

DOWNSTREAMING

RACHEL LANDY

INTRODUCTION	1252
I. CONTRACTING FOR INNOVATION?	1260
II. A BRAIDED APPROACH TO PRIVATE ORDERING	1264
<i>A. Threats and Opportunities in a World of Heightened Uncertainty</i>	1266
1. Disrupting Traditional Business Models.....	1266
2. An Attempt at Vertical Integration	1271
<i>B. Leveraging Market Conditions in Negotiation</i>	1273
<i>C. Parallel Formalities</i>	1279
1. Governance: MFNs and Product Restrictions.....	1281
2. Iterating: Controlling Promotion and Placement	1286
<i>D. Self-Enforcement Through Informal Norms</i>	1290
1. Repeat Players	1291
2. Reputational Threats.....	1293
3. Reciprocity	1294
III. THE PAYOFF	1295
<i>A. Capturing Surplus Beyond Copyright?</i>	1296
<i>B. Preventing Innovation Among Incumbents</i>	1296
<i>C. Keeping Startups Out</i>	1300
<i>D. A Homogenous Market</i>	1302
IV. SOLUTIONS	1305
<i>A. Copyright and Antitrust Reactions</i>	1306
<i>B. Encouraging Market Solutions Through Tax and Transparency</i>	1311
CONCLUSION	1315

DOWNSTREAMING

RACHEL LANDY*

Abstract: Spotify and its competitors offer the same product at the same price. Why? Scholars have argued that relationships can be designed in a way that naturally promotes innovation. By “braiding” certain formal contracting practices with informal enforcement norms, parties develop a framework that supports trust and positive, long-term collaboration. This Article takes on this consensus and shows that not all braiding is good. Using the multibillion-dollar subscription music streaming business as an illustration, this Article demonstrates just how industry forces can, and do, overcome braiding’s positive slant. In the music streaming industry, the major record labels (Universal, Warner, and Sony) weaponize braiding to control their downstream distributors: Spotify and the Big Tech companies. Parallel contracting practices are interwoven with informal industry norms that, taken together, create a homogenous market and prohibit startup entry. Innovation is stifled as a result. Policymakers frequently look to copyright and antitrust law to promote consumer choice in content industries, and there are some viable choices in those arenas. Nevertheless, this Article sets out other valuable tools that can solve these sorts of issues, disincentivize parallel practices, increase choice for consumers, and encourage market entry by technology startups.

INTRODUCTION

In the graveyard of defunct technology startups lie many a subscription streaming service,¹ fatally hampered by the private ordering of the music industry.² In that industry, major record labels have leveraged a contracting framework previously believed to promote innovation to create a market that is

* Visiting Assistant Professor of Law, Benjamin N. Cardozo School of Law. The author is grateful to William Boyd, Christopher Buccafusco, Michael Burstein, Joshua Fischman, Pamela Foohey, Myriam Gilles, Stephanie Hoffer, Cathy Hwang, Dorothy Lund, Alma Magaña, Jacob Noti-Victor, Michael Pollack, Vijay Raghavan, Daniel Schaffa, Scott Schumacher, Stewart Sterk (for thoughtful comments on *numerous* drafts), Xiyin Tang, Matthew Wansley, Samuel Weinstein, the Intellectual Property Scholars Conference, and the Georgetown Technology Law & Policy Colloquium for helpful feedback. Grace Huang provided valuable assistance with detailed edits. The author previously worked at Google and Spotify and represented both companies in private practice but had no personal involvement with the matters described in this Article. All of the information in this Article is from the public record, and the views represented are of the author alone, who has no ongoing relationship (other than as a consumer) with any of the companies referenced.

¹ This Article focuses on licensed, on-demand subscription services, such as Spotify, YouTube Music, Amazon Music, and Apple Music.

² See BOB KOHN, *KOHN ON MUSIC LICENSING* 1496 (5th ed. 2019) (describing how early streaming services buckled under licensing costs).

largely devoid of choice.³ There, this framework reveals a new “dark side of private ordering.”⁴

Academics argue that private ordering, or industry self-regulation, is a positive for society and a reflection of our commitment to the freedom of contract.⁵ Enabling actors who repeatedly transact with one another to set their own rules lowers transaction costs, reduces disputes, and lessens strain on the judicial system.⁶ In intellectual property industries, private ordering is believed to encourage innovation and allow flexibility in structuring transactions to accommodate technological nuances.⁷ Solidarity groups with shared values, however, can just as easily construct rules that facilitate discrimination, violence, and other pernicious conduct.⁸ They can also stagnate innovation and do

³ See generally Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Braiding: The Interaction of Formal and Informal Contracting in Theory, Practice, and Doctrine*, 110 COLUM. L. REV. 1377 (2010) (discussing how the use of braiding supports technological and entrepreneurial innovation).

⁴ Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 43 (2000). See generally Peter T. Leeson, *An-arrrgh-chy: The Law and Economics of Pirate Organization*, 115 J. POL. ECON. 1049 (2007) (describing seafaring pirate governance systems); Amitai Aviram, *Regulation by Networks*, 2003 BYU L. REV. 1179 (describing how parties discriminate against protected classes); Milhaupt & West, *supra* (describing how private ordering can facilitate violence).

⁵ See Andrew Keane Woods, *Public Law, Private Platforms*, 107 MINN. L. REV. 1249, 1277 (2023) (discussing the “technological perfection of private ordering” on digital platforms); David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 995 (2021) (noting that parties can assume American courts will defer to contracts as written).

⁶ See, e.g., Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561, 562 (2015) [hereinafter Bernstein, *Beyond Relational*] (examining original equipment manufacturers); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001) [hereinafter Bernstein, *Commercial Law*] (examining the cotton industry); Brian Uzzi, *Social Structure and Competition in Interfirm Networks: The Paradox of Embeddedness*, 42 ADMIN. SCI. Q. 35, 38 (1997) (examining the garment industry); Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders’ Coalition*, 83 AM. ECON. REV. 525, 525 (1993) (examining medieval merchants); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992) [hereinafter Bernstein, *Opting Out*] (examining diamond traders); Robert C. Ellickson, *A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry*, 5 J.L. ECON. & ORG. 83, 83 (1989) (examining whalers); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 623 (1986) (examining cattle ranchers).

⁷ Kristelia A. García, *Facilitating Competition by Remedial Regulation*, 31 BERKELEY TECH. L.J. 183, 212 (2016) [hereinafter García, *Regulation*]; Kristelia A. García, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1146, 1149 (2014) [hereinafter García, *Default Licenses*].

⁸ See Leeson, *supra* note 4, at 1065 (explaining the role of violence in the organizational structures of pirate ships); Milhaupt & West, *supra* note 4, at 44 (writing that when private ordering systems lack legitimate rights-enforcement agents, illicit actors can take the place of those agents).

so using the same set of tools that scholars have previously championed as promoting positive collaboration.⁹

For over a decade, academics have touted the combination of formal governance structures that facilitate symmetrical information exchange and informal enforcement norms in contracts as a means to organically promote innovation, especially “in a world of heightened uncertainty.”¹⁰ They call this interwoven framework “braiding.” Through braiding, parties develop trust that each of them will continue acting in a cooperative and collaborative manner as the relationship evolves.¹¹ Over time, switching costs rise, and the chances of a party acting opportunistically decrease.¹² This literature is notable for suggesting that contracts can be structured in a manner that is naturally positive for society, as opposed to being agnostic sets of promises. The braiding theory, however, is under-explored. Further, as this Article shows, forces motivated to take a coordinated approach to stifling innovation can overcome braiding’s pro-innovation bias.¹³ The way the major record labels (Universal Music Group, Sony Music, and Warner Music Group) license streaming services serves as a case study to show just how that can be accomplished.

The streaming industry demonstrates that braiding, as a tool to facilitate long-term collaboration in the face of uncertainty, should not be taken for granted as generating positive results. In fact, it enables firms to lawfully accomplish objectives that might otherwise be difficult to achieve without violating antitrust law. A comparison of the recording and book publishing industries demonstrates this point.

⁹ See Aviram, *supra* note 4, at 1221–22 (explaining that when networks reach a certain level of connectivity, they can produce inefficient results).

¹⁰ Gilson et al., *supra* note 3, at 1382. See generally Kishanthi Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865 (2022) (endorsing braiding as supporting positive collaboration in uncertain environments); Matthew Jennejohn, *Braided Agreements and New Frontiers for Relational Contract Theory*, 45 J. CORP. L. 885 (2020) (same); Henry Allen Blair, *Anticipating Procedural Innovation: How and When Parties Calibrate Procedure Through Contract*, 72 OKLA. L. REV. 797 (2020) (same); Cathy Hwang, *Faux Contracts*, 105 VA. L. REV. 1025 (2019) (same); Cathy Hwang & Matthew Jennejohn, *Deal Structure*, 113 NW. U. L. REV. 279 (2018) (same); Chapin F. Cimino, *The Relational Economics of Commercial Contract*, 3 TEX. A&M L. REV. 91 (2015) (same); Robert E. Scott, *Contract Design and the Shading Problem*, 99 MARQ. L. REV. 1 (2015) (same); Wendy Netter Epstein, *Facilitating Incomplete Contracts*, 65 CASE W. RES. L. REV. 297 (2014) (same); Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contract and Innovation: The Limited Role of Generalist Courts in the Evolution of Novel Contractual Forms*, 88 N.Y.U. L. REV. 170 (2013) (same).

¹¹ Gilson et al., *supra* note 3, at 1383.

¹² *Id.* at 1403.

¹³ See *infra* notes 33–34 and accompanying text (explaining how braiding can become the foundation for tacit collusion).

In 2006, Spotify was founded to provide music fans with a lawful, easy-to-use alternative to piracy.¹⁴ The platform made millions of songs available to users to stream for free, but unlike unauthorized file-sharing sites, the platform paid copyright owners a share of advertising revenue under the terms of a license agreement.¹⁵ Although rights to sound recordings are held by thousands of record labels of all sizes, Spotify only really needed licenses from Universal, Warner, and Sony to get off the ground. Today, those three labels collectively control almost eighty percent of the recorded music market, effectively all popular music.¹⁶ It would have been futile to launch without licenses from each of the major labels because, without access to their music catalogs, consumers would turn back to file-sharing.¹⁷ The company assumed it would take six months to get the necessary rights.¹⁸ The record labels were facing meaningful uncertainty and revenue declines of over thirty percent since the advent of Napster; Spotify was offering a revenue share and a promise to stem the tide of piracy.¹⁹

What Spotify confronted, however, was a market under the three firms' strict control. Even after securing initial local licenses from the labels to launch in Europe, it took another two-and-a-half years before the company had authorization from each label to launch to consumers in the United States.²⁰ To get across the finish line, the company was forced to abandon its dream of a purely free, ad-supported service and instead develop a subscription option, commit to paying fifty-five percent of its revenues to the labels (backed by large up-front minimum guarantee payments), and grant equity on highly favorable terms.²¹ Universal even reportedly demanded a side letter that entitled it to two percent of the proceeds from any acquisition or public sale of shares of the company.²² Nevertheless, Spotify would eventually become the market

¹⁴ SVEN CARLSSON & JONAS LEIJONHUFVUD, *THE SPOTIFY PLAY: HOW CEO AND FOUNDER DANIEL EK BEAT APPLE, GOOGLE, AND AMAZON IN THE RACE FOR AUDIO DOMINANCE* 6–7 (2021).

¹⁵ *Id.*

¹⁶ Dan Rys, *Record Label Market Share Q1 2022: Interscope Leads, Indies Gain, Disney Surges into Top 10*, BILLBOARD BULL., Apr. 7, 2022, at 1, 5. Market share means “album sales plus audio streaming equivalent albums plus track equivalent albums for music releases that came out in the past 18 months” *Id.* at 3. When this Article refers to “the labels,” it means the three major labels: Universal, Sony, and Warner.

¹⁷ CARLSSON & LEIJONHUFVUD, *supra* note 14, at 41–42, 44.

¹⁸ *Id.* at 45. Services must also license the compositions embodied in sound recordings; that industry is beyond this Article's scope, but Kristelia García has suggested that music publishers also stifle innovation. García, *Regulation*, *supra* note 7, at 248.

¹⁹ Glynn S. Lunney, Jr., *A Tale of Two Copyrights*, 53 AKRON L. REV. 987, 996 (2019).

²⁰ Peter DiCola & David Touve, *Licensing in the Shadow of Copyright*, 17 STAN. TECH. L. REV. 397, 433–34 (2014).

²¹ CARLSSON & LEIJONHUFVUD, *supra* note 14, at 55, 62.

²² *Id.* at 105–06.

leader, joined by Apple Music, Amazon Music, and YouTube Music; all other global services have a single-digit (or less) market share.²³

Soon after, in another highly concentrated copyright industry, rightsholders found themselves grappling with the challenges of a new market for their works: e-books. Book publishers were furious at Amazon for pricing popular books at \$9.99, well below the price points the publishers were accustomed to (and set themselves) for physical retail.²⁴ Apple, angling to launch its own e-book store and in need of licenses from the major publishers, was a willing co-conspirator.²⁵ Through a set of agreements tied to the copyright licenses, Apple and the publishers created a retail model for e-books such that the publishers regained control over end-user pricing. Each publisher executed an identical agreement with Apple at nearly the same time—the agreements were developed through conversations with Apple and among the publishers themselves.²⁶ Then, armed with the threat of pulling their licenses altogether, the publishers moved Amazon to the same model, eliminating the platform's ability to undercut Apple or any other distributor on price.²⁷

The motives of the major labels and the book publishers in licensing new distribution models were largely the same: to collectively control innovation and preserve profits in the downstream markets.²⁸ That, however, is where the narratives diverge. In 2013, in *United States v. Apple Inc.*, the Southern District of New York ruled in favor of the government in a lawsuit against the book publishers and Apple for conspiring to fix prices.²⁹ *Apple* shows what is well established in antitrust law: collectively agreeing on an industry-wide pricing framework and then papering it in identical contracts that are executed at the same time with the same distributor in a way that overtly harms competition looks mighty suspicious.³⁰ The record labels, however, have taken a more so-

²³ Mark Mulligan, *Music Subscriber Market Shares 2022*, MIDIA RSCH. (Dec. 7, 2022), <https://mediaresearch.com/blog/music-subscriber-market-shares-2022> [<https://perma.cc/N8ED-TWV9>].

²⁴ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 649 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015); see John B. Kirkwood, *Collusion to Control a Powerful Customer: Amazon, E-Books, and Antitrust Policy*, 69 U. MIA. L. REV. 1, 8–9 (2014) (explaining the publishers' and Amazon's pricing practices).

²⁵ See *Apple*, 952 F. Supp. 2d at 655–56 (describing how Apple met with the book publishers to discuss e-book pricing).

²⁶ *Id.* at 677.

²⁷ *Id.* at 681–82.

²⁸ See *id.* at 647 (explaining the profit motive behind the defendant publishers' pursuit of the agency agreement model); Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 934–36 (describing how labels embraced online distribution models only after their profits reached “rock bottom”).

²⁹ *Apple*, 952 F. Supp. 2d at 691.

³⁰ See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) (indicating that “concerted action to set prices . . . ha[s] been *per se* illegal since the early years of national antitrust enforcement”).

phisticated approach to maintaining control over the third parties that dominate the adjacent distribution market—they engage in entirely independent negotiations with the streaming services but braid formal governance structures that enable information-sharing with informal enforcement norms to implement parallel contract terms and facilitate their own private ordering.³¹

Scholars believe that braiding has enabled parties operating in rapidly changing industries to structure their relationships in a manner that organically promotes innovation.³² Parties can monitor each other's performance, but with sufficient flexibility to cooperatively respond to unforeseen challenges.³³ Innovation, however, does not appear to be the result of the major labels' licensing practices. Instead, each of the streaming services offers roughly the same product at the same price, and braiding begins to look more like the foundation for a form of collusion among competitors known as "conscious parallelism" or tacit collusion.³⁴

Each label negotiates agreements with the services individually, as detailed by government officials in the United States and United Kingdom, industry experts, and the labels themselves.³⁵ Yet, each agreement includes most-

³¹ See Gilson et al., *supra* note 3, at 1383 (defining braiding); Tony Harlow, Warner Music UK, Supplementary Written Evidence Submitted by Warner Music UK (Feb. 12, 2021), at 1 [hereinafter Warner DCMS Response], <https://committees.parliament.uk/writtenevidence/22693/pdf/> [<https://perma.cc/JVU8-7Z5Q>] (arguing that additional regulations of the music streaming industry are not needed given the role of private negotiations).

³² Gilson et al., *supra* note 3, at 1382; see *supra* note 10 and accompanying text (collecting sources discussing braiding as a tool for collaboration).

³³ Gilson et al., *supra* note 3, at 1382; Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 489 (2009).

³⁴ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); MARC IVALDI ET AL., THE ECONOMICS OF TACIT COLLUSION: FINAL REPORT FOR DG COMPETITION, EUROPEAN COMMISSION 11 (2003), <https://www.bateswhite.com/assets/htmldocuments/media.730.pdf> [<https://perma.cc/WL2H-K26R>].

³⁵ See *infra* Part II.B for a discussion of the negotiations. These agreements are global. DIGIT., CULTURE, MEDIA & SPORT COMM., ORAL EVIDENCE: ECONOMICS OF MUSIC STREAMING, 2021–2, HC 868, at Q241, Q669 (UK) [hereinafter DCMS HEARINGS], <https://committees.parliament.uk/work/646/economics-of-music-streaming/publications/oral-evidence/> [<https://perma.cc/V7EX-RM9W>] (statements of David Joseph, Chairman & CEO of Universal Music UK (Joseph (UMG)) & Horacio Gutierrez, Spotify's Head of Global Affairs and Chief Legal Officer (Gutierrez (Spotify))); see COMPETITION & MKTS. AUTH., MUSIC AND STREAMING: FINAL REPORT 30 (2022) [hereinafter CMA REPORT], https://assets.publishing.service.gov.uk/media/6384f43ee90e077898ccb48e/Music_and_streaming_final_report.pdf [<https://perma.cc/M5SW-ZLLZ>] (referencing the global licenses); see, e.g., Dani Deahl, *Spotify and Warner Agree to an 'Expanded' Global Licensing Deal*, THE VERGE (Apr. 1, 2020), <https://www.theverge.com/2020/4/1/21203324/spotify-warner-agree-expanded-global-licensing-deal> [<https://perma.cc/WM4Y-RGMH>] (describing global licenses); *Universal and YouTube Agree Multi-Year Global Licensing Deal*, MUSIC BUS. WORLDWIDE (Dec. 19, 2017), <https://www.musicbusinessworldwide.com/universal-youtube-agree-multi-year-licensing-deal/> [<https://perma.cc/N3J5-23LC>] (same).

favorable provisions (MFNs) that ensure each label gets the benefit of the highest revenue share that any of them individually secure³⁶ and detailed license restrictions that limit what licensees may do with the catalogs,³⁷ effectively demanding that each platform seek permission from the labels for any product change.³⁸ These parallel provisions implicitly require each service to share information with the other labels, shedding light on how the labels are acting relative to one another: Did they get a better revenue share? Are they approving the new feature?

Any long-term collaboration, including tacit collusion, might be prone to defection, such as a label offering a different compensation structure or more flexible license terms. Informal enforcement norms that raise switching costs, however, mitigate this risk.³⁹ In the music industry, these norms have developed over years of industry consolidation, coordinated strategy against new technologies, and repeat player dynamics on the individual and institutional levels, all of which breeds trust.⁴⁰ That trust underwrites self-enforcement, eliminating the need for explicit coordinated action among the labels and deterring opportunism.⁴¹ At the same time, the labels, like other parties operating in braided contracts, benefit from continuing to act in tandem with one another.⁴² Here, though, the upside is not a new discovery. Rather, the labels arguably profit at a level beyond what copyright law intended and prevent innovation (whether on products, features, or business models) in the downstream subscription streaming market by incumbents and startups alike.⁴³

Indeed, investors avoid music startups because the labels' negotiation practices and high payment demands can swallow a funding round.⁴⁴ Any new company that seeks to enter the market has but one option to try and bridge the gap between the cash demanded and its actual financial health: ceding equity

³⁶ CMA REPORT, *supra* note 35, at 68–69, 74, 79, 111, 133; KOHN, *supra* note 2, at 1525. The most-favored-nation provisions (MFNs) in the label agreements are widely acknowledged. See *infra* Part II.C.1 for a discussion of the MFNs.

³⁷ CMA REPORT, *supra* note 35, at 67–68.

³⁸ See *id.* at 92 (“Music streaming services have described how the introduction of any potential innovation will necessarily involve negotiating with a large number of counterparties.”). Warner admitted that certain changes require the consent of all the major labels. Warner DCMS Response, *supra* note 31, at 7.

³⁹ Gilson et al., *supra* note 33, at 485 (explaining how contracts that are enforced, at least partially, through informal norms result in parties that are less willing to leave).

⁴⁰ See *infra* Part II.D (discussing informal enforcement of braided contracts).

⁴¹ See *infra* Part II.D.

⁴² See Warner DCMS Response, *supra* note 31, at 1 (writing on the importance of “[p]rivate contractual negotiations” between labels and services to the evolution of streaming).

⁴³ See *infra* Part III (discussing how braiding in the streaming industry has impacted innovation).

⁴⁴ See Peter DiCola, *Copyright Equality: Free Speech, Efficiency, and Regulatory Parity in Distribution*, 93 B.U. L. REV. 1837, 1877 (2013) (“Venture capital, according to some, has stayed on the sidelines as a result of royalty costs.”).

to the major labels.⁴⁵ Some companies make substantial payments *and* give equity. When the ink dried on Spotify's first global major label agreements, it had paid dearly: Spotify gave up 17% of the company to the major labels while receiving less than 9,000 British pounds as consideration (in addition to the licenses, which came with their own high fees).⁴⁶ After Spotify's initial public offering in 2018, Sony liquidated half of its shares in Spotify for \$750 million, Warner sold 75% of its holdings for \$400 million, and Universal reportedly still owns over 3% of the company.⁴⁷ It may not be a coincidence that the areas in which there *is* meaningful innovation and startup activity in online music—user-generated content sites, for example—do not require platforms to obtain direct licenses from record labels.⁴⁸

This Article fills a gap in the braiding literature by demonstrating that positive, innovative results are not the natural outcome of the framework scholars first proposed. Instead, this Article shows how firms can use braiding to stifle innovation. Part I of this Article reviews the braiding theory first articulated by scholars Ronald Gilson, Charles Sabel, and Robert Scott (GSS).⁴⁹ Part II describes the threats faced by the recording and book publishing industries due to the transformation from physical to digital consumption, and how each industry responded to those threats.⁵⁰ This transformation gave rise to the uncertain circumstances in which braiding is believed to thrive. The book publishers chose a different route, however, and failed to sustain long-term control over their industry as a result. The record labels, on the other hand, serve as a case study in how braiding can be used to facilitate control over a market. Part III continues with that case study, detailing the effects of the braided framework on innovation in the streaming industry.⁵¹ Lastly, Part IV offers solutions to chip away at the

⁴⁵ KOHN, *supra* note 2, at 1496.

⁴⁶ HOUSE OF COMMONS, DIGIT., CULTURE, MEDIA & SPORT COMM., ECONOMICS OF MUSIC STREAMING: SECOND REPORT OF SESSION 2021–22, at 58 [hereinafter DCMS REPORT], <https://committees.parliament.uk/publications/6739/documents/72525/default/> [<https://perma.cc/FV39-5W8B>]. One independent label conglomerate, Merlin, received 1%. *Id.*

⁴⁷ *Id.* at 58–59. As of February 2024, Spotify's market cap is \$49.36 billion. *Market Capitalization of Spotify (SPOT)*, COS. MKT. CAP (Feb. 2024), https://companiesmarketcap.com/spotify/market-cap/#google_vignette [<https://perma.cc/M9TD-UN2E>].

