https://perma.cc/25EG-SR7C] (quoting CEO Bill Pitman saying "I don't want to try and guess how much advertising I can sell . . . [The digital performance royalties] encourage[] us to try and play as little music as possible").

367. *See* Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1154 (2014) (explaining that "*efficient* deals tend to proliferate—such as the copycat deals that followed the Clear Channel-Big Machine deal").

368. *See* Kristelia A. García, *Private Copyright Reform*, 20 MICH. TELECOMMS. & TECH. L. REV. 1, 31 (2013) (noting that despite its potential efficiencies, "private copyright reform introduces adverse selection and distributive justice concerns").