⁴⁸ See Andrea Zarczynski, *Innovative Music Licensing Frameworks Will Be Key to UGC-Powered Music Expansion*, FORBES (Nov. 12, 2020), <https://www.forbes.com/sites/andreazarczynski/2020/11/12/innovative-music-licensing-frameworks-will-be-key-to-ugc-powered-music-expansion/?sh=6acf30a64864> [<https://perma.cc/7X65-EKJH>] (reporting on the rise of user-generated content in the music industry). User-generated content platforms can take advantage of the safe harbor under the Digital Millennium Copyright Act. See 17 U.S.C. § 512(c) (limiting copyright infringement liability for online services that host user-generated content).

⁴⁹ See *infra* notes 54–92 and accompanying text.

⁵⁰ See *infra* notes 93–313 and accompanying text.

⁵¹ See *infra* notes 314–386 and accompanying text.

braided framework that, in this case, is socially harmful.⁵² Other scholars have suggested remedies to deter tacit collusion and ease licensing inefficiencies when copyright and competition interests are paramount.⁵³ This Article builds on the options available under those regimes and offers additional, nuanced proposals rooted in tax and transparency to facilitate a market solution that gets to the heart of the braiding infrastructure that, in this case, stifles innovation.

I. CONTRACTING FOR INNOVATION?

Scholars have long examined how parties use different frameworks to structure their relationships, ranging from purely formal contracting to purely relational contracting.⁵⁴ In between those extremes lies the braiding model,⁵⁵ which is believed to organically foster innovation, particularly in industries that operate with a healthy amount of, or “heightened,” uncertainty.⁵⁶ GSS assert that the uncertainty inherent in rapidly changing, technology-driven markets creates an opportunity for parties seeking to collaborate to engage in hold-up tactics or other opportunistic behavior because it is difficult (even for the most sophisticated parties) to draft complete contracts that account for every possible scenario.⁵⁷

According to GSS, parties mitigate those risks by braiding certain formal contract provisions with informal norms, such as trust.⁵⁸ The interplay between the formal and informal strands raises switching costs for the parties and promotes collaboration that (in the agreements GSS reviewed) generates beneficial outcomes.⁵⁹ The result, GSS state, is a “contract for innovation.”⁶⁰

The braiding literature puts a particularly fine point on the kinds of formal contracting provisions and informal norms that result in innovation. The first formality GSS identify is a process for the parties to exchange information and facilitate “mutual transparency.”⁶¹ Long-term, reciprocal information-sharing

⁵² See *infra* notes 387–446 and accompanying text.

⁵³ See Kristelia García, *Super-Statutory Contracting*, 95 WASH. L. REV. 1783, 1800 (2020) (arguing that licensing efficiency is achieved through compulsory licenses); Wentong Zheng, *A Knowledge Theory of Tacit Agreement*, 9 HARV. BUS. L. REV. 399, 410 (2019) (arguing that courts should consider intent to resolve uncertainty around tacit collusion).

⁵⁴ See, e.g., Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 133 (2018) (describing the spectrum of contracting options). Relational contracting refers to contracting that relies on social norms and sanctions. *Id.*

⁵⁵ See *id.* at 133–34 (discussing the blend of formal and relational approaches to contracting).

⁵⁶ Gilson et al., *supra* note 3, at 1382.

⁵⁷ Ronald J. Gilson, Charles F. Sabel & Robert E. Scott, *Text and Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 44 (2014).

⁵⁸ Gilson et al., *supra* note 3, at 1383.

⁵⁹ *Id.* at 1403; Gilson et al., *supra* note 10, at 187.

⁶⁰ Gilson et al., *supra* note 3, at 1383.

⁶¹ Gilson et al., *supra* note 10, at 177.

strengthens the collaborative nature of the relationship.⁶² The second formality is a means to manage disputes and any information asymmetry in an efficient manner.⁶³ The mechanism used to resolve issues is referred to as a “referee,” which enables the parties to avoid resorting to legal process for enforcement.⁶⁴ GSS refer to these formalities as a “governance structure.”⁶⁵ That structure serves as “scaffolding,”⁶⁶ under which the parties have some freedom to iterate and respond to unforeseen events cooperatively.⁶⁷

The formal obligations are then interwoven with informal self-enforcement norms that develop over time.⁶⁸ The most significant of the informal norms is trust, which results from long-term collaboration between repeat players,⁶⁹ a high risk of reputational sanctions,⁷⁰ and reciprocity.⁷¹ Trust leads to a lock-in effect among group members that promotes continued collaboration as the parties work together, exchange more information, and resolve dis-

⁶² Gilson et al., *supra* note 33, at 463.

⁶³ *Id.* at 480; Gilson et al., *supra* note 10, at 187.

⁶⁴ Gilson et al., *supra* note 3, at 1403.

⁶⁵ *Id.* at 1382.

⁶⁶ Gillian K. Hadfield & Iva Bozovic, *Scaffolding: Using Formal Contracts to Support Informal Relations in Support of Innovation*, 2016 WIS. L. REV. 981, 988.

⁶⁷ Gilson et al., *supra* note 33, at 487; Gilson et al., *supra* note 3, at 1408.

⁶⁸ Gilson et al., *supra* note 3, at 1403. *Contra* Bernstein, *Beyond Relational*, *supra* note 6, at 587 n.96 (criticizing GSS for failing to acknowledge pre-existing relationships between the parties to their braided contracts and how those relationships affected governance structures).

⁶⁹ ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 36 (6th ed. 2016); Gilson et al., *supra* note 3, at 1395–96; Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551, 568, 577.

⁷⁰ Jody S. Kraus & Robert E. Scott, *Contract Design and the Structure of Contractual Intent*, 84 N.Y.U. L. REV. 1023, 1055–56 (2009); Scott & Stephan, *supra* note 69, at 568, 577–78; *see also* Matthew Jennejohn, *Do Networks Govern Contracts?*, 47 J. CORP. L. 333, 344–45 (2022) [hereinafter Jennejohn, *Networks*] (discussing how reputational sanctions prevent opportunistic conduct); Matthew Jennejohn, *The Transactional Dynamics of Market Fragility*, 85 LAW & CONTEMP. PROBS. 281, 289 (2022) (stating that credible reputational threats are effective enforcement tools); Bernstein, *Opting Out*, *supra* note 6, at 133 (describing reputation’s relevance in private ordering); Cathy Hwang, *Deal Momentum*, 65 UCLA L. REV. 376, 378–79 (2018) (noting how reputation motivates parties to play by “the rules”); Matthew C. Jennejohn, *Collaboration, Innovation, and Contract Design*, 14 STAN. J.L. BUS. & FIN. 83, 98 (2008) (implying a relationship between reputational threats and trust); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 557 (2003) (observing the efficacy of reputational sanctions in small communities); Bernstein, *Beyond Relational*, *supra* note 6, at 608 (describing how relational networks reinforce reputational sanctions).

⁷¹ Scott & Stephan, *supra* note 69, at 568, 577; Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1644 (2003) [hereinafter Scott, *Self-Enforcing Indefinite Agreements*]; Robert E. Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005, 2041 (1987) [hereinafter Scott, *Conflict*]; *see also* Bernstein, *Opting Out*, *supra* note 6, at 121 (describing reciprocal enforcement mechanisms among diamond traders); Uzzi, *supra* note 6, at 43 (showing that trust promotes resource exchanges that would otherwise be cumbersome in arms-length deals).

putes amicably.⁷² As trust increases, so do the costs of leaving the collaboration, disincentivizing a party from defecting (i.e., leaving the relationship).⁷³ GSS suggest that braiding endows the parties with the necessary flexibility to respond to the risks of operating in highly uncertain environments without getting bogged down by the formalities of dispute resolution and enforcement.⁷⁴ Instead, parties can continuously adjust their expectations and obligations cooperatively.⁷⁵

GSS used an agreement between two pharmaceutical companies, Pharmacoepia and Bristol-Myers Squibb (BMS), as a prototypical braided contract.⁷⁶ In that agreement, the parties sought to collaborate on biotechnology research.⁷⁷ GSS identified a governance structure that included a steering committee that met regularly to discuss research and exchange information.⁷⁸ If any change to the research plan was necessary, then the committee—the referee—would have to vote unanimously or escalate the dispute to executives.⁷⁹ This governance structure was intertwined with informal norms. The unanimity requirement for the research plan reflected reciprocity between the parties, which fostered trust.⁸⁰ Each party had flexibility in how it conducted research, but had to use its “best efforts” to do so; that standard embodied trust because each party had to believe that the other would truly use its best efforts to perform the research in support of the collaboration and not take advantage of the relationship to further its own individual gains.⁸¹ GSS argued that the parties, by establishing guardrails around transparency rather than articulating specific outcomes, would be deterred from acting opportunistically and positive collaboration would result.⁸²

Yet, the braiding thesis—that the interplay between formal information-sharing and dispute resolution mechanisms and informal norms when parties are facing rapid change naturally promotes innovation—is oversimplified. Moreover, as Matthew Jennejohn points out, there are numerous agreements

⁷² Scott, *Conflict*, *supra* note 71, at 2027.

⁷³ *Id.* at 2026, 2028; Gilson et al., *supra* note 33, at 462; *see* Gilson et al., *supra* note 3, at 1386–87 (articulating the relationship between long-term information exchange and trust); Uzzi, *supra* note 6, at 44 (arguing that trust breaks down after repeated abuse).

⁷⁴ Gilson et al., *supra* note 3, at 1385; Gilson et al., *supra* note 33, at 487.

⁷⁵ Gilson et al., *supra* note 33, at 472; Gilson et al., *supra* note 10, at 177.

⁷⁶ Gilson et al., *supra* note 3, at 1405.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1408.

⁸¹ *Id.* at 1392, 1409.

⁸² *Id.* at 1409.

with innovative outcomes that are not braided.⁸³ Lisa Bernstein notes that GSS failed to acknowledge how pre-existing relationships between parties affect resulting governance structures.⁸⁴ Furthermore, in their examination of collaboration agreements, GSS overlooked significant other factors that likely informed the contract drafting.⁸⁵ For example, GSS described the information-sharing regime in the Pharmacopeia and BMS agreement in terms of its collaborative benefits: “transparency through information exchange, open inspection, and mutual learning.”⁸⁶ GSS, however, did not address other possible motivations for parties to impose safeguards on the sharing of information.

Applying the braiding theory to preliminary agreements in the defense industry, Jennejohn stated that “entropy” can result when there is a lack of boundaries around information exchange.⁸⁷ In addition to fostering a collaborative environment, parties may also seek to avoid technological spillover (inadvertent sharing of trade secrets).⁸⁸ Competitive concerns likely play a significant part, too. BMS and Pharmacopeia were competitors. The information-sharing guardrails may have helped protect them from an antitrust inquiry; the more information shared between competitors, the greater the chance of unlawful collusion.⁸⁹ As described in Part II, the ability of competing enterprises to find the line between braiding and explicit coordination is critical to maintaining long-term collaboration that does not run afoul of the law.⁹⁰ Lastly, even parties who do not directly compete may be motivated to safeguard sensitive information. GSS described another braided agreement between Apple and SCI Systems. At the time, SCI Systems also serviced Hewlett Packard and

⁸³ Matthew Jennejohn, *The Private Order of Innovation Networks*, 68 STAN. L. REV. 281, 290 (2016). Jennejohn is skeptical that braiding is a panacea to solve holdup risks. He notes that the referees in the contracts GSS examined (committees requiring unanimity) pose their own holdup issues through the risk of deadlock. *Id.* at 327.

⁸⁴ Bernstein, *Beyond Relational*, *supra* note 6, at 587 n.96.

⁸⁵ See, e.g., Juliet P. Kostritsky, *A Bargaining Dynamic Transaction Cost Approach to Understanding Framework Contracts*, 68 AM. U. L. REV. 1621, 1628 (2019) (arguing that the braiding framework is oversimplified and ignores how contracts reflect each party’s private bargaining interests).

⁸⁶ Gilson et al., *supra* note 3, at 1408.

⁸⁷ Jennejohn, *supra* note 10, at 906.

⁸⁸ Jennejohn, *supra* note 83, at 314–15.

⁸⁹ See Julia Shamir & Noam Shamir, *Colluding Under the Radar: Achieving Collusion Through Vertical Exchange of Information*, 63 CLEV. ST. L. REV. 621, 654 (2015) (discussing the risk of antitrust investigations when firms share information); FED. TRADE COMM’N & U.S. DEP’T OF JUST., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 15–16 (2000), <https://www.ftc.gov/sites/default/files/attachments/dealings-competitors/ftcdojguidelines.pdf> [<https://perma.cc/ETG8-NNEF>] (explaining the risk of information-sharing leading to collusion).

⁹⁰ See *infra* Part II.C.1 (discussing how information-sharing is critical to collaboration but can raise antitrust concerns).

IBM, both competitors of Apple.⁹¹ Surely, Apple would want to take care in drafting information exchange provisions to ensure its proprietary information would not be leaked to other SCI Systems customers.

Although GSS analyzed traditional, bilateral contracts, fundamentally, they outlined a framework for how parties structure relationships when seeking to facilitate long-term collaboration that preserves flexibility and minimizes the role of courts in enforcement amidst rapid change.⁹² Further, the underlying premise that combining formal governance structures and informal norms supports that long-term collaboration, especially in the face of heightened uncertainty, continues to hold water. Yet, their theory assumes away any potential externalities of long-term collaborations and ignores the possibility of less socially beneficial outcomes. When applied to the relationship between industry players seeking to sustain a coordinated response to their own states of heightened uncertainty (e.g., new and untested distribution methods), braiding does not necessarily generate innovation. Part II of this Article uses the relationship among the record labels and their approach to licensing downstream subscription streaming services as a case study to make that point.

II. A BRAIDED APPROACH TO PRIVATE ORDERING

There is ample literature on how different industries facilitate problem-solving, minimize transaction costs, and resolve disputes without making use of traditional legal mechanisms, such as lawsuits.⁹³ In leveraging informal norms that are backstopped by limited contractual formalities, these so-called private ordering systems operate lawfully, yet self-enforce obligations among members without involving the judicial system. In intellectual property markets, private ordering is believed to promote innovation and efficiency.⁹⁴ The

⁹¹ Gilson et al., *supra* note 33, at 463.

⁹² See Gilson et al., *supra* note 3, at 1402 (discussing the emergence of a braided framework). *But see* Brad Bernthal, *Investment Accelerators*, 21 STAN. J.L. BUS. & FIN. 139, 177 (2016) (distinguishing braiding from an examination of how formal and informal dynamics combine in startup accelerator management because of the “dyadic” nature of the collaborations GSS discussed). Bernthal also notes, however, that braiding does not neatly fit onto the accelerator framework, where the formalities and informalities each serve different sets of stakeholders. *Id.*

⁹³ See *supra* note 6 and accompanying text (explaining the benefits of informal enforcement). See generally Leeson, *supra* note 4 (using the governance structure of pirate ships to show the role violence can play in self-regulation); Milhaupt & West, *supra* note 4 (arguing that organized crime plays a role in regulation comparable to that of the state).

⁹⁴ Mark A. Lemley, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 135–38 (2004); see also Stephanie Plamondon Bair, *Innovation Inc.*, 32 BERKELEY TECH L.J. 713, 723 (2017) (examining how private ordering incentivizes employee innovation); García, *Default Licenses*, *supra* note 7, at 1124 (describing how “private ordering brings predictability, flexibility, and cooperation” to industries); Kristelia A. García, *Private Copyright Reform*, 20 MICH. TEL-

entire open-source software business is built on the premise that private ordering can be used to expand public access to copyrighted works.⁹⁵ Scholars have written favorably about the role private ordering plays in supporting innovation in patent industries, including by facilitating licensing pools.⁹⁶

The downside of private ordering, however, particularly in intellectual property and innovation industries, has received limited attention. Kristelia García previously articulated how music publishers (which control the rights in the compositions embodied in sound recordings) have sought to withdraw from collective licensing organizations in efforts to extract higher royalty rates, thereby increasing transaction costs for prospective licensees.⁹⁷ Jennejohn also identified one way in which private ordering curtails innovation by describing the risks of proprietary information leaking among collaborators.⁹⁸ More recently, Elizabeth Winston criticized the intellectual property owners' use of private ordering to expand the scope of their rights and undermine public interest.⁹⁹ Private ordering in the music industry adopts a similar tack.

This Part of the Article explains how private ordering has unfolded in the streaming music business. Section A begins with a description of the disruption the record labels faced due to rapidly changing distribution methods.¹⁰⁰ Then, Section B shows how the labels have secured control over licensees by using their negotiation leverage to implement a formal governance structure.¹⁰¹ Section C outlines such a structure, through parallel provisions in their downstream license agreements that facilitate information exchange and minimize disputes among the labels.¹⁰² Finally, Section D explains how that governance structure is interwoven with informal norms and obligations that support long-term coordinated control over the streaming market.¹⁰³

This approach contrasts with that taken by the major book publishers, who also faced significant uncertainty as the online distribution market for e-

ECOMMS. & TECH. L. REV. 1, 15 (2013) (noting that private ordering enables licensees and licensors to reach more efficient outcomes).

⁹⁵ See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 YALE L.J. 804, 873 (2008) (writing that “[free software] is a private ordering system designed to foster innovation within traditional IP regimes”).

⁹⁶ See, e.g., Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1937 (2002) (suggesting that private ordering may increase innovation in industries where intellectual property rights have been harmful to innovation).

⁹⁷ García, *Regulation*, *supra* note 7, at 201.

⁹⁸ Jennejohn, *Networks*, *supra* note 70, at 345.

⁹⁹ Elizabeth Winston, *Bargaining for Innovation*, 66 VILL. L. REV. 119, 123 (2021) (arguing that enforcing contracts that work in opposition to intellectual property regulations goes against the public interest).

¹⁰⁰ See *infra* notes 104–162 and accompanying text.

¹⁰¹ See *infra* notes 163–205 and accompanying text.

¹⁰² See *infra* notes 206–274 and accompanying text.

¹⁰³ See *infra* notes 275–313 and accompanying text.

books began to develop. The publishers sought to regain control over the downstream channels, but relied solely on formal mechanisms (i.e., a contract), leading them to litigation.

A. Threats and Opportunities in a World of Heightened Uncertainty

The braiding theory takes the uncertainty inherent in rapidly developing markets as its starting point.¹⁰⁴ Parties do not know what outcomes will result from technological innovation, and so they cannot specify them in advance.¹⁰⁵ Instead, they adopt the braided framework to allow for flexibility to respond to uncertainty in an iterative, collaborative manner.¹⁰⁶

Disruption to long-standing business models due to technological innovations creates uncertainty similar to what GSS described, and for rightsholders in the book and recording industries, this disruption was significant. In short order, the change from physical to digital formats shifted how consumers valued and engaged with content, but the outcome of that change was wholly unknown. Both sets of rightsholders saw benefits to a coordinated response where none could undercut the others' goals to maintain traditional revenue streams. In some respects, they responded similarly by finding means for cooperation and seemingly punishing defectors in a manner that allowed for further consolidation in the respective industries and eliminated any disagreement or opportunistic conduct. Differences in the scope of the threats brought about by digital consumption and each industry's pre-existing mechanisms for coordination, however, led each group of rightsholders to adopt different strategies to preserve long-term collaboration.

1. Disrupting Traditional Business Models

Napster launched in 1999, the same year that record industry revenues peaked at over fourteen billion dollars domestically.¹⁰⁷ The record labels were caught flat-footed by the advent of file-sharing technology; almost overnight, they saw consumers' perceived value of a record drop to nothing, and labels

¹⁰⁴ Gilson et al., *supra* note 3, at 1382.

¹⁰⁵ Gilson et al., *supra* note 33, at 435.

¹⁰⁶ *Id.* at 449.

¹⁰⁷ JOSHUA P. FRIEDLANDER & MATTHEW BASS, RECORDING INDUS. ASS'N OF AM., YEAR-END 2021 RIAA REVENUE STATISTICS 1 (2022), <https://www.riaa.com/wp-content/uploads/2022/03/2021-Year-End-Music-Industry-Revenue-Report.pdf> [<https://perma.cc/4YRA-UT9K>]; Tom Lamont, *Napster: The Day the Music Was Set Free*, THE GUARDIAN (Feb. 23, 2013), <https://www.theguardian.com/music/2013/feb/24/napster-music-free-file-sharing> [<https://perma.cc/KT7G-2K3X>]. Record industry revenue is not adjusted for inflation. See FRIEDLANDER & BASS, *supra*, at 1 (stating that the revenue was reported in 1999).

lost their grip on how music was distributed.¹⁰⁸ The labels had been instrumental in the development of vinyl records and compact discs, the most popular formats at the time,¹⁰⁹ and with physical merchandise, could control supply (and therefore, affect prices) throughout the industry.¹¹⁰ Once music was converted to digital files that could easily be shared across networks, however, fans controlled supply and brought prices to zero.¹¹¹

The industry responded to the threat of digital piracy with the most straight-forward weapon the law offers: litigation. Under copyright law, copyright holders may seek statutory infringement damages of up to \$150,000 per work (i.e., per sound recording).¹¹² Over the subsequent years, the then-five major labels (BMG, EMI, Sony, Universal, and Warner) sued Napster, Kazaa, and LimeWire,¹¹³ putting the platforms out of business and cashing settlement checks for one hundred million dollars from each of Kazaa and LimeWire.¹¹⁴

¹⁰⁸ See Carrier, *supra* note 28, at 934–35 (describing the labels’ frustration with losing control over price and “manufacturing and distribution”).

¹⁰⁹ See Felix Richter, *Despite Comeback, Vinyl Is Still Far from Its Glory Days*, STATISTA (Mar. 24, 2023) [hereinafter Richter, *Despite Comeback*], <https://www.statista.com/chart/7699/lp-sales-in-the-united-states/> [https://perma.cc/8NA7-C4YR] (showing the peak of vinyl sales in the 1970s and 1980s); Felix Richter, *The Rise and Fall of the Compact Disc*, STATISTA (Aug. 17, 2022) [hereinafter Richter, *Rise and Fall*], <https://www.statista.com/chart/12950/cd-sales-in-the-us/> [https://perma.cc/MJ8U-4PTK] (detailing the rise of CD sales beginning in the 1980s and the decline of sales around 2000); Jerome M. Hendricks, *Curating Value in Changing Markets: Independent Record Stores and the Vinyl Record Revival*, 59 SOCIO. PERSPS. 479, 480 (2016) (writing that in 2000, “CDs accounted for approximately 90 percent of album sales”). Columbia Records and RCA Victor (now divisions of Sony) competed to develop vinyl records, with Columbia pursuing the 33 1/3 rpm record and RCA Victor releasing songs on the 45 rpm record. *Beyond the Needle: History of Vinyl Records*, VICTROLA, <https://victrola.com/blogs/articles/beyond-the-needle-history-of-vinyl-records> [https://perma.cc/4KKW-AGVC]. Sony (Sony Music’s parent company) was also instrumental in developing the compact disc. *History of the CD: 40 Years of the Compact Disc*, BBC (Mar. 12, 2019), <https://www.bbc.co.uk/newsround/47441962> [https://perma.cc/6J7R-M8HK]; see Richter, *Despite Comeback*, *supra* (showing the peak of vinyl sales in the 1970s and 1980s); Richter, *Rise and Fall*, *supra* (detailing the rise of CD sales beginning in the 1980s and the decline of sales around 2000); Hendricks, *supra*, at 480 (writing that in 2000, “CDs accounted for approximately 90 percent of album sales”).

¹¹⁰ See Carrier, *supra* note 28, at 921 (explaining how labels optimized distribution costs to maximize revenues from physical products).

¹¹¹ See *id.* at 907 (describing, as one of Napster’s enduring effects, users’ ability to control what music they listened to).

¹¹² 17 U.S.C. § 504(c)(2).

¹¹³ See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001) (labels’ suit against Napster); *Arista Records LLC v. Lime Grp. LLC*, 715 F. Supp. 2d 481, 492 (S.D.N.Y. 2010) (labels’ suit against LimeWire), *withdrawn and superseded by* 784 F. Supp. 2d 398 (S.D.N.Y. 2011); *Universal Music Austl Pty Ltd v. Sharman License Holdings Ltd* [2005] FCA 1242 (5 September 2005) 1 (Austl.) (labels’ suit against Kazaa).

¹¹⁴ Eriq Gardner, *Record Labels Settle Massive LimeWire Copyright Lawsuit*, HOLLYWOOD REP. (May 12, 2011), <https://www.hollywoodreporter.com/business/business-news/record-labels-settle-massive-limewire-188028/> [https://perma.cc/9TF2-WRC2]; *Major Labels Settle with Kazaa for \$115 Million*, BILLBOARD (July 27, 2006), <https://www.billboard.com/music/music-news/major-labels->

They would go on to file over twenty thousand lawsuits against file-sharing sites and users.¹¹⁵

Common enemies are a uniting force, and, in many ways, the file-sharing lawsuits seem to have laid the groundwork for the trust among the major labels that appears today. Prior to Napster, the recording industry had brought few copyright cases that implicated the catalogs of all the major labels; most were single work disputes.¹¹⁶ In order to mount a successful full-scale attack on piracy, each label had to trust that the others would fully buy into a joint, “take no prisoners” litigation strategy led primarily by the labels’ trade association, the Recording Industry Association of America (RIAA). The RIAA, whose Board is dominated by representatives from the major labels, provided a permissive forum for the labels to get in the same room and discuss common objectives in litigation and industry-wide approaches to digital distribution.¹¹⁷

There was, however, one defector from the group’s strategy. BMG recognized that there were millions of fans using Napster, and with that, an opportunity to monetize the new technology.¹¹⁸ It attempted to negotiate a license with Napster, but those discussions fell apart when the platform was enjoined.¹¹⁹ A couple of years later, Sony merged with BMG, reducing the number of major labels to four and, perhaps coincidentally, eliminating any lingering appearances of discrepancies among the labels in embracing new modes of distribution.¹²⁰ In 2012, Universal bought EMI, and the four labels became the

settle-with-kazaa-for-115-million-1351972/ [https://perma.cc/FF2B-8WZ3]. The labels sought damages of \$75 trillion from LimeWire. Gardner, *supra*.

¹¹⁵ Henry H. Perritt, Jr., *Music Markets and Mythologies*, 9 J. MARSHALL REV. INTELL. PROP. L. 831, 833 (2010).

¹¹⁶ See Daniel Reynolds, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 980 (2008) (writing that litigation brought by the recording industry against file sharing networks began in earnest in 2000, when RIAA sued Napster). Arguably, the most notable industry-wide, pre-Napster lawsuit was *Recording Industry Ass’n of America, Inc. v. Diamond Multimedia Systems, Inc.* 29 F. Supp. 2d 624 (C.D. Cal. 1998). In that case, the RIAA lost a claim against an MP3 player manufacturer, paving the way for the development of digital music devices. *Id.* at 632–33.

¹¹⁷ See *Spotlight on Trade Associations*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/spotlight-trade-associations> [https://perma.cc/JGG4-ANJ5] (providing a basic outline for permissive behaviors by trade associations); *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 318 (2d Cir. 2010) (stating that the labels leveraged the RIAA to communicate about digital distribution).

¹¹⁸ Eamonn Forde, *Oversharing: How Napster Nearly Killed the Music Industry*, THE GUARDIAN (May 31, 2019), <https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution> [https://perma.cc/3H58-5WHM].

¹¹⁹ See *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (upholding the district court’s preliminary injunction and shut down order against Napster).

¹²⁰ Andrew Dansby, *Sony, BMG Complete Merger*, ROLLING STONE (Aug. 6, 2004), <https://www.rollingstone.com/music/music-news/sony-bmg-complete-merger-246093/> [https://perma.cc/FH5Q-L8MK].

three that exist today and control over seventy-five percent of the recorded music market.¹²¹

The threat that early online distribution methods posed to the music industry stands in contrast to what faced book publishers. Namely, the publishers did not encounter a dramatic loss of control over distribution channels.¹²² The display technology behind e-books (E Ink) was not invented until the late 1990s, and unlike with “ripping” CDs, users could not easily leverage the dominant existing format (physical books) to create their own digital files.¹²³ When an online market began to evolve for books, the book publishers were involved from the start.¹²⁴ They licensed their content to authorized distributors (such as Amazon), who generally were also selling e-book readers.¹²⁵ As adoption of Amazon’s Kindle reader went up, so did Amazon’s market share of e-book sales—all the way to ninety percent.¹²⁶

In their original deals with Amazon, the book publishers licensed copies of e-books for a wholesale price, and Amazon set the final retail price to consumers, mirroring the traditional physical bookstore model; the publishers were always paid for the books.¹²⁷ Amazon, which made a hefty margin on Kindles that it did *not* share with the publishers, priced many top-selling books at \$9.99 to encourage Kindle purchases, often matching the wholesale price it paid to the publisher.¹²⁸ The \$9.99 price point angered the publishers, who felt it undervalued their works and would destroy sales of physical books (often priced at \$30 or more for a hardcover).¹²⁹ These joint concerns led the book publishers to begin considering a coordinated strategy, but unlike the music industry, they likely could not leverage their trade association, the Association of American Publishers (AAP), for collaboration for two reasons. First, they sought to coordinate on price, which is not a permissible use of a trade association.¹³⁰ Second, the AAP has a much more diversified board of directors than

¹²¹ DCMS REPORT, *supra* note 46, at 55; Rys, *supra* note 16, at 5.

¹²² See Kristina Groennings, *An Analysis of the Recording Industry’s Litigation Strategy Against Direct Infringers*, 7 VAND. J. ENT. L. & PRAC. 389, 389 (2005) (writing that the rise of file-sharing led to “the most dramatic” decline in album sales “in the past 30 years”); Salil K. Mehra, *Competition Law for a Post-Scarcity World*, 4 TEX. A&M L. REV. 1, 16 (2016) (detailing how the book publishers were able to adapt to new distribution channels).

¹²³ Mehra, *supra* note 122, at 16.

¹²⁴ *Id.* at 16–17 (explaining how the book publishers aligned with Apple and Amazon to offer e-books in the early twenty-first century).

¹²⁵ See *id.* (describing the link between e-book and e-reader sales).

¹²⁶ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 649 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Spotlight on Trade Associations*, *supra* note 117.

the RIAA, making it objectively difficult for the organization to take a unified position on behalf of all members.¹³¹ The preferences of smaller, independent publishers did not necessarily align with those of the major publishers, especially if, in 2010, those small publishers were not releasing the books that were targeted for \$9.99 price points.¹³² The AAP, in contrast to the RIAA, would not be able to facilitate trust-building among the large publishers.

Apple approached the six largest book publishers about launching an e-book store, sharing their concerns about Amazon's pricing practices.¹³³ In under two months, five of the six publishers and Apple agreed that the publishers would change the licensing model for e-books from a wholesale price regime to an "agency model" that shifted the ability to set retail prices back to the publishers, who would then share revenues with the distributor.¹³⁴ The sixth publisher, Random House, resisted the change, and refused to sign the Apple agreement. Within a year, though, it would capitulate so that its titles could be available through Apple's store.¹³⁵

In order to comply with a MFN provision that the publishers granted Apple, the publishers had to insist that all other distributors—including Amazon and Google—move to the same model.¹³⁶ Although Amazon resisted the change, ultimately, the publishers threatened to pull their content from the site if the agency model was not adopted, and within months, the revised agreements were signed.¹³⁷ Soon after, Amazon notified the Federal Trade Commission (FTC) about the publishers' demands to transition to the agency agreements, prompting the Department of Justice (DOJ) to sue Apple and the five publishers for conspiring to fix prices.¹³⁸ The publishers settled, whereas Apple proceeded to trial and lost. The evidence in the case was the sort that antitrust plaintiffs dream of, including Apple CEO Steve Jobs' public statements about how the publishers were re-taking control over pricing.¹³⁹ The judge found that

¹³¹ *Our Members*, ASS'N OF AM. PUBLISHERS, <https://publishers.org/who-we-are/our-members/> [<https://perma.cc/J5ZR-MHNW>].

¹³² *Apple*, 952 F. Supp. 2d at 649. Amazon's \$9.99 discounts were most frequently applied to new releases and bestsellers. *Id.*

¹³³ *Id.* at 654–55. At the time, the "Big Six" published "about two-thirds of books in the United States." Boris Kachka, Opinion, *Book Publishing's Big Gamble*, N.Y. TIMES (July 9, 2013), <https://www.nytimes.com/2013/07/10/opinion/book-publishings-big-gamble.html> [<https://perma.cc/FBB8-LR2L>].

¹³⁴ *Apple*, 952 F. Supp. 2d at 677–78.

¹³⁵ *Id.* at 677, 685–86.

¹³⁶ *Id.* at 686, 692. An MFN provision "is a promise by one party, for example a supplier, to treat a buyer as well as the supplier treats its best, 'most-favored' customer." Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 ANTITRUST L.J. 517, 519 (1996).

¹³⁷ *Apple*, 952 F. Supp. 2d at 681.

¹³⁸ *Id.*

¹³⁹ *Id.* at 705.

the repeated communications between and among the publishers and Apple and the near-simultaneous, parallel demands for Amazon to switch pricing models amounted to “overwhelming” evidence of an agreement to fix prices.¹⁴⁰ Soon after the verdict, Penguin purchased Random House, eliminating the sole defector from the original conspiracy.¹⁴¹

In any industry, high concentration increases the risk of coordinated behavior.¹⁴² The fewer firms there are, the easier it is to mirror one another’s behavior and engage in parallel conduct.¹⁴³ The book publishing industry had just six large publishers, including five that were willing to collude, but coordinating the actions of five entities is much more difficult than coordinating that of three (as in the music industry), and their trade association provided no cover.¹⁴⁴ The book publishers, therefore, were forced to use an agreement to implement their shared strategy, and they quickly came to one that eliminated Amazon’s ability to set retail prices below their desired levels.¹⁴⁵ Yet, such agreements are illegal, and the one among the book publishers was no exception.¹⁴⁶ In the music industry, however, the file-sharing litigation seemed to be just the beginning of collaboration for the record labels, whose next step was to seek control over the downstream market in a more traditional way.¹⁴⁷

2. An Attempt at Vertical Integration

The music industry experienced a more significant disruption than book publishers: piracy had turned the entire business model of selling music on its head.¹⁴⁸ Ultimately, the labels would need to revamp how they thought about

¹⁴⁰ *Id.* at 691.

¹⁴¹ Julie Bosman, *Penguin and Random House Merge, Saying Change Will Come Slowly*, N.Y. TIMES (July 1, 2013), <https://www.nytimes.com/2013/07/02/business/media/merger-of-penguin-and-random-house-is-completed.html> [<https://perma.cc/46AZ-SS5N>].

¹⁴² Aviram, *supra* note 4, at 1227.

¹⁴³ Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 10 (2004); *see also* Alexander J. MacKay & Samuel N. Weinstein, *Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response*, 100 WASH. U. L. REV. 111, 130 (2022) (explaining the market characteristics that allow for tacit collusion); *infra* notes 311–313 and accompanying text (discussing how concentrated markets can facilitate tacit collusion).

¹⁴⁴ *See supra* notes 130–133 and accompanying text (explaining why the book publishers could not leverage their trade association for collaboration with one another).

¹⁴⁵ *See* Kirkwood, *supra* note 24, at 13 (explaining that the impact of the agreement between the book publishers and Apple was an “immediate and sharp increase in the retail prices of many e-books” on Amazon).

¹⁴⁶ *See* *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 709 (S.D.N.Y. 2013) (finding that the agreement that the book publishers and Amazon entered into amounted to an illegal price-fixing agreement), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

¹⁴⁷ *See infra* Part II.A.2 (discussing the music industry’s attempt at vertical integration).

¹⁴⁸ *See* Groennings, *supra* note 122, at 389 (explaining how even after RIAA’s victory against Napster, new file-sharing services emerged and continued to impact the music industry).

licensing downstream distributors, but not before making one more attempt at controlling the supply of music content.

Before its court-ordered demise, Napster fundamentally changed the expectations of music consumers.¹⁴⁹ In summer 2000, users were downloading fourteen thousand songs each minute from the site;¹⁵⁰ music fans were not going back to the record store, and they were not paying \$15 for a CD.¹⁵¹ Between 1999 and 2014, the American record industry's revenues dropped from \$14 billion to just under \$5 billion, as the industry struggled to determine a digital strategy that would reinstate the control to which the labels were accustomed.¹⁵²

Following the Napster litigation, the then-five major labels made their first attempt at a unified approach to authorizing content for online distribution. It had been expensive to play litigation "whack-a-mole" with the file-sharing services (and infamously, their individual users), yet the strategy was successful in deterring new file-sharing entrants.¹⁵³ An opportunity arose for the labels to insert themselves into the online distribution market through vertical integration. Vertical integration is the natural result of a company deciding to bring certain functions in-house when managing them externally is too expensive.¹⁵⁴

The labels created two joint ventures: MusicNet (backed by Warner, EMI, and BMG) and Pressplay (backed by Sony and Universal).¹⁵⁵ Each joint venture licensed its combined music catalogs to third parties, such as America Online and Yahoo!,¹⁵⁶ and offered consumers the option to subscribe directly to both services for access to music from all five labels, at a total annual price

¹⁴⁹ See *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (upholding the injunction and shut down order against Napster).

¹⁵⁰ Lamont, *supra* note 107.

¹⁵¹ In 2001, the average CD price in the United States was \$15.85. Paul Sussman, *Compact Discs: The High Cost of Music*, CNN (Jan. 29, 2001), <http://edition.cnn.com/2001/SHOWBIZ/Music/01/26/cd.price/> [<https://perma.cc/XFW4-FSPB>].

¹⁵² FRIEDLANDER & BASS, *supra* note 107, at 1 (indicating that the record industry's revenue in 2023 was 37% below its 1999 level); JOSHUA P. FRIEDLANDER, RECORDING INDUS. ASS'N OF AM., NEWS AND NOTES ON 2014 RIAA MUSIC INDUSTRY SHIPMENT AND REVENUE STATISTICS 1 (2014), https://www.riaa.com/wp-content/uploads/2015/09/2013-2014_RIAA_YearEndShipmentData.pdf [<https://perma.cc/D4EK-UCLM>] (reporting 2014 as the "fifth straight year of relatively flat retail revenues" for recorded music). These figures are not inflation-adjusted.

¹⁵³ See *RIAA v. the People: Five Years Later*, ELEC. FRONTIER FOUND. (Sept. 30, 2008), <https://www.eff.org/wp/riaa-v-people-five-years-later> [<https://perma.cc/V4RH-JKJQ>] (describing the RIAA's lawsuits against music users); Groennings, *supra* note 122, at 390 (explaining that after repeated lawsuits against file sharers, "all reports confirm that the RIAA's suits caused an initial, and possibly lasting, decrease in file-sharing on mainstream, targeted sites").

¹⁵⁴ Peter Lee, *Autonomy, Copyright, and Structures of Creative Production*, 83 OHIO ST. L.J. 283, 293 (2022).

¹⁵⁵ *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 318 (2d Cir. 2010).

¹⁵⁶ John Borland, *Listen.com Lands Last Big Five Label*, CNET (Aug. 3, 2002), <https://www.cnet.com/tech/services-and-software/listen-com-lands-last-big-five-label/> [<https://perma.cc/JV3W-V46W>].

of \$240.¹⁵⁷ The labels' open admission that "the continuing devaluation of music will proceed unabated unless [they] do something about it" illuminates their clear motive to regain control over the distribution market.¹⁵⁸

These services, however, were wildly unpopular, difficult to use, and commercial flops, rendering them futile as a meaningful alternative to file-sharing.¹⁵⁹ Further dooming the labels' foray into online music distribution was a 2006 antitrust lawsuit filed by consumers against the labels. Users alleged that the labels conspired (through the joint ventures) to fix the price of music distributed online and impose unreasonable restrictions on the use of the digital files with digital rights management software.¹⁶⁰ That lawsuit continued for years, settling confidentially in 2018.¹⁶¹ The labels' strategy to bring distribution in-house had failed, and they had likely learned a valuable lesson about the risks of open coordination on licensing. The labels began to authorize third parties, such as iTunes, before eventually licensing streaming services to make content available to users on-demand.¹⁶² Structuring sound recording licenses to downstream distributors was critical for the labels to regain control over music consumption, but the coordination required to effectuate a unified strategy would need to be nuanced to avoid antitrust scrutiny.

B. Leveraging Market Conditions in Negotiation

Both music and books rightsholders faced the need to license online retailers as their products became multi-format; they would be leaving substantial money on the table if they refused to deal (especially in the music industry, with many users getting accustomed to paying nothing for content).¹⁶³ The

¹⁵⁷ *Starr*, 592 F.3d at 318.

¹⁵⁸ *Id.* at 319 (quoting Edgar Bronfman, Jr., then-CEO of Warner Music Group).

¹⁵⁹ *Id.* at 318 (quoting a magazine stating "nobody in their right mind will want to use" either service); see Matthew Fagin, Frank Pasquale & Kim Weatherall, *Beyond Napster: Using Antitrust Law to Advance and Enhance Online Music Distribution*, 8 B.U. J. SCI. & TECH. L. 451, 492 (2002) (noting Pressplay prohibited users "who have paid for the right to stream, download, and burn music to burn no more than two tracks by an artist for any month-long billing cycle").

¹⁶⁰ *Starr*, 592 F.3d at 318. Previously, the FTC charged Warner and Universal with conspiring to restrain competition related to their joint distribution of products featuring the Three Tenors' music. Press Release, Fed. Trade Comm'n, *FTC Finds Vivendi Subsidiaries Violated Antitrust Laws in Distribution of Three Tenors CDs* (July 28, 2003), <https://www.ftc.gov/news-events/news/press-releases/2003/07/ftc-finds-vivendi-subsidiaries-violated-antitrust-laws-distribution-three-tenors-cds> [<https://perma.cc/P2EF-G6RT>].

¹⁶¹ Chuck Stanley, *Music Downloaders Settle Price-Fixing MDL with Record Cos.*, LAW360 (Apr. 18, 2018), <https://www.law360.com/articles/1034644> [<https://perma.cc/8VR7-9973>].

¹⁶² See Peter Lee, *Reconceptualizing the Role of Intellectual Property Rights in Shaping Industry Structure*, 72 VAND. L. REV. 1197, 1255 (2019) (noting that the labels "essentially outsourced digital music distribution to the likes of iTunes, Amazon, and Spotify").

¹⁶³ See Mehra, *supra* note 122, at 15 (explaining how the book publishers reacted to "[n]ew, quantum-level cheaper forms of distribution" by conspiring to fix prices); Gabriel Fitch, Note, *From*

book publishers, however, faced a simple pricing problem arising from a single retailer. The consumption practices of their consumers were not changing, only the format and cost were.¹⁶⁴ Practically speaking, users purchased e-books the same way they purchased physical books; the only change was that they read the books on a screen.¹⁶⁵ As a result, the transaction costs associated with licensing deals were low; the publishers presented terms to their e-book distributors, granting them flexibility over retail pricing, and those distributors agreed.¹⁶⁶ There may have been some posturing, but there was little pushback or exchanging of redlined drafts.¹⁶⁷

This is markedly different from music, where consumption underwent a fundamental change. Users transitioned from purchasing single albums to own to purchasing access to a catalog of tens of millions of tracks.¹⁶⁸ The record labels had no precedent to work from; they had never licensed entire catalogs on an “access” model¹⁶⁹ before and were reluctant to cede any of the control they had historically exercised over the format and means through which fans consumed music.¹⁷⁰ The novelty and uncertainty of the market, the need to license catalogs from all three labels, and the time spent on negotiations have led to persistently high transaction costs, which enable the labels to impose parallel contract terms on licensees, ultimately facilitating information-sharing and hindering the services’ ability to innovate.

Napster to KaZaa: What the Recording Industry Did Wrong and What Options Are Left, 9 J. TECH. L. & POL’Y 183, 191–92 (2004) (writing that Napster made its MusicShare software free to users who could use it to upload and download MP3 music files).

¹⁶⁴ See Mehra, *supra* note 122, at 16–17 (describing how the rise of e-books attracted book consumers away from purchasing hardback books and toward purchasing the cheaper e-books).

¹⁶⁵ *Id.* E-book “purchases,” however, are typically licenses, not sales. Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 319 (2017).

¹⁶⁶ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 648 (S.D.N.Y. 2013), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

¹⁶⁷ See *id.* at 672–73, 679–81 (describing Amazon’s initial resistance to the agency model).

¹⁶⁸ See Groennings, *supra* note 122, at 389 (explaining how album sales dropped with the advent of Napster); *Modernizing Our Royalty System to Drive an Additional \$1 Billion Toward Emerging and Professional Artists*, SPOTIFY FOR ARTISTS (Nov. 21, 2023), <https://artists.spotify.com/en/blog/modernizing-our-royalty-system> [<https://perma.cc/WLK8-DQFU>] (indicating that “Spotify hosts well over 100 million tracks”).

¹⁶⁹ DCMS HEARINGS, *supra* note 35, at Q582 (statement of Gutierrez (Spotify)) (explaining that Spotify uses an access model, which requires an active subscription to access downloaded, offline playback music, rather than a download model, which allows consumers to retain access after ending their subscription).

¹⁷⁰ See Lital Helman, *When Your Recording Agency Turns into an Agency Problem: The True Nature of the Peer-to-Peer Debate*, 50 IDEA 49, 92 (2009) (stating that the recording industry’s licensing motives are to generate revenues and maintain control over distribution); Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 79 (2003) (describing how copyright holders prefer “to engage in a costly, individualized, non-automated assessment of what price to charge”).

For a music streaming service, the catalog of each major label is now considered a must-have.¹⁷¹ Consumers expect that streaming services are one-stop shops with complete catalogs and services to provide the broadest selection possible for the best user experience.¹⁷² A similar dynamic exists in the e-books market, where third-party retailers, such as Amazon, seek to have the widest selection possible.¹⁷³ Each catalog, however, embodies copyrights, so each catalog owner has a statutory monopoly over its exploitation.¹⁷⁴ There are no substitutes for any one catalog: if a music service wants to include Beyoncé on its platform, it can only obtain the sound recording rights from Sony. Unlike in other entrepreneurial markets, operating outside the bounds of the Copyright Act is not a great option.¹⁷⁵ The record labels have a well-documented history of going full bore against companies that run afoul of the law, and the threat of statutory damages is significant.¹⁷⁶

Therefore, any new service must obtain sound recording rights from the three major labels to launch, or else risk throwing away its business plan, illuminating one roadblock in the market. Services negotiate with three individual entities to get their businesses off the ground, each of whom has a veto right over the company's viability.

The power imbalance resulting from each label's "must have[]" input creates an environment ripe for opportunism and hold-up strategies in negotia-

¹⁷¹ DCMS HEARINGS, *supra* note 35, at Q665 (statement of Gutierrez (Spotify)); Spotify Technology S.A., Registration Statement (Form F-1) 15–16 (Feb. 28, 2018) [hereinafter Spotify F-1], <https://www.sec.gov/Archives/edgar/data/1639920/000119312518063434/d494294df1.htm> [<https://perma.cc/4EEY-X8GS>]; Fed. Trade Comm'n, Statement of Bureau of Competition Director Richard A. Feinstein *In the Matter of Vivendi, S.A. and EMI Recorded Music 1* (Sept. 21, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/proposed-acquisition-vivendi-s.a.emi-recorded-music/120921emifeinsteinstatement.pdf [<https://perma.cc/6NKY-7R4U>]; Xiyin Tang, *Copyright's Techno-Pessimist Creep*, 90 FORDHAM L. REV. 1151, 1178 (2021); CMA REPORT, *supra* note 35, at 75; Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 977–78 (2020).

¹⁷² CMA REPORT, *supra* note 35, at 77; see Emily Smith, *The Biggest Pain Points Consumers Have with Music Streaming Services*, BRANDWATCH (May 19, 2022), <https://www.brandwatch.com/blog/pain-points-music-streaming-services/> [<https://perma.cc/8GSC-ZRD7>] (finding that consumers list unavailability of songs as a primary issue with music services).

¹⁷³ See Kirkwood, *supra* note 24, at 12 (explaining how the major book publishers acted collectively to induce Amazon into accepting the agency model, as otherwise Amazon would risk losing almost half of its e-book revenues).

¹⁷⁴ See 17 U.S.C. § 102(a)(7) (listing sound recordings as a category in which copyright protection for original authorship exists).

¹⁷⁵ See Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 398 (2017) (describing entrepreneurs who pursued legal changes as part of their business plans). But see Kristelia A. García, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 216 (2019) (describing business models that seek to take advantage of Copyright Act loopholes).

¹⁷⁶ See *supra* Part II.A.1 (discussing how the recording industry used litigation as a way to go after digital music pirates).

tions.¹⁷⁷ Opportunism arises when a party to a contract makes “‘asset-specific’ investments in reliance on a deal,” and the counterparty is subsequently able to extract concessions, such as more money,¹⁷⁸ because those assets have no use outside the contractual relationship.¹⁷⁹ That seems to be the case with the music services. Each service develops its platform in reliance on an assumption that it will complete the licensing deals and that those deals will remain in place. There is little use for a music service with no music; the Copyright Royalty Board (CRB), which is tasked with setting royalty rates for compulsory copyright licenses, has agreed that losing even a single major label catalog would be a death knell for a service’s business.¹⁸⁰ Therefore, each major label can hold the service hostage over the initial licensing terms, as well as at any renegotiation point.¹⁸¹ Spotify, for example, had to abandon its initial free-only (advertising-supported) business model to secure the licenses it needed to launch.¹⁸² As set forth in Part II.C, music services continue to be at the whims of the labels’ preferences for product functionality and pricing.¹⁸³

In some cases, opportunism leads to hold-up problems, where the opportunistic party refuses to continue with the relationship until it has secured significant, unexpected concessions to its benefit.¹⁸⁴ This can happen in any highly concentrated copyright market with must-have catalogs: Amazon found itself in this very position, having to agree to the new terms that the book pub-

¹⁷⁷ Victor, *supra* note 171, at 928, 977; cf. Clark D. Asay, *Rethinking Copyright Harmonization*, 96 IND. L.J. 1005, 1030 (2021) (noting that “because copyright provides a more secure basis for transactions, it may often help reduce transaction costs and thereby bring copyright owners and digital tech providers together in mutually beneficial relationships”). *But see* Lee, *supra* note 162, at 1255 (asserting that digital distributors have “amassed significant leverage, thus weakening the major labels”).

¹⁷⁸ Lee, *supra* note 154, at 294.

¹⁷⁹ G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Toward a New Cause of Action*, 44 VAND. L. REV. 221, 229 (1991).

¹⁸⁰ Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), 86 Fed. Reg. 59452, 59459 (Oct. 27, 2021) (to be codified at 37 C.F.R. pt. 380) [hereinafter Web V].

¹⁸¹ See Commission Decision 139/2004 of Sept. 21, 2012, Merger Procedure, 2012 O.J. 1, 164 (EC) [hereinafter EU UMG Decision] (quoting a service that described the changes Universal demanded it make, including to pricing and the product offering, before granting a license).

¹⁸² See *supra* notes 20–23 and accompanying text (discussing how Spotify developed a subscription-based service in order to launch in the United States).

¹⁸³ See *infra* notes 206–274 and accompanying text (discussing the control held by the labels). Although opportunism is typically characterized as random, there is little surprise in the music market because the copyright monopoly enables such behavior. Benjamin Klein, Robert G. Crawford & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 298–99 (1978). Nevertheless, the services reported that the labels do occasionally make surprising demands. CMA REPORT, *supra* note 35, at 92.

¹⁸⁴ Jennejohn, *supra* note 83, at 300–01.

lishers proposed in order to keep their catalogs on the site.¹⁸⁵ The risk of hold-up is especially high in the music context because each rightsholder knows that a service needs to aggregate rights from the entire group; each can unilaterally hold up a business's launch by delaying the licensing negotiations.¹⁸⁶ In a classic hold-up move, Universal reportedly refused to expand its license with Spotify to cover the United States until it secured an agreement entitling it to two percent of any proceeds from an acquisition or initial public offering.¹⁸⁷

Labels can also hold services hostage through the passage of time. It takes an average of eighteen months for a new service to license all three catalogs.¹⁸⁸ Spotify spent two-and-a-half years negotiating the licenses for expansion to the United States.¹⁸⁹ The average "runway" for a startup (i.e., the length of time it has before it runs out of money) is twelve to eighteen months.¹⁹⁰ Beyond Oblivion, a would-be Spotify competitor, took eighteen months to negotiate licenses and then went bankrupt before it launched, holding two \$50 million notes in favor of Sony and Warner.¹⁹¹ Negotiation delays, therefore, can be used to weed out unfunded (or under-funded) startups and/or ensure certain terms are secured.

Economists have argued that the hold-up problems associated with multiple must-have inputs can be solved most efficiently through vertical integration.¹⁹² Vertical integration remains an unrealistic option for the music market, however. As described earlier, the labels tried to develop their own digital distribution products, but they were commercial failures.¹⁹³ Now, consumers expect

¹⁸⁵ See *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 680–81 (S.D.N.Y. 2013) (explaining how Amazon announced "it would 'capitulate and accept' Macmillan's agency terms"), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

¹⁸⁶ Victor, *supra* note 171, at 929; see BJ Ard, *More Property Rules Than Property? The Right to Exclude in Patent and Copyright*, 68 EMORY L.J. 685, 698 (2019) (stating that intellectual property licensing becomes expensive when rightsholders use holdout strategies).

¹⁸⁷ CARLSSON & LEJONHUFVUD, *supra* note 14, at 105; see Schwartz & Scott, *supra* note 70, at 544, 552 (articulating how hold-up behavior requires unanticipated events).

¹⁸⁸ DiCola & Touve, *supra* note 20, at 444.

¹⁸⁹ *Id.* at 433–34.

¹⁹⁰ *Does Your Startup Have Enough Runway?*, J.P. MORGAN (Sept. 14, 2020), <https://www.jp.morgan.com/commercial-banking/insights/does-your-startup-have-enough-runway-to-survive> [<https://perma.cc/RQ6M-KFWZ>].

¹⁹¹ DiCola & Touve, *supra* note 20, at 434–35.

¹⁹² See Gilson et al., *supra* note 33, at 437–38 (describing the economic theory).

¹⁹³ See Fagin et al., *supra* note 159, at 492–93 (explaining how the labels coordinated on the development of distribution services MusicNet and Pressplay, which "raise[d] the risk that they will, in the long-term, collude").

that any popular service will have music from all three labels, so independent vertical integration (e.g., Sony creating a Sony-only service) is unlikely.¹⁹⁴

Alternatively, as is common in other intellectual property contexts, pooling the copyrights into a joint licensing vehicle would minimize transaction costs without resulting in full vertical integration. Robert Merges has suggested that those “with a recurring need to transact in intellectual property rights” are compelled by basic economics to find a way to lower transaction costs.¹⁹⁵ This has occurred in the music publishing industry through the development of three main organizations that license the collective rights to publicly perform musical works for their composer-members.¹⁹⁶ In an efficient market, Merges asserts, participants find a way to lower transaction costs. This is particularly true where the intellectual property owners do not compete on price to downstream distributors, as is the case with the labels.¹⁹⁷ Nevertheless, pooling is an unlikely option in this market. The MusicNet and Pressplay joint ventures were set up as pools (as well as direct-to-consumer products), but the labels were sued for price-fixing, understandably deterring them from further forays into joint licensing.¹⁹⁸ Instead, they directly license all the services individually.¹⁹⁹

Taken together, the labels have several characteristics working in their favor to ensure they can impose the terms they desire on licensees: opportunism, the ability to hold up transactions, and the leverage afforded by the copyright monopoly.²⁰⁰ Additionally, because the three labels control a significant part of the market and each holds complementary inputs for the services, regulators

¹⁹⁴ See CMA REPORT, *supra* note 35, at 77 (explaining that streaming services need to provide full music catalogs to compete effectively); Smith, *supra* note 172 (highlighting consumers’ preferences for a wide catalog of songs).

¹⁹⁵ Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1294 (1996).

¹⁹⁶ See *Performance Rights Organizations: What They Are and Why You Need One*, INDIEFLOW (Mar. 14, 2023), <https://www.indieflow.me/blog/performance-rights-organizations-royalties-the-basics> [<https://perma.cc/CL8P-RDDQ>] (listing the three most prominent performing rights organizations in the United States: American Society of Composers, Authors, and Publishers (ASCAP); Broadcast Music, Inc. (BMI); and Society of European Stage Authors and Composers). The DOJ and FTC recognize that pools “provide procompetitive benefits by integrating complementary technologies, reducing transaction costs, clearing blocking positions, and avoiding costly infringement litigation.” U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY* 30 (2017) [hereinafter DOJ/FTC GUIDELINES], <https://www.justice.gov/atr/IPguide> lines/download [<https://perma.cc/PWC5-BQWR>].

¹⁹⁷ See CMA REPORT, *supra* note 35, at 73–74 (explaining the low incentives for the major labels to compete on prices); *infra* Part II.C.1 (discussing MFNs and product restrictions).

¹⁹⁸ *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 318–19 (2d Cir. 2010).

¹⁹⁹ KOHN, *supra* note 2, at 1497 (explaining that the license agreements between labels and streaming services are highly complex and individualized).

²⁰⁰ See *supra* notes 177–181 and accompanying text (discussing opportunism and hold-up strategies in the music streaming industry).

have characterized them as a complementary oligopoly.²⁰¹ In turn, scholars believe they can charge supracompetitive prices—prices higher than would be seen in a competitive market.²⁰² As a corollary, they can likely also impose non-economic terms that would not be consistently agreed to in competitive markets. Therefore, the record labels have a firm upper hand in licensing negotiations, and especially at the outset, before a product is launched (when the service has almost no bargaining power).²⁰³ One Warner executive noted outright to policymakers in the United Kingdom that licensing affords them “maximum power of negotiation. . . . [The power] to say no.”²⁰⁴

As the labels’ own experiences with MusicNet and Pressplay (and in *United States v. Apple Inc.*) showed, explicitly coordinating on contracting would be met with justifiable antitrust scrutiny.²⁰⁵ The copyright licensing market conditions, however, obviate the need for explicit coordination. The labels’ negotiation leverage means there is some certainty that they will each be able to secure particular terms.

C. Parallel Formalities

Parallel contracting arises when a party “enters into a series of contracts with many similarly situated individuals on background terms that are presumptively identical.”²⁰⁶ When the background terms are non-controversial, parallel contracting can yield positive results in a market. Much of the literature around private ordering describes various forms of parallel contracting, such as diamond dealers agreeing to submit all business disputes to an arbitration body,²⁰⁷ or the cotton industry agreeing to uniform penalties for late deliv-

²⁰¹ Determination of Royalty Rates and Terms for Ephemeral Recording and Webcasting Digital Performance of Sound Recordings (Web IV), 81 Fed. Reg. 26316, 26368 (May 2, 2016) (to be codified at 37 C.F.R. pt. 380) [hereinafter Web IV] (describing the major labels as enjoying a “complementary oligopoly” over the music industry); Web V, *supra* note 180, at 59455 (explaining that each label is a “must have” for streaming services, creating a complementary oligopoly).

²⁰² Tang, *supra* note 171, at 1178; Victor, *supra* note 171, at 926; *see also* Jordan M. Barry, John William Hatfield, Scott Duke Kominers & Richard Lowery, *Not from Concentrate: Collusion in Collaborative Industries*, 108 IOWA L. REV. 1089, 1115 (2023) (noting that firms in industries with interdependent players can organize themselves in a manner to extract supracompetitive prices).

²⁰³ *See* William W. Bratton & Simone M. Sepe, *Corporate Law and the Myth of Efficient Market Control*, 105 CORNELL L. REV. 675, 681 (2020) (stating that “the party with bargaining power controls the result whether or not the outcome is optimal”).

²⁰⁴ DCMS REPORT, *supra* note 46, at 68; *see* Lee, *supra* note 162, at 1255 (noting that the major labels have used their copyright monopolies and market power to maintain negotiating leverage).

²⁰⁵ *See supra* note 198 and accompanying text (discussing the claim that MusicNet and Pressplay violated antitrust laws by engaging in price fixing).

²⁰⁶ Aditi Bagchi, *Parallel Contract*, 75 U. PITT. L. REV. 139, 142 (2013).

²⁰⁷ Bernstein, *Opting Out*, *supra* note 6, at 120.

eries and payments.²⁰⁸ In other contexts, scholars have determined that parallel contracting can lead to socially inefficient outcomes. Orly Lobel suggests, for example, that the widespread use of restrictive covenants in employment agreements inhibits competition.²⁰⁹ Parallel contracting can also consolidate control in a small handful of firms, so long as each continues to impose the parallel provisions.²¹⁰ Nevertheless, as demonstrated in *Apple*, parties cannot explicitly agree among themselves to impose parallel contract terms on their counterparties.²¹¹ They can, however, mirror each other to accomplish such an objective.

In the music industry, each label enters into separate agreements with each service at different times, yet each label appears to impose a similar model on each service.²¹² Over the last decade, the CRB, regulators in Europe, and industry experts have consistently described the streaming license agreements as containing certain notable, parallel terms.²¹³ These parallel provisions cement the labels' control over the market in two ways. First, MFNs and product restrictions create a governance structure that enables information-sharing and the resolution of any asymmetry or disputes.²¹⁴ These terms allow the collaborators (the labels) to observe each other's behavior, identify any discrepancies and respond as needed, and all in a manner that restricts the services' independent decision-making.²¹⁵ Second, an additional set of provisions reflects the flexibility the labels have preserved for themselves to iterate on how best to preserve some control over promotion and placement of music in a streaming environment.²¹⁶ This Subsection discusses each such term.

²⁰⁸ Bernstein, *Commercial Law*, *supra* note 6, at 1733–34.

²⁰⁹ Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 908 (2021).

²¹⁰ See Bagchi, *supra* note 206, at 167 (noting that parallel contracting allows parties with leverage in negotiations to maintain “cumulative” control over contracts); Lobel, *supra* note 209, at 909 (noting that parallel contracting shapes the power structure of a market).

²¹¹ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

²¹² DCMS HEARINGS, *supra* note 35, at Q261, Q323, Q325 (statements of Tony Harlow, Chairman and Chief Executive, Warner Music UK (Harlow (WMG)) & Joseph (UMG)).

²¹³ See, e.g., CMA REPORT, *supra* note 35, at 66–72 (describing numerous similar contract provisions across major label agreements); Music Managers Forum & Featured Artists Coalition, Written Evidence Submitted by the Featured Artists Coalition and Music Managers Forum 4–5 (2021) [hereinafter MMF Evidence], <https://committees.parliament.uk/writtenevidence/18835/pdf/> [<https://perma.cc/4S4Z-MLWV>] (describing the consistent economic model); KOHN, *supra* note 2, at 1525 (suggesting that “each service . . . ends up reaching the virtually same deal with each of the major companies or significant representatives with whom it negotiates”).

²¹⁴ See *infra* notes 217–248 and accompanying text.

²¹⁵ Gilson et al., *supra* note 3, at 1403.

²¹⁶ See *infra* notes 249–274 and accompanying text.

1. Governance: MFNs and Product Restrictions

When GSS first introduced the braiding theory, they noted two critical elements of formal governance structures in collaborative contracts. The first is the continued exchange of information.²¹⁷ Information-sharing, as GSS described, is fundamental to supporting long-term collaboration: as more information is shared over time, the switching costs of leaving rise.²¹⁸ The second is a referee mechanism that is used to resolve any disputes or information asymmetry and prevent defections.²¹⁹ If any issue arises, the referee is called in.²²⁰

Direct sharing of private, business-sensitive information among competitors, however, raises concerns under antitrust laws.²²¹ Enterprises operating in the same market cannot simply trade competitive information about their business practices with each other; there must be some safeguards in place. In the Pharmacopeia/BMS agreement that GSS examined, a framework was implemented for parties to exchange information about their joint efforts through a defined steering committee that met regularly to review and discuss research plans.²²² In the music industry, the record labels appear to have developed a different kind of formality to share intelligence while navigating the streaming distribution market: MFN provisions and product restrictions.²²³ These terms ultimately put the licensees in the position of ensuring information is exchanged on an equal basis among the labels; the services are the referees.

Some brief background is warranted, as the economic terms in the label licensing agreements are complicated (yet largely standardized across the industry).²²⁴ First, the service pays the major label an up-front payment known

²¹⁷ Gilson et al., *supra* note 3, at 1403; Gilson et al., *supra* note 33, at 480, 482.

²¹⁸ Gilson et al., *supra* note 33, at 481–82, 489.

²¹⁹ Gilson et al., *supra* note 3, at 1403; Gilson et al., *supra* note 33, at 480, 482.

²²⁰ Gilson et al., *supra* note 3, at 1403.

²²¹ See 15 U.S.C. § 1 (making explicit collusion illegal); Zheng, *supra* note 53, at 410–11 (positing that tacit sharing of information could constitute collusion); FED. TRADE COMM’N, *supra* note 89, at 6 (“Competitor collaborations also may facilitate explicit or tacit collusion through facilitating practices such as the exchange or disclosure of competitively sensitive information or through increased market concentration.”).

²²² Gilson et al., *supra* note 3, at 1405.

²²³ Other scholars have examined the use of MFN pricing provisions as a facilitating practice (of collusive conduct) that should be considered problematic under antitrust law. See generally Baker, *supra* note 136 (examining the use of MFNs as a facilitating practice); Piraino, *supra* note 143 (same); Shamir & Shamir, *supra* note 89 (same); cf. Keith J. Crocker & Thomas P. Lyon, *What Do “Facilitating Practices” Facilitate? An Empirical Investigation of Most-Favored-Nation Clauses in Natural Gas Contracts*, 37 J.L. & ECON. 297 (1994) (finding that MFNs can facilitate efficient price negotiations).

²²⁴ KOHN, *supra* note 2, at 1525; Chris Cooke, *Trends: Music Licensing—Explained at Last!*, COMPLETE MUSIC UPDATE (May 29, 2015), <https://completemusicupdate.com/article/trends-music-licensing-explained-at-last/> [https://perma.cc/296L-XP4U]; see DCMS HEARINGS, *supra* note 35, at Q666 (statement of Gutierrez (Spotify)) (explaining that the revenue share model “has become the way all the labels do business”). In September 2023, Universal and Deezer (a European streaming

as a “minimum guarantee[.]”²²⁵ These payments are astronomical.²²⁶ In 2011, Spotify’s agreement with Sony (which was leaked to the press) had a minimum guarantee payment of \$25 million for the first two years of the agreement, with another \$17.5 million due if Sony exercised an option to renew the agreement for an additional year.²²⁷ As of the end of 2022, Spotify’s outstanding minimum guarantee commitments to all licensors had ballooned to over 1.4 billion Euros.²²⁸ In 2016, one industry analyst determined that the major labels earned nearly \$1.6 million a day over the course of a calendar quarter in minimum guarantees from streaming services.²²⁹

Then, the labels are allocated a revenue share. The service typically sets aside a portion of its revenues—the label pool, for which 55% to 60% is con-

service) announced a partnership to experiment with a new model for calculating streaming royalties. Press Release, Universal Music Group, Universal Music Group and Deezer to Launch the First Comprehensive Artist-Centric Music Streaming Model (Sept. 6, 2023), <https://www.universalmusic.com/universal-music-group-and-deezer-to-launch-the-first-comprehensive-artist-centric-music-streaming-model/> [<https://perma.cc/D4MU-842M>]. It appears, however, that the parties will continue to use the same model this Article describes and that the change concerns how royalties are allocated to each individual artist. See Umar Shakir, *Universal Music Group Lands New Royalty Model That Boosts Popular Artists*, THE VERGE (Sept. 6, 2023), <https://www.theverge.com/2023/9/6/23861232/universal-music-deezer-streaming-deal> [<https://perma.cc/44EU-GHGH>] (highlighting that the new model is intended to increase royalty payments to professional artists).

²²⁵ CMA REPORT, *supra* note 35, at 66; DCMS HEARINGS, *supra* note 35, at Q256, Q261 (statements of Joseph (UMG) & Harlow (WMG)); KOHN, *supra* note 2, at 1496, 1510; MMF Evidence, *supra* note 213, at 4; MEREDITH ROSE, PUB. KNOWLEDGE, STREAMING IN THE DARK: WHERE MUSIC LISTENERS’ MONEY GOES—AND DOESN’T 24–25 (2023), https://publicknowledge.org/wp-content/uploads/2023/03/Streaming-in-the-Dark_Meredith-Rose_Public-Knowledge_March-2023.pdf [<https://perma.cc/TAB2-5WL8>]; see also UNIVERSAL MUSIC GROUP, MUSIC IS UNIVERSAL: ANNUAL REPORT 2022, at 241, <https://view.publitas.com/cfreport/umg-annual-report-2022/page/1> [<https://perma.cc/6TJJ-NEQX>] (defining a minimum guarantee as “generally recoupable and . . . in substance an advance payment”); Warner Music Group Corp., Annual Report (Form 10-K) 35 (Nov. 21, 2023) (detailing minimum guarantees); Sony Corporation, Annual Report (Form 20-F) F-69 (June 18, 2019) (detailing minimum guarantees).

²²⁶ See MMF Evidence, *supra* note 213, at 4 (noting that minimum guarantees are usually “multi-million [British] pound[s]”).

²²⁷ SONY MUSIC ENTERTAINMENT & SPOTIFY USA INC. DIGITAL AUDIO/VIDEO DISTRIBUTION AGREEMENT, at Exhibit A § 4 (Jan. 18, 2011) [hereinafter SONY/SPOTIFY CONTRACT].

²²⁸ Spotify Technology, S.A., Annual Report (Form 20-F) 16 (Feb. 2, 2023) [hereinafter Spotify 2022 Annual Report]. This number includes publishing payments. The traditional ratio of payments between sound recording and publishing rightsholders is just under 4:1 (publishing payments are ~15% of revenues, and sound recording payments are ~55%), so roughly one billion Euros is likely owed to labels (and mostly to the majors). See U.S. On-Demand Subscription Streaming Revenue: Who Gets Paid and How Much?, DIGIT. MEDIA ASS’N, <https://dima.org/news-and-resources/who-gets-paid-and-how-much/> [<https://perma.cc/ECZ8-KRNT>] (explaining the calculation of royalty rates for publishers and recording rightsholders).

²²⁹ Paul Resnikoff, *Spotify, Apple Music, Tidal Paying \$1.6 Million a DAY in Major Label Guarantees* . . . , DIGIT. MUSIC NEWS (Sept. 1, 2016), <https://www.digitalmusicnews.com/2016/09/01/spotify-apple-tidal-millions-daily-guarantees> [<https://perma.cc/M4PN-YKWX>].

sidered standard²³⁰—and pays each label a pro-rata portion of the label pool based on that label’s share of streams of recordings across the service for a given accounting period.²³¹ As an example, if a service makes \$1,000 in subscriber revenues in a month and the labels’ revenue share is 55%, then \$550 will be allocated to the labels. That \$550 is divided among labels based on their relative “stream share” (the percentage of streams of a given label’s artists across all streams). If Universal artists commanded 40% of the streams in a month, Universal would be allocated 40% of \$550, or \$220. The revenue share amounts, however, are credited against the minimum guarantee and are not paid out until the minimum guarantee is recouped.²³² If a service paid Universal a \$5,000 minimum guarantee, then \$220 would be credited against the \$5,000 account. Once \$5,000 is earned, the regular revenue share payments kick in.

Regulators and services agree there is little (if any) price competition among the labels in their deals with streaming services.²³³ This is likely due to widespread, parallel use of MFN provisions.²³⁴ These MFNs apply to the “rates” (i.e., the revenue share) and ensure that each label gets the benefit of the highest rate that any other label negotiates.²³⁵ For instance, if Warner were to negotiate for a label pool of 60% of revenues, and there are price MFNs in the Sony and Universal deals, then Sony and Universal are likely to also be paid out based on a 60% label pool, even if Sony and Universal each negotiated for a 55% label pool. The MFNs, which have been well-publicized for years, allow the labels to exchange pricing information without any direct communication among them.²³⁶ If an MFN in one label agreement is triggered

²³⁰ *U.S. On-Demand Subscription Streaming Revenue: Who Gets Paid and How Much?*, *supra* note 228; Web IV, *supra* note 201, at 26324 (summarizing the rightsholders’ proposed 55% revenue share, mirroring the interactive agreements).

²³¹ DCMS REPORT, *supra* note 46, at 15, 90; DCMS HEARINGS, *supra* note 35, at Q671 (statements of Kevin Brennan, Member of Parliament & Gutierrez (Spotify)); Chris Cooke, MUSIC MANAGERS F., DISSECTING THE DIGITAL DOLLAR: PART TWO—FULL REPORT 22 (2016), https://themmf.net/wp-content/uploads/2023/10/MMF_DDD-Part-Two_Full-Report_Web.pdf.pdf [<https://perma.cc/MU7G-AKLL>].

²³² DCMS HEARINGS, *supra* note 35, at Q256 (statement of Joseph (UMG)); MMF Evidence, *supra* note 213, at 4; ROSE, *supra* note 225, at 25.

²³³ CMA REPORT, *supra* note 35, at 73; Web IV, *supra* note 201, at 26341–42, 26344; Services’ Joint Proposed Findings of Fact and Conclusions of Law at 46, *In re Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V)*, No. 19-CRB-0005-WR (2021–2025); Web V, *supra* note 180, at 59475.

²³⁴ See Andre Boik & Kenneth S. Corts, *The Effects of Platform Most-Favored-Nation Clauses on Competition and Entry*, 59 J.L. & ECON. 105, 108 (2016) (describing MFNs as vehicles for price-fixing).

²³⁵ CMA REPORT, *supra* note 35, at 68; see Web IV, *supra* note 201, at 26365 (describing MFNs on “rates and terms” in major label agreements).

²³⁶ See Shamir & Shamir, *supra* note 89, at 629–30, 661 (discussing how competitors can communicate pricing information through third parties). The CRB has acknowledged the MFNs in related rate-setting proceedings since 2016. Web IV, *supra* note 201, at 26364. When Universal purchased

(e.g., by the service granting a more favorable revenue share to another label), then the service is likely obligated to automatically provide that label with the better term.²³⁷ Overnight, the label simply gets paid more—and learns what another label negotiated. If there is any doubt as to the services' compliance with MFNs, additional tools can be employed to verify enforcement, such as the use of an independent auditor.²³⁸

MFNs are not the only vehicle in the contracts used to distribute information. Each major label agreement also includes specifications of what the services can and cannot do with the licensed content.²³⁹ Narrow copyright licenses are not unusual; copyright owners are free to impose restrictions on the use of their works, so long as they are consistent with copyright law.²⁴⁰ In this industry, however, the restrictions are highly specific and therefore must be generally consistent across agreements for a service to build a product without risking breach of an agreement.²⁴¹ Sony's 2011 agreement with Spotify illustrates the level of detail included. Sony authorized Spotify to make Sony's streaming content available to end users only through pre-approved versions of

EMI in 2012, the EU issued a decision that detailed prevalent use of MFNs across the industry (and banned Universal from imposing MFNs that applied within its borders for 10 years). EU UMG Decision, *supra* note 181, at 120–21. In 2022, the CMA summarized provisions of the label license agreements with the streaming services, including price MFNs. CMA REPORT, *supra* note 35, at 68, 111. In public submissions to the CMA, both Warner and Universal defended their use of MFNs. WARNER MUSIC GRP. CORP., WARNER MUSIC GROUP CORP.'S SUBMISSION FOLLOWING THE COMPETITION AND MARKETS AUTHORITY'S MUSIC AND STREAMING MARKET STUDY UPDATE 3 (Sept. 21, 2022) [hereinafter WARNER CMA RESPONSE], https://assets.publishing.service.gov.uk/media/632205f3d3bf7f33d11238e5/Warner_Music_Group_21.9.22_Redacted.pdf [<https://perma.cc/J8LU-4VX3>]; UNIVERSAL MUSIC GRP., MUSIC AND STREAMING MARKET STUDY: UNIVERSAL MUSIC GROUP'S RESPONSE TO THE CMA'S UPDATE PAPER DATED 26 JULY 2022, at 14 (Aug. 19, 2022) [hereinafter UMG CMA RESPONSE], https://assets.publishing.service.gov.uk/media/63220501d3bf7f33d5ddd933/Universal_Music_Group_21.9.22.pdf [<https://perma.cc/PY8U-C7ZE>].

²³⁷ See SONY/SPOTIFY CONTRACT, *supra* note 227, at Exhibit A, § 13(b) (requiring that Spotify inform Sony if it enters into a "Specifically More Favorable Agreement" with another party).

²³⁸ See *id.* at Exhibit A, § 13(e)–(i) (outlining Sony's right to request an independent auditor). The auditor is subject to confidentiality obligations that prevent it from revealing which label negotiated the better economics. *Id.* at Exhibit A, § 13(g).

²³⁹ KOHN, *supra* note 2, at 1530; see CMA REPORT, *supra* note 35, at 67 ("We have observed that the majors' recording licences [sic] usually contain detailed specifications of the functionality parameters which authorise [sic] what the music streaming service is permitted to do within each 'tier' of its service.").

²⁴⁰ See *What Is Copyright Licensing?*, WINSTON & STRAWN LLP, <https://www.winston.com/en/legal-glossary/copyright-licensing> [<https://perma.cc/BM8F-6ZDW>] (writing that a copyright license "may be broad or narrow").

²⁴¹ DCMS HEARINGS, *supra* note 35, at Q655–57 (statements of Paul Firth, Director of International Music, Amazon, Gutierrez (Spotify) & Elena Segal, Global Senior Director of Music Publishing, Apple Inc.) (explaining product standardization). Product standardization is illustrated by a colloquy among representatives from Amazon, Apple, and Spotify regarding "autoplay" features during a hearing in the United Kingdom, in which all witnesses chimed in to describe the feature, even though the question was posed to Amazon. *Id.*

the Spotify platform (the then-current desktop and mobile applications), on devices pre-approved by Sony, at a pre-determined bit rate, from computer servers that were pre-identified to Sony.²⁴² These narrow licenses mean that, for a service to pursue a new innovative feature or functionality, it must likely seek permission from each label to amend the product restrictions.²⁴³ Through that process, the labels can glean insight into whether the others have approved that feature or functionality. There are some changes for which each label will have a veto right (i.e., any change that implicates a new, unforeseen use of the catalog), so ongoing discussions would suggest that no label has exercised that power.

The MFN provisions and product restrictions facilitate the exchange of information among the labels. These terms also illuminate how information asymmetry is resolved: the labels utilize the services as referees.²⁴⁴ To comply with the MFNs and product restrictions, each service must provide information to the labels that indicates how the other labels are acting, eliminating any asymmetry. The services also have other tools at their disposal to prevent defections. Arguably, Universal cheated on the other labels with a reported side letter that entitled it to two percent of the proceeds from a Spotify exit transaction.²⁴⁵ Supposedly, that letter did not trigger the MFNs in the license agreements (i.e., Sony and Warner did not get the same benefit) because it was entered into directly with Spotify shareholders, not the company itself.²⁴⁶ That side letter would suggest a possible fracture in the braided framework, but for the role of the referee: Spotify, in this case. Journalists have speculated that Spotify's decision to go public through a direct listing of its existing shares on the stock exchange, rather than generate proceeds by issuing new shares through a traditional initial public offering, may have been related to this agreement.²⁴⁷ In a direct listing, the company does not raise any new capital, and so Universal was reportedly not owed any money.

The parallel contract provisions implement a governance regime that maintains industry-wide standards but without the explicit coordination de-

²⁴² SONY/SPOTIFY CONTRACT, *supra* note 227, at Exhibit A, § 9(a)(1).

²⁴³ CMA REPORT, *supra* note 35, at 92–93; Warner DCMS Response, *supra* note 31, at 7; Spotify AB, Supplementary Written Evidence Submitted by Spotify AB 4 (Mar. 19, 2021), <https://committees.parliament.uk/writtenevidence/24796/pdf/> [<https://perma.cc/M64P-B9CX>] (stating the labels' "consent is required every time Spotify wants to launch the service in a new territory, and when Spotify adds new features to its streaming service that are not covered under the scope of the existing licenses"); *see also* Spotify F-1, *supra* note 171, at 18 (including as a risk factor the requirement to obtain consent for "certain business initiatives" from some licensors).

²⁴⁴ *See* Gilson et al., *supra* note 3, at 1403 (explaining that referee mechanisms are used to resolve information asymmetry).

²⁴⁵ CARLSSON & LEIJONHUFVUD, *supra* note 14, at 105–06.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 239.

tailed in *Apple*.²⁴⁸ This structure enables the labels to iterate in other areas, as set forth in the next Subsection.

2. Iterating: Controlling Promotion and Placement

The MFNs and product restrictions are key components of the label license agreements: they are the scaffolding that supports information-sharing and reinforces cooperation. For example, so long as there are MFNs, there is little incentive for services to try and negotiate better economics in exchange for promotional placement.²⁴⁹ Instead, the labels have secured additional, parallel provisions that demonstrate how they continue to iterate, particularly as it relates to influencing how music is promoted and presented to consumers.²⁵⁰ Some provisions appear across all agreements and some do not, but all are enabled by the protections that the MFNs and product restrictions give in ensuring that no label is undercut on price or use of its catalog.

Chief among these provisions is the minimum guarantee payment, which is meant to reflect the value of the relevant catalog.²⁵¹ Each label requires services to take its entire catalog; the service cannot license only popular music and leave long-tail or obscure content behind.²⁵² This “must carry” amounts to a

²⁴⁸ *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 691 (S.D.N.Y. 2013) (“There is little dispute that the Publisher Defendants conspired together to raise the prices of their e-books.”), *aff’d*, 791 F.3d 290 (2d Cir. 2015). Because the apparent goal is parity among the labels, it is irrelevant that a label will not know who negotiated a better term or approved a new feature. In fact, each of the agreements is subject to robust confidentiality provisions, preventing the services and the labels from disclosing the specifics of each contract to anyone else. CMA REPORT, *supra* note 35, at 71; *see also* SONY/SPOTIFY CONTRACT, *supra* note 227, at § 1 (including a robust confidentiality provision); DCMS HEARINGS, *supra* note 35, at Q342 (statement of Rupert Skellett, General Counsel, Beggars Group) (stating that “[t]he deals between the majors and the platforms are top secret”).

²⁴⁹ *See* Jonathan B. Baker & Fiona Scott Morton, *Antitrust Enforcement Against Platform MFNs*, 127 YALE L.J. 2176, 2179 (2018) (explaining that an MFN “creates a strong financial incentive for the seller not to offer low prices”). Offering discounts on fees has long been a valid strategy for securing more eyes or ears. *See* Letter from Spotify to The Honorable Jerrold Nadler, Chairman & The Honorable Henry C. “Hank” Johnson, Chairman (June 16, 2021) (on file with author) (describing how Spotify’s “Discovery Mode” feature is not payola); *see also* Christopher Buccafusco & Kristelia Garcia, *Pay-to-Playlist: The Commerce of Music Streaming*, 12 U.C. IRVINE L. REV. 803, 829–30 (2022) (describing “reverse payola,” in which Spotify seeks to lower its royalty burden by programming lower-cost content in playlists).

²⁵⁰ *See* Gilson et al., *supra* note 57, at 63 (describing how braiding enables parties to repeatedly iterate on different approaches to achieve a goal).

²⁵¹ *See* CMA REPORT, *supra* note 35, at 66 (finding that minimum guarantee payments clauses are common among recording licenses).

²⁵² *Id.* at 70; UMG CMA RESPONSE, *supra* note 236, at 25; WARNER CMA RESPONSE, *supra* note 236, at 5–6; SONY MUSIC, CMA MARKET STUDY INTO MUSIC STREAMING: SONY MUSIC ENTERTAINMENT’S RESPONSE TO THE CMA’S INTERIM REPORT 4–5 (Sept. 21, 2022) [hereinafter SONY CMA RESPONSE], https://assets.publishing.service.gov.uk/media/632203f4e90e072ce3c633cd/Sony_Music_Entertainment_21.9.22.pdf [https://perma.cc/3TH7-62LB].

form of package licensing similar to tying.²⁵³ Tying occurs when a seller conditions the purchase of one or more items on the purchase of another item(s).²⁵⁴ For instance, if a service wants Beyoncé from Sony, it must also take Sony's least popular albums, and it will pay for those unpopular albums, as they are figured into the minimum guarantee. In the physical era, record stores could pick and choose which inventory they wanted to stock based on what consumers were predicted to buy. No such option exists for streaming.

The determination of the minimum guarantee is critical; a service overpays for a catalog if it does not fully recoup the minimum guarantee over the applicable contract term.²⁵⁵ That over-payment (i.e., the amount by which the minimum guarantee exceeds the actual revenue share amounts attributed to the label) is known as “breakage.”²⁵⁶ The labels retain any breakage, which can range from 0.5% to 5% of a label's total streaming revenues.²⁵⁷ As discussed further in Part III.A, breakage suggests that the labels may be capturing more surplus through the streaming agreements than copyright law was intended to return to owners as an incentive to create.²⁵⁸

The minimum guarantee model also appears to give the labels some control over end-user pricing. Although the labels do not set the prices that consumers pay to subscribe to music services, the minimum guarantee constrains the range of prices for which it remains economically feasible to run a business.²⁵⁹ A service is likely to price a subscription such that it can recoup the minimum guarantee.

Additionally, the minimum guarantee can affect the content that is promoted. In the days of radio, labels paid (illegally) for promotion.²⁶⁰ Now, labels can use the minimum guarantee to (lawfully) incentivize services to pri-

²⁵³ DOJ/FTC GUIDELINES, *supra* note 196, at 29; cf. Jorge Padilla, Douglas H. Ginsburg & Koren W. Wong-Ervin, *Antitrust Analysis Involving Intellectual Property and Standards: Implications from Economics*, 33 HARV. J.L. & TECH. 1, 29 (2019) (distinguishing tying from “pure bundling,” a tying-like arrangement that occurs when there are no substitutes for the relevant product).

²⁵⁴ DOJ/FTC GUIDELINES, *supra* note 196, at 28.

²⁵⁵ DCMS HEARINGS, *supra* note 35, at Q256 (statement of Joseph (UMG)). Services do not want to recoup too quickly, either. If they do, the catalog will appear to be worth more than the minimum guarantee, and the labels are likely to demand a higher payment in the next renegotiation.

²⁵⁶ CMA REPORT, *supra* note 35, at 117; KOHN, *supra* note 2, at 1497; DCMS HEARINGS, *supra* note 35, at Q255–56 (statements of Harlow (WMG) & Joseph (UMG)); Chris Cooke, *supra* note 231, at 56; Warner Music Group Corp., Registration Statement (Form S-1) F-21 (Feb. 6, 2020); ROSE, *supra* note 225, at 25.

²⁵⁷ KOHN, *supra* note 2, at 1497; *see also* CMA REPORT, *supra* note 35, at 121 (describing the labels' retention of breakage).

²⁵⁸ *See infra* Part III.A and accompanying text.

²⁵⁹ *See* EU UMG Decision, *supra* note 181, at 161 (noting that minimum guarantees are “one of the main obstacles to the emergence of innovative business models that offer comprehensive consumer choice for digital music”).

²⁶⁰ Buccafusco & García, *supra* note 249, at 806.

oritize major label content over others. The minimum guarantees are recouped using revenue share payments that are determined by each label's stream share across a platform. So, services are implicitly encouraged to program their platforms to ensure each major label recoups its minimum guarantee—and it appears they do. Top playlists, for example, favor major label content.²⁶¹ A 2022 study showed that over 85% of the songs on popular Spotify-generated playlists such as “Rap Caviar” and “Today's Top Hits” are licensed from the major labels,²⁶² even though they account for approximately 75% of streams across the entire service.²⁶³ These playlists have millions of followers (for example, Spotify's “Today's Top Hits” has over thirty-three million followers) and drive streaming success.²⁶⁴ Having a song added to a popular playlist can lead to tens of millions of streams and over one hundred thousand dollars in royalties.²⁶⁵ Content that is pushed to fans is more likely to be listened to, and in turn, what fans listen to affects the recommendation algorithms that push more content to them and others.²⁶⁶ If you listen to Beyoncé with some regularity, you are likely to be recommended Beyoncé and Beyoncé-like artists.

Nevertheless, some (not all) labels still negotiate additional provisions to enhance and preserve the presentation of their music on the platforms. Some of the major labels require that playlists contain that label's content in proportion to the label's overall stream share on the platform.²⁶⁷ “Anti-steering” clauses also appear in some agreements, which prevent services from favoring another label's content (i.e., through promotion) on the basis of a lower revenue share

²⁶¹ DCMS REPORT, *supra* note 46, at 69, 78; INDEP. MUSIC COS. ASS'N, CMA MUSIC AND STREAMING MARKET STUDY—IMPALA'S COMMENTS ON THE CMA'S REPORT UPDATE 4-5 (2022), https://assets.publishing.service.gov.uk/media/6329a224e90e073722497882/IMPALA_21.9.22.pdf [<https://perma.cc/C9NN-7VUX>].

²⁶² Ashley King, *A New Study Confirms the Obvious: Major Labels Control Spotify Playlists*, DIGIT. MUSIC NEWS (May 4, 2022), <https://www.digitalmusicnews.com/2022/05/04/spotify-playlist-study-major-labels/> [<https://perma.cc/TT4V-KTV7>].

²⁶³ Spotify 2022 Annual Report, *supra* note 228, at 14–15.

²⁶⁴ DCMS REPORT, *supra* note 46, at 78; *Today's Top Hits' New Social Media Accounts Give You More Ways to Discover the Very Best in Music*, SPOTIFY (July 18, 2023), <https://newsroom.spotify.com/2023-07-18/todays-top-hits-tiktok-threads-instagram-twitter-social-media/> [<https://perma.cc/FN3U-3X45>]; Kal Raustiala & Christopher Jon Sprigman, *The Second Digital Disruption: Streaming and the Dawn of Data-Driven Creativity*, 94 N.Y.U. L. REV. 1555, 1597 (2019).

²⁶⁵ Luis Aguiar & Joel Waldfogel, *Platforms, Promotion, and Product Discovery: Evidence from Spotify Playlists* 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24713, 2018); see Buccafusco & García, *supra* note 249, at 824 (“The value of placement on these playlists cannot be overstated.”).

²⁶⁶ See Buccafusco & García, *supra* note 249, at 830 (“Streams beget streams beget streams.”).

²⁶⁷ CMA REPORT, *supra* note 35, at 69; Web IV, *supra* note 201, at 26365; cf. DCMS HEARINGS, *supra* note 35, at Q250 (statement of Harlow (WMG)) (“I think your question . . . was also pointing at whether our deals gave any advantage to different kinds of artists, and whether we got preferential terms on things like placement. The answer is no, we don't.”).

because services typically pay independent labels less than the majors.²⁶⁸ Although these provisions may minimize the risk of breakage because they force more major label streams (and therefore promote recoupment), they are not harmless.

These terms appear to mitigate the chances of a service under-promoting music from a label for which it has already recouped its minimum guarantee, which would otherwise be a rational choice. If a service has recouped Sony's minimum guarantee but not Universal's, it is incentivized to begin pushing Universal content (and downplaying Sony content) until Universal's minimum guarantee has been met, because it has already paid for the Sony content.²⁶⁹ Any Sony streams following recoupment of the minimum guarantee cost the service more out-of-pocket. Additionally, anti-steering provisions in other contexts have been criticized for harming competition, and here, they make it difficult for independent labels, for example, to compete with majors for visibility on the service.²⁷⁰

The consistent adoption of terms across multiple contracts can lead to what some call network benefits, under the theory that there is comfort among contracting parties in knowing a term has been used before.²⁷¹ In that case, the value of the term increases as it is used more widely.²⁷² Negative externalities, however, can result from the same phenomena.²⁷³ Individually, the label licensing terms are aggressive and reflect a significant degree of control over an individual service's business. Taken together across all agreements, however, the minimum guarantee, additional programming limitations, MFNs, and product restrictions amount to collective control over the streaming services, effectuat-

²⁶⁸ Web IV, *supra* note 201, at 26319, 26373 (“In the interactive market, the Majors commonly include anti-steering or [non-economic] MFN clauses in their agreements with the services.”); CMA REPORT, *supra* note 35, at 69. At the time of Web IV, all majors included anti-steering provisions in their agreements. Web IV, *supra* note 201, at 26364–65.

²⁶⁹ See DCMS HEARINGS, *supra* note 35, at Q256 (statement of Joseph (UMG)) (explaining that if the revenue generated by songs from a certain label falls short of the minimum guarantee, then the streaming service owes the balance to the label).

²⁷⁰ See *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 1001 (9th Cir. 2023) (finding that a provision controlling what payment options are available to users was an anti-steering provision that harmed Epic Games); *In re Am. Express Anti-Steering Rules Antitrust Litig.*, 19 F.4th 127, 142–43 (2d Cir. 2021) (describing American Express's anti-steering rules as raising merchant fees, but dismissing the claim for lack of standing). For clarity, this practice is not necessarily payola. Independent labels license content for less than the major labels; anti-steering prevents services from factoring in lower rates in promotional decisions. Web V, *supra* note 180, at 59454.

²⁷¹ Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (or “The Economic of Boilerplate”), 83 VA. L. REV. 713, 718, 729 (1997).

²⁷² See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 761 (1995) (discussing how the value of a contract term may increase as it becomes more widespread).

²⁷³ Bagchi, *supra* note 206, at 164–66.

ed through braiding, without any explicit agreement among the labels.²⁷⁴ The next Section illustrates how the labels appear to self-enforce the continued independent imposition of the parallel provisions.

D. Self-Enforcement Through Informal Norms

In entering into a braided contract, parties forgo certain formalities in favor of informal norms that better support long-term collaboration.²⁷⁵ Informal enforcement is, scholars assert, intended to “partially protect the commitment to collaborate, but . . . not control the course or the outcome.”²⁷⁶ Self-enforcement builds trust between the parties that each will continue to support the collaborative effort, wherever it may lead.²⁷⁷ Among competitors, informal norms are critical to maintaining a relationship, whether collusive or not, because formalities more easily create legal problems.²⁷⁸ The book publishers may not have found themselves defending a conspiracy case if they had not overtly coordinated on drafting and executing identical distribution contracts.²⁷⁹

The labels demonstrate how informal enforcement norms support continued coordination. They attest to independent, “detailed” negotiations with each streaming service, but despite those negotiations, a consistent set of terms persists throughout the industry.²⁸⁰ For this parallel effort to continue, there must be a high degree of trust. Trust minimizes (but does not eliminate) the chances that anyone will “cheat”²⁸¹ and is derived (at the individual and institutional

²⁷⁴ This Article’s primary goal is to resist the existing contract theory. An obvious subplot, however, is the behavior of oligopolists and how the described parallel contract terms arguably accomplish price-fixing (through MFNs) and product standardization (through license restrictions) that go beyond tacit collusion. For discussion of MFNs and their role in facilitating practices of collusion, see Baker, *supra* note 136, at 519–20; Shamir & Shamir, *supra* note 89, at 651. See generally Crocker & Lyon, *supra* note 223. For a discussion of how the artificial standardization of products can serve as a “plus factor” that turns tacit collusion into actionable collusion, see Zheng, *supra* note 53, at 429–30.

²⁷⁵ Gilson et al., *supra* note 3, at 1403.

²⁷⁶ *Id.*

²⁷⁷ *Id.*; Gilson et al., *supra* note 10, at 188.

²⁷⁸ See Bernthal, *supra* note 92, at 168–69 (noting that informal norms help create mentor networks that are loath to be formalized due to legal risk).

²⁷⁹ See *United States v. Apple Inc.*, 952 F. Supp. 2d 638, 673 (S.D.N.Y. 2013) (detailing the way the five major publishers coordinated with one another), *aff’d*, 791 F.3d 290 (2d Cir. 2015).

²⁸⁰ See Warner DCMS Response, *supra* note 31, at 1 (emphasizing the importance of private negotiations to the labels’ licenses); see also UMG CMA RESPONSE, *supra* note 236, at 14 (characterizing negotiations with services as complex); SONY CMA RESPONSE, *supra* note 252, at 4 (stating that negotiations with services are “extensive and complex”).

²⁸¹ See Scott, *Self-Enforcing Indefinite Agreements*, *supra* note 71, at 1645 (discussing how the concept of reciprocal fairness encourages self-enforcement); Uzzi, *supra* note 6, at 43 (explaining how executives view trust as a “primary feature” of relationships with other firms); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 138 (1996) (describing how individuals are likely to cheat or free-ride if they think they can escape undetected).

levels)²⁸² from repeat player dynamics,²⁸³ reputational threats,²⁸⁴ and reciprocity.²⁸⁵ All three work in tandem and pressure parties to continue collaborating.²⁸⁶ Each is present in the music industry, where trust reinforces the long-term coordination on parallel contracting.

1. Repeat Players

Repeat players establish a pattern of transacting with each other over time.²⁸⁷ The more repetition between them, the more likely they are to cooperate long-term, allowing for the development of informal norms and obligations that foster trust, even in the absence of an explicit agreement.²⁸⁸ These dynamics increase the potential costs of defecting from the pattern of transacting.²⁸⁹

There is a long history of the record labels and their parent companies transacting with each other in ways that engender trust on the institutional level. At present, the major labels and their subsidiaries comprise eighteen of twenty-four outside seats on the RIAA's Board of Directors.²⁹⁰ The major labels also continue to participate in litigation, monitor piracy through the RIAA, and collaborate in regular CRB proceedings.²⁹¹ Every five years, the CRB uses a litigation-like process to determine royalty rates for noninteractive webcasters who use sound recordings under a compulsory license. The labels participate in those proceedings together through SoundExchange, the entity designated to administer their noninteractive webcasting royalties.²⁹² These CRB proceedings

²⁸² See Scott, *Conflict*, *supra* note 71, at 2042 (noting that long-term collaboration between individuals strengthens cooperation at the institutional level).

²⁸³ See *supra* note 69 and accompanying text (discussing how trust is built when the same parties collaborate long-term).

²⁸⁴ See *supra* note 70 and accompanying text (discussing the effect of the threat of reputational sanctions to private ordering).

²⁸⁵ See *supra* note 71 and accompanying text (discussing reciprocal enforcement mechanisms).

²⁸⁶ Gilson et al., *supra* note 33, at 492; Jennejohn, *supra* note 83, at 295.

²⁸⁷ COOTER & ULEN, *supra* note 69, at 36.

²⁸⁸ Gilson et al., *supra* note 3, at 1395–96; see Barry et al., *supra* note 202, at 1110 (“The more collaborative interactions that firms have, and the more important they are relative to interfirm competition for customers, the more collaborative the industry.”).

²⁸⁹ Bernstein, *Commercial Law*, *supra* note 6, at 1782.

²⁹⁰ *About RIAA*, RECORDING INDUS. ASS'N OF AM., <https://www.riaa.com/about-riaa/board-executives/> [<https://perma.cc/6TGN-YSCV>].

²⁹¹ See, e.g., *UMG Recordings v. Kurbanov*, No. 18-cv-957, 2021 U.S. Dist. LEXIS 250844, at *15–16 (E.D. Va. Dec. 16, 2021) (capturing the findings from a piracy-related lawsuit relying on evidence provided by the RIAA); *Sony Music Ent. v. Cox Commc'ns, Inc.*, 426 F. Supp. 3d 217, 222 (E.D. Va. 2019) (same).

²⁹² 37 C.F.R. § 380.2(a) (2021); see *Webcaster All., Inc. v. Recording Indus. Ass'n of Am., Inc.*, No. C 03-3948, 2004 U.S. Dist. LEXIS 11993, at *3 (N.D. Cal. Apr. 1, 2004) (indicating that the RIAA “acted as a negotiation agent on behalf of its members” and “was at all relevant times (and still is) a trade association representing the corporate [major label] defendants”).

serve as an opportunity for the labels to monitor one another's performance with respect to the parallel contracting. In each of the prior three CRB proceedings to determine noninteractive webcasting royalty rates, parties put forth the interactive license agreements to serve as benchmarks, and as a result, the judges summarized them in their final rate determination.²⁹³ These proceedings were some of the first instances to publicly note the prevalence of MFNs and other parallel provisions across the major labels' agreements.²⁹⁴

Moreover, each major label has an affiliated music publishing company in the same corporate family. Universal Music Group (the label) is also the parent company of Universal Music Publishing Group; Sony Music Group and Sony Music Publishing share a parent corporation, Sony Entertainment; and Warner Chappell Music is a subsidiary of Warner Music Group.²⁹⁵ Each label needs rights to underlying musical compositions to release physical products, and those compositions are often owned (in whole or in part) by unaffiliated publishing companies (i.e., the publishing companies affiliated with the other major labels).²⁹⁶ So, Universal Music Group frequently does deals with Sony Music Publishing and Warner Chappell Publishing. The frequency of these deals suggests there is substantial trust among the record labels and publishing companies at the highest institutional level.²⁹⁷

There are repeat player dynamics at the individual (executive) level, as well. In some cases, these dynamics arise from individuals staying in the same

²⁹³ See Determination of Royalty Rates for Digital Performance Right in Sound Recordings and Ephemeral Recordings, 79 Fed. Reg. 23102 (Apr. 25, 2014) (announcing the Copyright Royalty Judges' determination of royalty rates); Web IV, *supra* note 201, at 26342 (concluding that the "must have" power that labels enjoy exists in the proffered interactive benchmark as well); Web V, *supra* note 180, at 59455 (disagreeing that the interactive benchmark is generating competitive rates).

²⁹⁴ See, e.g., Web IV, *supra* note 201, at 26373 ("In the interactive market, the Majors commonly include anti-steering or MFN clauses in their agreements with the services.").

²⁹⁵ *Universal Music Group*, MUSIC BUS. WORLDWIDE, <https://www.musicbusinessworldwide.com/companies/universal-music-group/> [<https://perma.cc/FQ44-RSSV>] (listing Universal Music Publishing Group as a subsidiary of Universal Music Group); *Affiliated Companies*, SONY, <https://www.sony.com/en/SonyInfo/CorporateInfo/Subsidiaries/> [<https://perma.cc/NX55-735C>] (listing Sony Music and Sony Music Publishing as affiliates of Sony Entertainment); *What We Do*, WARNER CHAPPELL MUSIC, <https://warnerchappell.com/what-we-do/> [<https://perma.cc/BM7B-CP4D>] (describing Warner Chappell music as "the global music publishing arm of Warner Music Group").

²⁹⁶ See DiCola & Touve, *supra* note 20, at 409 (describing how the three major record labels that own the major music publishers have "overlapping interests" with regard to licensing music).

²⁹⁷ See, e.g., Determination of Royalty Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV), 87 Fed. Reg. 76937, 76938 (Dec. 16, 2022) (detailing a proposed settlement between the major labels and the music publishers). For instance, in the latest CRB proceeding to set royalty rates for the use of musical works, the major labels and the major publishers proposed that rates between them remain at their 2006 levels, while proposing significant increases for the streaming services. The CRB rejected the settlement. *Id.*; see also DiCola & Touve, *supra* note 20, at 409 (noting the "cross-relationships and overlapping interests" between the major publishers and the major labels).

position for many years, such that when litigation and CRB proceedings arise, the same people are in the same room revisiting the same deals they made earlier. It is not uncommon for senior executives at the labels to have been in their roles for more than ten years.²⁹⁸ There is another dynamic at play, though, that reinforces not just the trust arising from repeat player dynamics, but the industry-wide strategy writ large: the executive game of musical chairs.

The rotation of executives among the three major labels is a trend so well-known in the industry that the leading trade publication, *Billboard*, publishes a corporate hiring blog entitled “Executive Turntable”; by way of example, Universal currently employs executives who previously held senior posts at Sony and Warner.²⁹⁹ This trend has persisted for decades. The former chairman and Chief Executive Officer of Universal Music Group (from 1995 to 2011) left to hold the same position at Sony until 2017, and now runs a label under Warner’s umbrella.³⁰⁰ Every time an executive moves labels, but continues to reinforce the same strategy, more and more trust is built.

2. Reputational Threats

The threat of reputational sanctions is also critical to a self-enforcing framework. Firms (and their principals) generally make self-interested decisions, but the threat of reputational harm among a solidarity group can cause a firm to change its course of action or else risk expulsion.³⁰¹ With just three labels, reputation is an effective way to maintain individual and institutional norms. The threat of ostracism from a small group is meaningful; it is not difficult for two players to team up against one.³⁰² On the individual level, the musical chairs described above illustrates why reputational damage is an effec-

²⁹⁸ See, e.g., Mark Piibe, LINKEDIN, <https://www.linkedin.com/in/mark-piibe-954216/> [<https://perma.cc/C7DL-TAEC>] (providing that Sony’s Executive Vice President for Global Business Development and Digital Strategy has been at the company for over eleven years).

²⁹⁹ See Mitchell Peters, *Executive Turntable: Universal, Warner Bros. Records, RED Distribution, ASCAP, Shazam, Downtown Music Publishing, Creative Allies*, BILLBOARD (Oct. 11, 2013), <https://www.billboard.com/music/music-news/executive-turntable-universal-warner-bros-records-red-distribution-ascap-5755316/> [<https://perma.cc/TVKR-YKRC>] (announcing prior Sony executive Michele Anthony as a new V.P. at UMG); *Executive Management Board: Leadership: Michael Nash*, UNIVERSAL MUSIC GRP., <https://www.universalmusic.com/executives/michael-nash> [<https://perma.cc/TY73-359R>] (indicating that the UMG Executive Vice President previously worked for Warner Music Group).

³⁰⁰ Doug Morris, WIKIPEDIA, https://en.wikipedia.org/wiki/Doug_Morris [<https://perma.cc/BG85-RRV8>].

³⁰¹ See BARAK D. RICHMAN, STATELESS COMMERCE: THE DIAMOND NETWORK AND THE PERSISTENCE OF RELATIONAL EXCHANGE 61–62 (2017) (suggesting the threat of reputational harm may be more important than the development of trust in self-enforcement structures).

³⁰² See Schwartz & Scott, *supra* note 70, at 557 (describing the role of reputation in contract self-enforcement, and explaining that reputational sanctions work best in small communities).

tive enforcement tool; failure to be a “team player” might preclude one from a job opportunity.³⁰³ Institutionally, the labels could harm one another in the one arena in which they do compete: signing talent.³⁰⁴ If Universal defected from the arrangement, then Sony and Warner could disparage Universal to artists they seek to sign, asserting that Universal is not as ruthless in its negotiations with the streaming services as the others are.

3. Reciprocity

Lastly, reciprocity is frequently present when self-enforcement persists.³⁰⁵ In braiding, reciprocal investments reinforce the collaborative nature of the relationship.³⁰⁶ The governance structure in the license agreements also embodies reciprocity. The MFNs ensure that all labels are on equal footing with respect to the revenue share and the product restrictions amount to a unanimity requirement for changes to a service’s functionality akin to what GSS described in the Pharmacopeia/BMS agreement.³⁰⁷ More broadly, the labels rise and fall together with each streaming service they license. So long as the status quo persists, it is not worth any of them granting a license to a service unless they all license the service because a service without all three licenses will not launch.³⁰⁸ Additionally, if any label were to pull a license from a service, it would harm all three of them, as subscribers scramble to find alternatives (which could include piracy).³⁰⁹

* * *

As GSS observed, when parties seek to facilitate long-term collaboration in uncertain environments, they can adopt braiding to deter opportunism and maintain focus on shared goals.³¹⁰ The fact that the parallel conduct among the labels continues suggests that braiding has worked, and that each label sees a greater benefit to ongoing collaboration than getting out and doing something different, such as negotiating different or better economics for itself that fall outside the scope of an MFN. Although GSS believed that braiding would lead

³⁰³ See Jennejohn, *supra* note 10, at 891 (describing how repeat players can credibly threaten reputation disparagement).

³⁰⁴ See *id.* (writing on how reputational risks encourage self-regulation).

³⁰⁵ Scott & Stephan, *supra* note 69, at 557; Uzzi, *supra* note 6, at 43; see Scott, *Conflict*, *supra* note 71, at 2041 (stating that reciprocity motivates long-term cooperation).

³⁰⁶ Gilson et al., *supra* note 3, at 1447.

³⁰⁷ See *supra* note 79 and accompanying text (explaining that any change to the research plan entered into by Pharmacopeia and BMS would have to pass a unanimous vote or be escalated to executives).

³⁰⁸ See Klausner, *supra* note 272, at 759 (suggesting that “one firm’s contract can affect the value of other firms’ contracts”).

³⁰⁹ Web V, *supra* note 180, at 59458.

³¹⁰ Gilson et al., *supra* note 3, at 1403.

to innovative results, however, the labels have shown that a different outcome is possible.

In fact, in this industry, braiding appears to be a highly effective tool for a lawful form of collusion known as tacit collusion, or conscious parallelism. Tacit collusion arises when firms in a market (typically, a highly concentrated one) intentionally mirror one another's actions with an expectation that competition will be lessened as a result.³¹¹ Market conditions such as few sellers, pricing transparency, and low variation in products offered make tacit collusion more likely.³¹² Both are present in the music industry, where the labels (with their unilateral abilities to grant or withhold licenses) have used braiding to collectively control the adjacent downstream distribution market. Instead of facilitating innovation, however, the labels appear to extract significant profits, raise transaction costs, impose barriers to entry, and lessen consumer choice.³¹³

III. THE PAYOFF

Braiding works well as a driver of long-term collaboration in the face of uncertainty, and the music industry demonstrates as much. Instead of generating innovation, however, the record labels appear to control the downstream market in a manner that does the opposite. Long-term collaboration, whether through contract or conscious parallelism, only endures insofar as the payoff from staying in the arrangement is greater than the payoff from leaving.³¹⁴ For the labels, the benefits of staying in are layered, and the costs of leaving (i.e., the switching costs) appear to increase the longer the coordination continues. Section A of this Part demonstrates that, arguably, the labels extract more value out of streaming services than copyright policy intends, reducing the amounts available for reinvestment by the technology companies operating the streaming services.³¹⁵ The effects on innovation, however, are even broader—the aggregation of the parallel terms across all the services has led to a lock-in effect, cementing the labels' control over the ecosystem.³¹⁶ Sections B, C, and D of

³¹¹ MacKay & Weinstein, *supra* note 143, at 130.

³¹² See Piraino, *supra* note 143, at 10–11, 30 (indicating that sellers can more easily observe the price-setting behaviors of other firms when there are fewer sellers in a market).

³¹³ See *supra* notes 201–204 and accompanying text (explaining how the major labels enjoy a complementary oligopoly that allows them to set supracompetitive prices).

³¹⁴ Posner, *supra* note 281, at 137; see Barry et al., *supra* note 202, at 1105 (describing the tools firms use to deter deviation from collusion).

³¹⁵ See *infra* Part III.A.

³¹⁶ See Spencer Williams, *Contracts as Systems*, 45 DEL. J. CORP. L. 219, 228–29 (2021) (outlining how the interaction between individual contract terms can strengthen their impact); Hwang & Jennejohn, *supra* note 10, at 296 (arguing that isolating a single term leads to an incomplete understanding of the parties' intent); Lobel, *supra* note 209, at 908–09 (providing that the strength of a given contract term is boosted when aggregated across multiple parties); Bagchi, *supra* note 206, at

this Part show how the labels' control over the means of distribution harms incumbent services,³¹⁷ startups,³¹⁸ and consumers alike.³¹⁹ Braiding, here, does not resemble a contract for innovation.

A. Capturing Surplus Beyond Copyright?

The copyright monopoly is meant to provide an incentive (e.g., the right to charge for the use of works) to continue creating.³²⁰ Yet, arguably, the streaming industry has evolved to allow labels to earn more than what that standard intends, revealing the first payoff for the labels: high profits. As a result of the MFNs, one or two labels are likely obtaining more than they would have been able to bargain for bilaterally; they benefit from the better revenue share negotiated by the third label.³²¹ Who that latter label is may rotate from time to time and from service to service; with MFNs in place for years, it is likely that they will all give and receive the benefit at different stages. Additionally, breakage is a windfall for the labels. In the physical world, the labels' revenues were tied to actual consumption of music; breakage is payment for content *not* consumed.³²² The labels have remained opaque on how much breakage they share with artists.³²³ This surplus takes money out of the services' hands that could be otherwise reinvested into better or newer technologies, and at the same time, bears remote relation to the incentive needed for record labels to continue investing in creative works. That amount *is* reflected in the revenue share, which is directly tied to music use.

B. Preventing Innovation Among Incumbents

Typically, companies innovate to build better products or reduce costs—the savings of which can be passed onto consumers.³²⁴ Innovation on either

161–65 (describing the leverage that a “central party” has on subsequent parties who contract on parallel terms).

³¹⁷ See *infra* Part III.B and accompanying text.

³¹⁸ See *infra* Part III.C and accompanying text.

³¹⁹ See *infra* Part III.D and accompanying text.

³²⁰ Pamela Samuelson, *Should Economics Play a Role in Copyright Law and Policy?*, 1 U. OTTAWA L. & TECH. J. 1, 3 (2004).

³²¹ See *supra* notes 235–238 and accompanying text (explaining that once an MFN in a label's agreement is triggered, a music service is likely required to provide other labels with the highest rate negotiated and triggered by the MFN).

³²² DCMS HEARINGS, *supra* note 35, at Q255–Q261 (statements of Joseph (UMG) & Harlow (WMG)).

³²³ See CMA REPORT, *supra* note 35, at 121 n.263 (writing that “[n]on-artist specific revenues . . . are typically passed on to artists” through allocation rules that typically result in distributions proportional to the artist's streaming share).

³²⁴ Padilla et al., *supra* note 253, at 2.

front allows a company to differentiate itself from competitors and offer consumers more variation in product choice, including through price discrimination.³²⁵ In the technology sector, research and development investments are part of a company's competitive advantage; every company tries to out-innovate the others.³²⁶

Yet, in the music sector, where three-fourths of the most popular streaming services are owned by Big Tech conglomerates, the companies are hamstrung in their ability to innovate, revealing the second payoff for the labels: control over the means of distribution.³²⁷ Individually, each service is subject to detailed product restrictions in its licenses, functionally preventing any significant product change without permission from the labels.³²⁸ This construct, in and of itself, deters investments in research and development; no service would want to spend too much on a new feature or product change without assurances it will be able to go to market. Further, once the labels are read into the plan, they may pare it back, stymie the effort completely,³²⁹ or demand additional, high payments for the unforeseen use of their catalogs.³³⁰

The standardization of product functionality terms across all subscription services has left consumers with little meaningful choice. Each service offers roughly the same selection of music, for roughly the same monthly price, and promotes roughly the same popular music.³³¹ Each allows users to download music locally to their devices for offline listening and create playlists of their favorite content.³³² In this regard, the large streaming services have effectively mimicked the big-box, loss leader retailers of the physical era who all had the

³²⁵ *Id.* at 5.

³²⁶ See Mirit Eyal-Cohen, *Innovation Agents*, 76 WASH. & LEE L. REV. 163, 201 (2019) (noting that “intrapreneurial” companies must invest as much in innovation as their competitors).

³²⁷ See Rys, *supra* note 16, at 5 (providing that Universal Music Group, Sony Music, and Warner Music Group control almost 80% of the recorded music market).

³²⁸ See *supra* notes 168–183 and accompanying text (discussing how high transaction costs led to labels imposing restrictive terms on licenses with streaming services leading to hold-up strategies).

³²⁹ See CARLSSON & LEJONHUFVUD, *supra* note 14, at 55 (describing how the labels forced Spotify to develop a subscription service); Carrier, *supra* note 28, at 951 (quoting an entrepreneur as saying we “would have seen much more advanced implementations of [streaming] if the innovation was free to go further”).

³³⁰ See Bernstein, *Beyond Relational*, *supra* note 6, at 613 (linking homogeneity among information sources (e.g., having to return to the three labels for permission each time) to a lack of innovation); Amanda Reid, *Copyright Policy as Catalyst and Barrier to Innovation and Free Expression*, 68 CATH. U. L. REV. 33, 52 (2019) (noting copyright is used to “block[] project development and innovation”).

³³¹ DCMS REPORT, *supra* note 46, at 76; see also CMA REPORT, *supra* note 35, at 55–56 (describing similarities among services); Web V, *supra* note 180, at 59458, 59471 n.62 (indicating that “[t]he record does not indicate that Apple, Amazon, Google, and Spotify compete among themselves”); cf. García, *Default Licenses*, *supra* note 7, at 1149 (suggesting private ordering enables flexibility in business models).

³³² DCMS REPORT, *supra* note 46, at 76.

same popular music featured in their aisle endcaps and priced all the CDs the same (and used music to get consumers in the door to buy other products, like washing machines).³³³ In the physical era, however, music fans could find an independent record store with curated organization and differentiated pricing. Many independent record stores, for example, sold used CDs at a discount, and whether music fans had a budget of \$4 or \$400, something would satisfy their interests. There are extremely few independent record stores on the internet.³³⁴ Consumers have little option than to find their way through these big-box retailers, where they must pay an admission fee of about \$132 a year to sort through one hundred million songs.³³⁵

The incumbent services also have little flexibility to price discriminate. Although some services do offer a free, advertising-supported tier (which is subject to more product restrictions by the labels than the subscription tiers), there is no middle tier between free and the prevailing price of \$10.99 a month (Spotify, Apple, YouTube Music, or Amazon Music for non-Prime members).³³⁶ Further, because services must recoup the minimum guaranteed payments to the labels and do so on a revenue share basis, there is no apparent business incentive to lower prices to subscribers.³³⁷ In fact, in 2023, after the major record labels began to publicly clamor for price increases, the subscription fees for YouTube Music, Amazon Music, and Spotify each went up by a dollar.³³⁸

Nevertheless, Spotify and the Big Tech services have been able to foster an increasingly symbiotic relationship. These four services control over eighty

³³³ Peter DiCola, *A Practical Model of Copyright Economics with Intermediaries*, 19 REV. ECON. RSCH. ON COPYRIGHT ISSUES 1, 10 (2022); Jacob Noti-Victor & Xiyin Tang, *Antitrust Regulation of Copyright Markets*, 101 WASH. U. L. REV. 851, 864–68 (2024).

³³⁴ See Hendricks, *supra* note 109, at 480 (explaining how “innovation in online digital downloading technologies rendered many [music retail firms] obsolete”).

³³⁵ See Padilla et al., *supra* note 253, at 3 (arguing that product innovation enables consumers to find products more tailored to their needs); *infra* note 336 and accompanying text (indicating that the average monthly price for music subscription services comes out to about \$132 per year).

³³⁶ CMA REPORT, *supra* note 35, at 16. Amazon Prime members pay \$9.99 and non-Prime members pay \$10.00 per month. *Amazon Music FAQs*, AMAZON, <https://www.amazon.com/music/i/faq> [<https://perma.cc/4E8G-UV2F>]. Services also offer bundled deals (e.g., family plans). Those prices are also standardized, currently at \$16.99 a month. *Id.* Spotify Premium, Apple Music and YouTube Music are each \$10.99 per month. *Premium*, SPOTIFY, <https://www.spotify.com/us/premium/> [<https://perma.cc/L28M-9U9D>]; *Apple Music*, APPLE, <https://www.apple.com/apple-music/> [<https://perma.cc/757X-N9LZ>]; *Music*, YOUTUBE, https://music.youtube.com/music_premium [<https://perma.cc/KW6B-D9G6>].

³³⁷ For some services, the revenue share is subject to a per-subscriber minimum, which operates as a floor. CMA REPORT, *supra* note 35, at 66; KOHN, *supra* note 2, at 1515.

³³⁸ See Jon Porter, *It's Spotify's Turn to Increase Prices*, THE VERGE (July 24, 2023), <https://www.theverge.com/2023/7/24/23805364/spotify-us-price-increase-10-99-a-month-9-99-month-twelve-years> [<https://perma.cc/EGA4-MN5B>] (writing that Spotify's one-dollar-per-month increase in 2023 “isn't entirely unexpected considering every other major music streaming service has announced a price increase in recent months”).

percent of the global market (by subscription revenues)³³⁹ and collectively pay billions of dollars to the recording industry, which earned twelve billion dollars from subscription streaming in 2022.³⁴⁰ Yet, given the small profit margins on music and inflexibility to innovate, a question remains as to why the Big Tech companies continue to support the labels' private ordering.³⁴¹ Although they may not be able to negotiate away the MFNs and service restrictions, they do choose to remain in the business when they could allocate the same resources to divisions with much higher profitability.³⁴²

It may be that music is simply another avenue for the platforms to remain entrenched in consumers' lives (and at the same time capture incremental revenue in exchange for greater engagement across their respective ecosystems). Globally, Google's Android and Apple's iOS mobile operating systems have a collective 99.2% market share.³⁴³ Google's market share for Search is over 81%.³⁴⁴ Amazon alone accounts for over 10% of all retail—physical and digital—in the United States,³⁴⁵ and over 37% of online retail,³⁴⁶ that amounts to one in every three online purchases. Simply put, these companies appear to not enter markets they do not intend to dominate, and music is no different. As set forth in Section C of this Part, the platforms are indeed, perhaps begrudgingly, complicit in keeping startups out of the market.

³³⁹ Mulligan, *supra* note 23.

³⁴⁰ See INT'L FED'N OF PHONOGRAPHIC INDUS., GLOBAL MUSIC REPORT 2023: STATE OF THE INDUSTRY 10–11 (2023), https://www.ifpi.org/wp-content/uploads/2020/03/Global_Music_Report_2023_State_of_the_Industry.pdf [<https://perma.cc/6HND-6BHP>] (providing that the recording industry's global 2022 streaming revenues were \$17.5 billion, and over \$12 billion of that total was from subscriptions).

³⁴¹ After payments for sound recording and music publishing rights, services typically retain less than 30% of their revenues. *U.S. On-Demand Subscription Streaming Revenue: Who Gets Paid and How Much?*, *supra* note 228.

³⁴² Web V, *supra* note 180, at 59471.

³⁴³ *Global Market Share Held by Mobile Operating Systems from 2009 to 2023*, by Quarter, STATISTA, <https://www.statista.com/statistics/272698/global-market-share-held-by-mobile-operating-systems-since-2009/> [<https://perma.cc/4ETV-XLFH>].

³⁴⁴ *Market Share of Leading Desktop Search Engines Worldwide from January 2015 to January 2024*, STATISTA, <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/> [<https://perma.cc/68EK-4BRS>].

³⁴⁵ Geri Mileva, *Amazing Amazon Statistics You Need to Know to Amplify Growth in 2023*, INFLUENCER MKTG. HUB, <https://influencermarketinghub.com/amazon-statistics/> [<https://perma.cc/Y2RK-YT8K>] (Oct. 24, 2023).

³⁴⁶ *Market Share of Leading Retail E-Commerce Companies in the United States in 2023*, STATISTA, <https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/> [<https://perma.cc/Z5ZS-3MP8>].

C. Keeping Startups Out

It is hard enough to enter the music streaming market, given the transaction costs associated with negotiating licenses (including the minimum guarantees).³⁴⁷ It is even harder to enter a market where three of the four dominant incumbent services are operated by Big Tech, which can sustain the high licensing costs.³⁴⁸ The parallel contracting terms, including the high minimum guarantees, appear to have created a “market value” for the label catalogs that is prohibitive for startups. By sustaining the market value, the Big Tech companies help to keep competition out of the market.³⁴⁹

The labels also benefit from keeping the market compact. They have no incentive to offer discounts to early-stage companies, as demonstrated by the many start-up services that have buckled (or, in some cases, sold their assets to incumbents).³⁵⁰ To lower their rates would inadvertently give the high-paying incumbent services some justifiable pushback in a negotiation: if they know that the catalog is actually worth less to the labels than what they are asking, and that the labels cannot survive without the incumbent services, suddenly, the services have a bit more authority to push back on the labels’ economic demands (whether on the revenue share or minimum guarantee).³⁵¹ Additional-

³⁴⁷ See *supra* Part II.B (discussing the labels’ negotiation approach); see also Web IV, *supra* note 201, at 26374 (quoting SoundExchange’s witness as conceding that large up-front payments stifle competition); EU UMG Decision, *supra* note 181, at 161 (“In particular, high advance payments and minimum revenue guarantees, requested by large record companies, significantly increase the risk for nascent digital services.”).

³⁴⁸ *American Tech Giants Are Making Life Tough for Startups*, THE ECONOMIST (June 2, 2018), <https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups> [<https://perma.cc/9N2J-EMXT>]; see Filippo Lancieri & Patricia Morita Sakowski, *Competition in Digital Markets: A Review of Expert Reports*, 26 STAN. J.L. BUS. & FIN. 65, 97 (2021) (describing investors’ reluctance to invest in startups that are likely to be targets for Big Tech).

³⁴⁹ García, *Regulation*, *supra* note 7, at 225; see Asay, *supra* note 177, at 1032 (indicating that the costs of negotiating licenses “can quickly become overwhelming for many cash-strapped start-up companies”); Carrier, *supra* note 28, at 893–94, 947 (“The labels . . . ‘cripple the companies by demanding such advances and guarantees that they go belly up.’” (quoting an interview with “Participant ‘L’” one of “31 CEOs, company founders, and vice presidents from technology companies, the recording industry, and venture capital firms”))).

³⁵⁰ See Web V, *supra* note 180, at 59474 n.77 (explaining that the labels will not offer licensees lower rates if those rates would enable the licensee to cannibalize the business of those paying more); García, *supra* note 94, at 31 (expressing concerns about private actors representing private agreements as reflecting copyrighted works’ “market” value). Rdio, Mog, iLike, and URGE are just a few of the services that did not survive. See *infra* note 373 and accompanying text (discussing various startups that did not survive).

³⁵¹ See Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 229 (2004) (arguing that authors who lower copyright prices for one customer may be compelled to do the same for others).

ly, there is little incentive for the labels to facilitate a lower-cost service that could take away subscribers from the higher-paying incumbents.³⁵²

Once faced with the high market entry costs, entrepreneurs are discouraged from even flirting with the idea of a music product, and investors stay far away, too.³⁵³ Even Spotify (initially self-funded by its founders) had a hard time seeking venture funding after it launched in Europe.³⁵⁴ Venture capitalists invest in startups with the goal of seeing an eventual, successful exit.³⁵⁵ For a startup seeking to preserve a path to an acquisition or initial public offering, having definitive, documented rights is critical, and so upstart music services often find themselves seeking licenses even when the law is not clear they need them.³⁵⁶ The alternative is to risk litigation and statutory damages, and the possibility of a business-killing lawsuit deters investment.³⁵⁷ This is particularly true because copyright infringement lawsuits pose a realistic risk for investors. Copyright owners, skeptical of a startup's ability to pay, are incentivized to add investors as defendants to infringement lawsuits to ensure maximum recovery.³⁵⁸

The startups that persevere with licensing conversations can expect to give up equity to cover the gap between the demanded minimum guarantee and the startup's ability to pay³⁵⁹ to "cover the [labels'] risk."³⁶⁰ To launch in the United States, Spotify granted seventeen percent of its company to the major labels (on top of high minimum guarantees).³⁶¹ These equity grants main-

³⁵² Web V, *supra* note 180, at 59474 n.77.

³⁵³ Asay, *supra* note 177, at 1032.

³⁵⁴ DAKIN CAMPBELL, *GOING PUBLIC: HOW SILICON VALLEY REBELS LOOSENED WALL STREET'S GRIP ON THE IPO AND SPARKED A REVOLUTION* 93 (2022).

³⁵⁵ Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1, 6 (2021).

³⁵⁶ See Rachel Landy, *Exit Engineering*, 20 N.Y.U. J.L. & BUS. 27, 69–72, 85–87 (2023) (describing how acquirers and IPO underwriters review a company's records to determine sufficiency of intellectual property rights).

³⁵⁷ See Clark D. Asay, *Risk Taking and Rights Balancing in Intellectual Property Law*, 53 AKRON L. REV. 873, 875–76 (2019) (explaining how risk-averse innovators create a pattern of license-seeking that inadvertently expands intellectual property laws and deters investors).

³⁵⁸ See, e.g., *UMG Recordings, Inc. v. Shelter Cap. Partners LLC*, 718 F.3d 1006, 1013 (9th Cir. 2013) (adding investors to Veoh litigation); *Bridgeport Music, Inc. v. Hummer Winblad Venture Partners, No. CMDL-00-1369*, 2005 U.S. Dist. LEXIS 57223, at *10 (N.D. Cal. Feb. 3, 2005) (adding investors to Napster litigation). Investors are typically indemnified by portfolio companies, but indemnification is meaningless if a startup is judgment-proof. Carrier, *supra* note 28, at 942–43.

³⁵⁹ See KOHN, *supra* note 2, at 1496; DCMS HEARINGS, *supra* note 35, at Q329 (statement of Joseph (UMG)) (describing Universal's practice of taking equities in early-stage streaming startups); DCMS HEARINGS, *supra* note 35, at Q406–07 (statements of Yvette Griffith, Co-CEO and Executive Director, Jazz Re:freshed & Paul Pacifico, Chief Executive, Association of Independent Music) (describing the majors' equity stakes in startups).

³⁶⁰ DCMS HEARINGS, *supra* note 35, at Q251 (statement of Harlow (WMG)).

³⁶¹ DCMS REPORT, *supra* note 46, at 58; see also Adam Satariano, *SoundCloud Said to Near Deals with Record Labels*, BLOOMBERG (July 10, 2014), <https://www.bloomberg.com/news/articles/>

tain the integrity of the market rate for the catalog while continuing to deter venture capital investment. Venture capitalists are typically pro-innovation, and therefore likely loath to share space on a cap table with a label that has separate contractual approval rights over the development of the startup's business.

Public shareholders are just as skeptical. After Block, a financial technology company that operates the Square payment platform, bought Tidal, a small streaming service, shareholders sued, alleging that the purchase amounted to a breach of fiduciary duty by the board of directors.³⁶² Although the Delaware Chancery Court ultimately threw the shareholders' suit out, it agreed that the purchase was a "terrible business decision."³⁶³ At the time of acquisition, Tidal's accrued liabilities were "primarily from amounts owed to record labels for streaming fees" and totaled \$127 million.³⁶⁴

D. A Homogenous Market

The labels' braided approach to private ordering creates a homogenous market and reduces the number of choices available to consumers.³⁶⁵ Unlike the agreements GSS examined, innovation does not appear to be the result in the streaming industry.³⁶⁶ Although there is no way to completely quantify which businesses "died on the vine," the services that music fans have lost due to licensing challenges provide some insight into what is missing.³⁶⁷ Turntable.fm, which allowed online users to "DJ" for their friends in virtual rooms (i.e., select songs for simultaneous listening among fans), lasted barely two years after securing license agreements because it could not bear the costs.³⁶⁸ The founder has tried to resuscitate it ever since in modified fashion, announcing its comeback in 2021 in partnership with the labels; as of 2023, though, it has yet to launch.³⁶⁹ Imeem was a licensed service with more social sharing functionality than is seen in any of today's incumbents; it was sold at a deep

2014-07-10/soundcloud-said-to-near-deals-with-record-labels [<https://perma.cc/4GTU-YAKE>] (describing label equity stakes in SoundCloud as part of licensing discussions).

³⁶² City of Coral Springs Police Officers' Pension Plan v. Dorsey, No. 2022-0091, 2023 Del. Ch. LEXIS 107, at *16 (Del. Ch. May 9, 2023).

³⁶³ *Id.* at *2.

³⁶⁴ *Id.* at *10.

³⁶⁵ See Mirit Eyal-Cohen, *The Cost of Inexperience*, 69 ALA. L. REV. 859, 864–65 (2018) (arguing that when new firms are discouraged from entering a market, there is less incentive for firms to create innovative products for consumers).

³⁶⁶ See *supra* Part I (discussing GSS's examination of collaboration agreements).

³⁶⁷ Carrier, *supra* note 28, at 953–54.

³⁶⁸ Jacob Kastrenakes, *Turntable.fm Shutting Down Next Month*, THE VERGE (Nov. 22, 2013), <https://www.theverge.com/2013/11/22/5134694/turntable-fm-shutting-down-focus-on-live-concert-service> [<https://perma.cc/29JM-WQAC>].

³⁶⁹ See *About Turntable*, TT.LIVE, <https://turntablelive.com/about> [<https://perma.cc/SW5V-78YE>] (stating that Turntable LIVE is currently in beta testing).

discount to MySpace after it could not sustain the label licensing fees.³⁷⁰ Additionally, numerous services that were similar to the type we see today but had different user interfaces and programming features (for instance, some used more humans to curate playlists) could not generate enough revenue to survive in competition with Big Tech.³⁷¹ It is worth recalling that it was Spotify's partnership with Facebook that generated a sufficient subscriber base for the company to launch and grow in the United States.³⁷² Rdio, Mog, URGE, Songza, and iLike are just a few of those services that have folded or were otherwise subsumed by larger brands.³⁷³

Beyond those, the opportunities for innovation remain broad. Innovation expands choice, whether arising out of price, content organization, or entirely new products; even small changes can have a positive impact.³⁷⁴ The online, live television market is a useful model in this regard. Hulu, Sling, Fubo, and YouTube TV offer consumers most traditional broadcast channels, as well as a

³⁷⁰ Michael Arrington, *Ok, Now It's Done. MySpace Music Completes Acquisition of iMeem*, TECHCRUNCH (Dec. 8, 2009), <https://techcrunch.com/2009/12/08/imeem-myspace-music-completes-acquisition> [<https://perma.cc/4DMX-GLNE>]; see Eric Eldon, *Music Startup iMeem Making Money, Not Dying Unless the Labels Kill It*, VENTUREBEAT (Mar. 26, 2009), <https://venturebeat.com/business/music-startup-imeem-making-money-not-dying-unless-the-labels-kill-it/> [<https://perma.cc/2L6E-PSPT>] (indicating that iMeem “has been reportedly running out of money, especially because of how much it has to pay for music licensing deals it has with record labels”).

³⁷¹ See *infra* note 373 and accompanying text (discussing some of these services).

³⁷² See Drew Olanoff, *Spotify Gains 1 Million New Users from Facebook Integration*, NEXT WEB (Sept. 28, 2011), <https://thenextweb.com/news/spotify-gains-1-million-new-users-from-facebook-integration> [<https://perma.cc/CHZ5-Y652>] (reporting on the massive jump in subscribers to Spotify after it announced a partnership with Facebook).

³⁷³ See Ingrid Lunden, *Pandora to Buy Rdio Assets for \$75M in Cash, Rdio Files Ch. 11, Will Shutter Service*, TECH CRUNCH (Nov. 16, 2015), <https://techcrunch.com/2015/11/16/confirmed-pandora-buys-key-rdio-assets-for-75m-in-cash-rdio-files-ch-11-to-shut-down/#:~:text=That%20was%20fast%3A%20just%20as,the%20company%20has%20just%20announced> [<https://perma.cc/M927-R5YL>] (stating that Pandora bought Rdio's assets); Billy Steele, *Apple's \$3 Billion Purchase of Beats Has Already Paid Off*, ENGADGET, <https://www.engadget.com/2019-05-28-apple-beats-five-years-later.html> [<https://perma.cc/EM8N-D6GQ>] (May 28, 2019) (stating that Beats bought Mog and Apple bought Beats); Tricia Duryee, *Rhapsody, MTV Urge Services Merging*, SEATTLE TIMES, <https://www.seattletimes.com/business/rhapsody-mtv-urge-services-merging/> [<https://perma.cc/HQ6N-4WN2>] (Aug. 22, 2007) (stating that URGE merged with Rhapsody and became (legal) Napster); Michael Arrington, *Breaking: MySpace Close to Acquiring iLike for \$20 Million*, TECH CRUNCH (Aug. 17, 2009), <https://techcrunch.com/2009/08/17/breaking-myspace-close-to-acquiring-ilike/> [<https://perma.cc/73UV-GKP2>] (stating that MySpace bought iLike); Jordan Crook, *Google Buys Songza*, TECH CRUNCH (July 1, 2014), <https://techcrunch.com/2014/07/01/google-buys-songza/> [<https://perma.cc/X72B-R9QF>] (writing that Google “acquired music streaming service Songza”).

³⁷⁴ See D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1540 (2013) (citing Joseph Schumpeter's categorization of innovation opportunities, including with respect to new goods, new materials, and new means of organization); Padilla et al., *supra* note 253, at 3 (explaining that gains from innovation lead to higher consumer welfare).

significant selection of cable channels.³⁷⁵ Nevertheless, prices vary, from \$45 per month (Sling) to \$75 per month (Fubo).³⁷⁶ Consumers for each service can choose to add features, functionality, and content offerings for additional costs.³⁷⁷ Frndly TV, Philo, and Pluto offer cable channels, without any broadcast.³⁷⁸ Only one of these services is operated by Big Tech (YouTube TV).³⁷⁹ This market demonstrates how different services can find different ways to organize and offer content to consumers at different prices when they have the flexibility to do so.

* * *

The relationship between the labels in their approach to licensing streaming services serves as a case study in how collaborative parties operating in highly uncertain environments can use braiding to forestall innovation, rather than support it. This case study suggests that the details matter, and some additional factors should be considered before determining whether innovation will be the pre-ordained outcome of any braided arrangement. First, parties' intent remains paramount. GSS assert that braided contracts promote innovation because of how they are structured.³⁸⁰ Even though the contracts themselves do not specify outputs, however, the parties in the braided agreements came together with the goal of generating innovation. In the music industry, the record

³⁷⁵ See James K. Willcox, *Video Streaming Services That Let You Cut Cable TV*, CONSUMER REPS., <https://www.consumerreports.org/electronics-computers/streaming-media/video-streaming-services-that-let-you-cut-cable-tv-a9076884300/#:~:text=Hulu%20%2B%20Live%20TV,-Monthly%20bill%3A%20%2476&text=You%20also%20get%20cable%20channels%20such%20as%20A%26E%2C%20BET%2C%20CN,Hallmark%20and%20The%20Weather%20Channel> [https://perma.cc/EC88-FL79] (Dec. 6, 2023) (outlining the channels provided by varying TV streaming services). Sling does not offer CBS or PBS in any of its plans. *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ See *id.* (describing the channels that come with a Philo subscription); *frndly*, FRNDLYTV, <https://try.frndlytv.com/> [https://perma.cc/HNW4-RNYJ] (listing the 40-plus channels that come with a FrndlyTV subscription); Kelly Woo, *Pluto TV: App, Channels, Guide and How to Activate*, TOM'S GUIDE, <https://www.tomsguide.com/news/pluto-tv> [https://perma.cc/Z24H-7JN5] (May 23, 2023) (outlining the channels that come with a Pluto TV subscription).

³⁷⁹ See Matthew Johnston, *7 Companies Owned by Google (Alphabet)*, INVESTOPEDIA, <https://www.investopedia.com/investing/companies-owned-by-google/> [https://perma.cc/V4CL-SZCY] (Feb. 3, 2024) (explaining that YouTube is a subsidiary of Google). Sling TV is owned by Dish Network Corporation. *About Sling TV*, SLING, [https://news.sling.com/about-us#:~:text=SLING%20TV%20L.L.C.%20and%20AirTV,Corporation%20\(NASDAQ%3A%20DISH\)](https://news.sling.com/about-us#:~:text=SLING%20TV%20L.L.C.%20and%20AirTV,Corporation%20(NASDAQ%3A%20DISH)) [https://perma.cc/R8EA-WE2Y]. Disney recently took a majority stake in Hulu. Lucia Moses, *Disney Will Soon Own All of Hulu. Here's How the Company Got Here and What's Next.*, BUS. INSIDER (Nov. 11, 2023), <https://www.businessinsider.com/disney-bought-owns-hulu-valuation-explained-whats-next> [https://perma.cc/Q4SG-7FKA]. No Big Tech companies have ownership in FuboTV. See *fuboTV Inc.*, WALL ST. J., <https://www.wsj.com/market-data/quotes/FUBO/company-people> [https://perma.cc/YAV2-ULE2] (listing ownership of FuboTV stock).

³⁸⁰ See *supra* notes 58–91 and accompanying text (explaining how the formal and informal structures present in braided contracts promote collaboration and innovation).

labels have apparently sought to maintain control of the downstream market; braiding has facilitated that objective.³⁸¹ Second, competitive dynamics are important. The music industry shows that dominant firms in highly concentrated markets can use braiding to tacitly collude.³⁸² GSS's survey of braided agreements also included contracts between competing companies.³⁸³ In both cases, parties are incentivized to take care that their relationship, whatever the goal, does not run afoul of any antitrust laws. That consideration likely affects the way governance structures are implemented; otherwise, firms may end up facing a similar fate to the book publishers.³⁸⁴ Lastly, parallel contracting practices add a layer of complexity not present in GSS's research. It may be that GSS's theory remains strong in the case of traditional, one-off bilateral agreements.³⁸⁵ In the music industry, however, the use of parallel contract terms across all the licenses to facilitate information-sharing (which is fundamental to the braiding theory) creates meaningful negative externalities. Those externalities include the lock-in effect of labels' authority over the industry.³⁸⁶ For example, if MFNs appeared in only one label license agreement (instead of all) for a given service, then that service could entertain different licensing models with the others. For so long as it is bound by an MFN, however, there is no incentive to do so.

IV. SOLUTIONS

Typically, when society benefits from private ordering, policymakers should leave it alone. When the public (such as consumers and entrepreneurs) is harmed, however, policymakers should step in.³⁸⁷ Yet, not all braiding or private ordering is bad, and so solutions should be tailored to particular industries and

³⁸¹ See *supra* notes 249–274 and accompanying text (discussing how labels operate within a braided framework to impose terms on streaming services that impact the downstream market).

³⁸² See *supra* notes 206–217 and accompanying text (explaining how private ordering can lead to parallel terms in a concentrated market).

³⁸³ See *supra* notes 76–78 and accompanying text (providing as an example an agreement between pharmaceutical companies, Pharmacopeia and BMS).

³⁸⁴ See *supra* notes 137–145 and accompanying text (explaining how the book publishers were sued by the DOJ for conspiring to fix prices).

³⁸⁵ See *supra* notes 55–57 and accompanying text (explaining GSS's theory that braiding fosters innovation in rapidly changing markets).

³⁸⁶ See *supra* notes 72–75 and accompanying text (discussing how trust among collaborators can result in a lock-in effect that encourages working together but also increases switching costs).

³⁸⁷ See Winston, *supra* note 99, at 124–25 (arguing that Congress and courts should act when private ordering violates public policy); Daniela Caruso, *Non-Parties: The Negative Externalities of Regional Trade Agreements in a Private Law Perspective*, 59 HARV. INT'L L.J. 389, 404 (2018) (providing that regulatory action can mitigate the harms of contract externalities). *But see* Aditi Bagchi, *Other People's Contracts*, 32 YALE J. ON REGUL. 211, 233 (2015) (noting the difficulties of obtaining a legislative solution to alleviate the negative externalities on parties to contracts).

relationships where harm is shown to avoid an overly broad application. In the case of the music industry, there is a natural inclination to look to copyright and antitrust doctrine when innovation is stifled due to underlying copyright interests. Section A of this Part describes what solutions arising under those principles might look like.³⁸⁸ There are other, more nuanced options, however, that policymakers can also consider that adjust the labels' incentives and begin to fracture the braided framework that enables the labels to deter innovation.³⁸⁹

A. Copyright and Antitrust Reactions

Some might be inclined to shrug their shoulders at the labels' private ordering in deference to the limited monopoly granted to copyright holders; rightsholders are free to set prices and impose restrictions so long as they are not running afoul of the law. The terms of the major label licenses, however, arguably contravene copyright's intended purpose: to promote the creation of works and dissemination of those works to the public.³⁹⁰ For example, the labels' retention of the unrecouped minimum guarantee amounts (breakage) is unrelated to the creation or use of music (as is any premium the labels generate by virtue of the MFNs).³⁹¹ Terms requiring or incentivizing services to promote certain content inherently disadvantage the creators of other content, for which royalty payments may be more meaningful (i.e., independent artists).

Copyright law has long sought to find a balance between preserving incentives to create and facilitating public access to works. There are numerous constructs in the Copyright Act that address that tension, such as fair use and exceptions for libraries and educational institutions.³⁹² The statute also has a built-in mechanism to address licensing inefficiencies: the compulsory license.³⁹³ In the music industry, in particular, scholars have defended stronger compulsory licenses as the solution to restrictive licensing practices.³⁹⁴ These licenses impair the market value of works by reducing the level of copyright

³⁸⁸ See *infra* notes 390–427 and accompanying text.

³⁸⁹ See *infra* notes 428–446 and accompanying text.

³⁹⁰ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (writing that copyright monopolies are “intended to motivate the creative activity of authors and inventors”).

³⁹¹ See *supra* notes 256–257 and accompanying text.

³⁹² See, e.g., 17 U.S.C. § 107 (allowing the “fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship, or research”); *id.* § 108 (allowing a library or archive to reproduce a copyrighted work on a limited basis); *id.* § 110(1) (exempting the use of a copyrighted work by teachers in an educational institution from the restrictions in the Act).

³⁹³ *Id.* §§ 112, 114–15.

³⁹⁴ García, *Regulation*, *supra* note 7, at 243–44; Victor, *supra* note 171, at 927–30; Fagin et al., *supra* note 159, at 523–25; see also García, *supra* note 53, at 1800 (arguing that compulsory licenses lead to more efficient private ordering); cf. Annemarie Bridy, *Aereo: From Working Around Copyright to Thinking Inside the (Cable) Box*, 2015 MICH. ST. L. REV. 465, 481 (arguing that compulsory licenses are too nuanced to foster innovation).

protection (i.e., the owner's ability to say no to a licensee) enjoyed by the owner.³⁹⁵ García argues that compulsory licenses should be the default, and private ordering around those licenses should only be allowed in demonstrably competitive markets.³⁹⁶

There is already an administrative framework in place for noninteractive services (i.e., internet radio) to take advantage of a statutory license for sound recordings.³⁹⁷ That framework could be expanded to include interactive licenses. The addition of a compulsory license would, at a minimum, give licensees certainty that they have all the rights they need, and royalty rates would be fixed for five years (longer than the typical label license term).³⁹⁸ Compulsory licenses, however, have their drawbacks. Any new compulsory license is bound to include significant functionality restrictions.³⁹⁹ The noninteractive license, for example, has numerous programming limitations on how a service presents music content to consumers,⁴⁰⁰ primarily resulting from the labels' lobbying efforts.⁴⁰¹ These restrictions must be strictly adhered to; stepping outside the bounds of the license is actionable as infringement. Even the more permissive blanket compulsory license for the reproduction and distribution of musical works that are embodied in sound recordings still contains a significant limitation that prevents it from being used in many of the most popular music-related products today: it is exclusively available for audio-only formats (not video).⁴⁰²

³⁹⁵ Yoo, *supra* note 351, at 259.

³⁹⁶ García, *Regulation*, *supra* note 7, at 243–44.

³⁹⁷ 17 U.S.C. §§ 112, 114.

³⁹⁸ García, *Regulation*, *supra* note 7, at 244. Coverage of major label license renewals suggests that the agreements typically have terms around three years. *See, e.g.*, Joan E. Solsman & Megan Wollerton, *Spotify, Universal Music Renew License Deal, with a Twist*, CNET (Apr. 4, 2017), <https://www.cnet.com/tech/tech-industry/spotify-and-universal-music-group-reach-license-deal/> [<https://perma.cc/7C4R-KMXX>] (discussing the terms of the Spotify/UMG deal reached in 2017); Todd Spangler, *Spotify, Universal Music Group Reach Multiyear, Global Licensing Deal*, VARIETY (July 22, 2020), <https://variety.com/2020/music/news/spotify-universal-music-group-licensing-deal-1234713082/> [<https://perma.cc/B7LR-NNMN>] (reporting on the new terms of a new deal, after the previous deal expired in 2019).

³⁹⁹ *See* Mark A. Lemley & Mark P. McKenna, *Unfair Disruption*, 100 B.U. L. REV. 71, 90 (2020) (noting that intellectual property law is used to prevent innovations); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 20 (2010) (describing how changes to copyright law generally serve rightsholders); Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 570 (2014) (same).

⁴⁰⁰ 17 U.S.C. § 114(d)(2). For example, licensees may not play over three songs from any one album during any three-hour period on any channel. *Id.*

⁴⁰¹ *See* Randal C. Picker, *Copyright and Technology: Déjà Vu All Over Again*, 2013 WIS. L. REV. ONLINE 41, 44, https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=5351&context=journal_articles [<https://perma.cc/8W5Z-7S6C>] (suggesting that “[s]tatutory licenses represent exercises in political dealing”).

⁴⁰² 17 U.S.C. § 115(a)(1)(A).

Additionally, joining CRB proceedings to set license fees is akin to participating in adversarial litigation, and therefore, quite expensive, even compared to the transaction costs associated with negotiating licenses.⁴⁰³ CRB proceedings typically require a well-staffed outside counsel team, for example. Startups, therefore, may be priced out of the rate-setting proceedings and forced to free-ride on the larger services' arguments (which may or may not be well-suited to small businesses).

Straddling the line between copyright and antitrust are consent decrees, which other scholars have proposed leveraging more widely to eliminate licensing inefficiencies.⁴⁰⁴ For example, the DOJ could adopt the framework in place for the two largest musical work performing rights organizations, ASCAP and BMI. This framework would require that the major labels issue licenses upon receipt of a request from a licensee, and if the parties cannot work out the applicable payments, terms, and conditions, either party could petition to a "rate court" (i.e., litigate) to set a reasonable rate. Consent decrees, like compulsory licenses, are well understood throughout the music industry: the ASCAP and BMI licenses have been in place for over eighty years. The consent decrees are administered by the DOJ and therefore more streamlined (and arguably more efficient) than legislation, which would be necessary for expanding the compulsory license. The consent decrees have also historically provided more flexibility to licensees. There are few use limitations on the decrees, and licensees use them for all kinds of services: audio and audiovisual, and interactive and noninteractive. Consent decrees, however, provide little in the way of long-term certainty. Since 1979, the DOJ has disfavored consent decrees that last more than ten years; the ASCAP and BMI decrees are extreme outliers (and themselves have been reviewed by two recent presidential administrations).⁴⁰⁵ Plus, the judicial rate-setting process is expensive. The parties must first expend transaction costs in trying to come to terms on an agreement, and then if they cannot, they pay for federal court litigation.

Traditionally, antitrust doctrine steps in when harm to innovation is at the heart of the matter.⁴⁰⁶ To the chagrin of many scholars, however, antitrust law

⁴⁰³ See *supra* notes 291–293 and accompanying text (discussing the litigation-like process of CRB proceedings).

⁴⁰⁴ Victor & Tang, *supra* note 333, at 4.

⁴⁰⁵ *Questions for the Record: Hearing on Online Platforms and Market Power Before the H. Comm. on the Judiciary*, 116th Cong. 2–3 (2019), <https://www.congress.gov/116/meeting/house/110201/documents/HHRG-116-JU05-20191113-SD020.pdf> [<https://perma.cc/R2DM-V5LR>] (questions submitted by Ranking Member Jim Sensenbrenner). In 1979, the DOJ determined all subsequent decrees would sunset after 10 years. *Id.* at 1.

⁴⁰⁶ Tim Wu, *Taking Innovation Seriously: Antitrust Enforcement if Innovation Mattered Most*, 78 ANTITRUST L.J. 313, 315 (2012) (arguing that antitrust law's central purpose should be to protect innovation).

has remained strictly faithful to the text of its primary statute, the Sherman Act.⁴⁰⁷ In cases alleging collusive conduct between competitors, courts have shied away from condemning parallel practices that produce anticompetitive results in the absence of an explicit agreement.⁴⁰⁸ Although other scholars have suggested that courts take a closer look at parties' intent in determining whether seemingly tacit collusion should be actionable as overt collusion, that approach has yet to be adopted.⁴⁰⁹ In contrast, C. Scott Hemphill and Tim Wu have argued that parallel practices that exclude new market entrants should be actionable as monopolistic conduct, as opposed to collusion.⁴¹⁰ They describe certain mechanisms used by oligopolists that have monopolistic effects, such as the use of MFN provisions, "agents" in the supply chain (i.e., distributors) that assist with market exclusion, and control of retail prices.⁴¹¹ These attributes enable what they call "parallel exclusion," which "reinforces parallel pricing" and results in higher costs for consumers.⁴¹² Under either theory in the literature, the major labels, at a minimum, would face some serious scrutiny. Yet, tacit collusion remains generally legal, absent some "plus factor" that evidences an agreement.⁴¹³

Nevertheless, there is increasing interest in using the FTC's regulatory power to rein in various practices that may be used by dominant firms engaging in tacit collusion or other anticompetitive conduct, such as MFN provisions and tying.⁴¹⁴ MFNs have long raised the eyebrows of antitrust enforcers and

⁴⁰⁷ 15 U.S.C. § 1; see C. Scott Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182, 1186 (2013) (arguing that application of the Sherman Act has prioritized form over substance); see also Robin C. Feldman & Mark A. Lemley, *Atomistic Antitrust*, 63 WM. & MARY L. REV. 1869, 1873 (2022) (explaining that antitrust law "tends to miss synergistic competitive harm," resulting from aggregate actions that individually may not be anticompetitive). See generally Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562 (1969) (arguing that both express and tacit collusion should fall under § 1 of the Sherman Act).

⁴⁰⁸ See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (holding that defendants did not violate § 1 of the Sherman Act because plaintiffs did not allege facts showing a conspiratorial agreement).

⁴⁰⁹ See Zheng, *supra* note 53, at 411 (discussing how the Ninth Circuit considered the purpose behind certain pricing behaviors to conclude that the parties engaged in tacit collusion); Piraino, *supra* note 143, at 14–15 (suggesting that courts can infer a collusive effect by looking at the purpose behind oligopolists' conduct).

⁴¹⁰ Hemphill & Wu, *supra* note 407, at 1182.

⁴¹¹ *Id.* at 1201–03.

⁴¹² *Id.* at 1210.

⁴¹³ See *Bell Atl. Corp.*, 550 U.S. at 553, 556 (holding that tacit collusion does not fall under the Sherman Act); Zheng, *supra* note 53, at 429–30 (listing the "plus factors" that courts have identified). For clarity, information-sharing can be a "plus factor[]." Shamir & Shamir, *supra* note 89, at 658.

⁴¹⁴ See generally Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020) (arguing that the FTC should engage in more rulemaking).

scholars because they standardize prices among parties⁴¹⁵ and can create market conditions that deter entry.⁴¹⁶ In *United States v. Apple Inc.*, the MFN between Apple and each publisher was considered substantial evidence of price-fixing.⁴¹⁷ Enforcers could seek to enjoin the use of MFNs that reduce competition.⁴¹⁸ Such an action is not without precedent. The EU prohibited Universal from using MFNs that applied within its borders for ten years after acquiring EMI Records.⁴¹⁹ The book publishers' *Apple* settlements included MFN bans.⁴²⁰ The FTC has recently made similar industry-wide, contract-related proposals to increase competition, such as banning the use of employee non-competes.⁴²¹ Alternatively, the FTC could, as one author suggests, take greater aim at parallel pricing practices by prohibiting firms from raising their prices solely because competitors have done so.⁴²² This would amount to a ban on MFNs of the type that are present in the label agreements. Eliminating MFNs (however accomplished) that effectively fix prices could lead to increased price competition between labels, but more saliently, rupture the information-sharing among them.

Additionally, the requirement that services license the labels' entire catalogs (as opposed to allowing them to pick and choose the content that is most likely to be consumed) resembles tying.⁴²³ Tying is unlawful when a seller has

⁴¹⁵ See Baker & Morton, *supra* note 249, at 2179–80 (describing how MFNs affect pricing among competitors); Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp.*, 1983 WIS. L. REV. 887, 934 (suggesting that parallel MFN clauses among sellers could be evidence of price-fixing); see also Shamir & Shamir, *supra* note 89, at 651 (discussing how certain facilitating practices, such as MFNs, are designed to make collusion easier).

⁴¹⁶ Boik & Corts, *supra* note 234, at 109; Baker, *supra* note 136, at 525. Some courts have held that MFNs reduce prices to consumers or prevent insurance companies from being overcharged (typically when the MFN benefits the buyer, not the seller). See, e.g., *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (finding that the effect of a health clinic's MFN provisions was to minimize physician costs and the provisions did not amount to price-fixing); Jennifer D. Lee, Note, *Post U.S. v. Apple: How Should Most-Favored Nation Clauses Be Treated Now?*, 33 CARDOZO ARTS & ENT. L.J. 237, 250 (2015) (describing arguments in support of MFNs as facilitating competition, such as reducing transaction costs).

⁴¹⁷ 952 F. Supp. 2d 638, 692 (S.D.N.Y. 2013) (indicating that the MFN was “to protect [Apple] against any retail price competition and to ensure that [Apple] had no retail price competition”), *aff'd*, 791 F.3d 290 (2d Cir. 2015).

⁴¹⁸ Herbert Hovenkamp, *Antitrust Harm and Causation*, 99 WASH. U. L. REV. 787, 815 (2021).

⁴¹⁹ EU UMG Decision, *supra* note 181, at 218 (explaining that anticompetitive MFN provisions can be addressed through injunctions).

⁴²⁰ Press Release, U.S. Dep't of Just., Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-book Prices (Apr. 11, 2012), <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-three-largest-book-publishers-and-continues-litigate> [<https://perma.cc/ZBM6-KR7J>].

⁴²¹ Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023).

⁴²² Brendan Ballou, *The “No Collusion” Rule*, 32 STAN. L. & POL'Y REV. 213, 233 (2021).

⁴²³ See *supra* notes 253–254 and accompanying text.

sufficient market power in the tied product, such that the purchaser is forced to do something it might not do in a competitive market,⁴²⁴ and the tying impairs competition.⁴²⁵ Enforcers could challenge the label licenses on tying grounds and argue that any procompetitive benefits are outweighed by anticompetitive harms.⁴²⁶ The “must carry” aspects of the licenses could also be shown to harm competition, and not just because they inflate the size of the minimum guarantee. These provisions also cement the major label catalogs as “must-haves,” because marquee artists can only be obtained through these whole-catalog licenses.⁴²⁷ If services were given the flexibility to pick and choose the content that makes sense for their audiences (as the online television services do), the “must-have-ness” of the labels’ catalogs would diminish, thereby alleviating their bargaining power in negotiations. Lessened bargaining power could increase the chances that a service would be able to negotiate away any of the parallel provisions.

Simply because a problem appears rooted in copyright and antitrust does not mean that the solution is confined to those doctrines. There are additional nuanced paths policymakers could take to mitigate the harms of private ordering in the music industry by disincentivizing, rather than outright prohibiting, the current conduct.

B. Encouraging Market Solutions Through Tax and Transparency

As described above, there are changes to copyright and antitrust laws that could theoretically loosen the labels’ grip on the subscription streaming industry. This Section offers additional proposals that are tailored to the industry. These suggestions target the labels’ incentives, seeking to increase the benefit of defecting from the arrangement or decrease the benefit of coordination (or both).⁴²⁸ Private ordering (and braiding) is, fundamentally, about parties’ freedom to contract, and so facilitating a market solution is an appropriate avenue for addressing an abuse of deference to that freedom.⁴²⁹

For both startups and consumers, the economics of the deals appear to have significant negative effects. The MFNs not only eliminate price competi-

⁴²⁴ Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 16 (1984), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006).

⁴²⁵ DOJ/FTC GUIDELINES, *supra* note 196, at 28–29.

⁴²⁶ *See id.* (explaining the conditions under which a tying agreement has anticompetitive effects).

⁴²⁷ *See supra* notes 253–254 and accompanying text (discussing the licensing of each label’s complete catalog); Web V, *supra* note 180, at 59455 (explaining that each label is a “must have” for streaming services, creating a complementary oligopoly).

⁴²⁸ *See* Posner, *supra* note 281, at 146–50 (proposing solutions to socially beneficial coordination that lower defection value and increase coordination value); *see also* Lemley & McKenna, *supra* note 399, at 112 (arguing that innovation issues should be handled with “other social policy instruments”).

⁴²⁹ *See supra* note 5 and accompanying text (discussing private ordering).

tion, but they are the labels' most powerful information-sharing tool.⁴³⁰ The continued application of the MFNs perpetuates the current licensing framework because a service has no incentive to try and trade on other terms (such as promotional visibility) for lower rates, so long as the MFNs persist.⁴³¹ The high minimum guarantees prevent startups from entering the market, while also preventing meaningful end-user price variation. An incentive for the major labels to remove the MFN provisions and pare back the minimum guarantees would blunt their force and open the door to more flexibility in the market. A mechanism used to minimize negative externalities from otherwise legal behavior, such as smoking cigarettes, is tax.

There is longstanding precedent in the law for treating different forms of income differently under the tax code. Proceeds from stocks that are bought and sold within a year, for example, are taxed at a higher rate than those that are bought and held onto for more than a year.⁴³² A higher tax rate could be imposed on any revenues earned by virtue of the application of a price MFN. In the music industry, such a tax would apply to the profits generated by one label because another label negotiated a better deal for itself; those profits do not reflect what the first label believed its own copyrights were worth.⁴³³ Incentivizing the labels to do away with the MFNs could introduce more flexibility in negotiations, leading to more variation in contract terms, and perhaps more variation in products and prices. Additionally, even if the services agreed, independent of MFNs, to pay each label the same revenue share for ease of accounting, the absence of the provisions could eventually facilitate a breakdown of coordination among the majors. They would no longer be able to mirror one another's pricing practices so easily.

Second, a tax could be imposed on any breakage the labels earn from the minimum guarantee, because that amount is also unrelated to actual use of the copyrighted works.⁴³⁴ Such a tax would encourage the labels to lower any minimum guarantee payment to an amount that is certain to be fully recouped (without any steering from the services), eliminating any inclination for services to promote music based on a label's recoupment status and freeing up

⁴³⁰ See *supra* notes 244–248 and accompanying text (discussing the role of MFNs in information-sharing).

⁴³¹ See Baker, *supra* note 136, at 529–30 (describing how MFNs lead to less aggressive negotiations).

⁴³² DEP'T OF TREASURY, INTERNAL REVENUE SERV., PUBLICATION 544: SALES AND OTHER DISPOSITIONS OF ASSETS 52 (2023), <https://www.irs.gov/pub/irs-pdf/p544.pdf> [<https://perma.cc/9R7A-D6V4>].

⁴³³ See *supra* notes 320–321 and accompanying text (explaining how MFNs can allow labels to earn profits beyond what the artistic work may be worth).

⁴³⁴ See *supra* notes 255–258 and accompanying text (discussing breakage).

funds to invest in product development.⁴³⁵ A breakage tax could also significantly ease the financial barrier to entry for startups in the music space. Not only would the label licenses be cheaper, but minimum guarantee payments are pervasive across the industry (recording and publishing) and all sizes of licensors, insisted upon by large independent labels, music publishers, and performing rights organizations alike.⁴³⁶ Up-front costs could come down on all sides.

Taxes are a useful tool because they overcome the hurdles posed by legislative reforms rooted in copyright and antitrust. First, they preserve the copyright interests that are front and center in the industry. Unlike compulsory licenses, a tax leaves the copyright monopoly undisturbed, while incentivizing market participants to take actions that promote greater access to works for the public. Startups could face fewer barriers to entering the market, and services could have more flexibility in setting consumer prices. Second, unlike a change to antitrust or copyright law, a tax provides immediate relief to the ecosystem; no lawsuits or regulatory proceedings would be necessary. Moreover, a tax is useful when there may be certainty as to harm, but not its scope, as is the case here. We do not know how much the labels earn in breakage or by way of the MFNs. A tax considers that uncertainty by only applying if there is a windfall.

The proceeds from such taxes need not necessarily flow into the Internal Revenue Service's coffers. In Europe, countries have imposed tax-like obligations (often referred to as levies) on large enterprises that may be harming the market for cultural works.⁴³⁷ There, the amounts collected from those levies are deposited into national funds that are used to promote the development of the arts sectors.⁴³⁸ In this case, the money generated from taxes could be earmarked for different causes that would serve to facilitate more innovation in the streaming market. Congress could commission an incubator to work with startups (along with economists and the labels) to develop new models for streaming that allow entrants into the market without compromising the underlying copyrights. Funds could also be used to support the independent artist community, which is arguably disadvantaged on streaming services due to the

⁴³⁵ See EU UMG Decision, *supra* note 181, at 131 (summarizing complaints about how minimum guarantees constrain product development).

⁴³⁶ See *supra* notes 251–268 and accompanying text (discussing minimum guarantee payments).

⁴³⁷ See Council Directive 2018/1808, art. 13(2), 2018 O.J. (L 303) 69, 86 (EU) (capturing amendments to “Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media service (Audiovisual Media Services Directive) in view of changing market realities”).

⁴³⁸ See FRANCISCO JAVIER CABRERA BLÁZQUEZ, MAJA CAPPELLO, JULIO TALAVERA MILLA & SOPHIE VALAIS, *IRIS PLUS, INVESTING IN EUROPEAN WORKS: THE OBLIGATIONS ON VOD PROVIDERS* 24–51 (2022), <https://rm.coe.int/iris-plus-2022en2-financial-obligations-for-vod-services/1680a6889c> [<https://perma.cc/X5FX-NNKE>] (describing how different countries have implemented levies).

provisions the major labels secure to incentivize (and in some cases, mandate) promotion of their content.

It is axiomatic, however, that imposing a specific tax on corporations like the major record labels is a complex and unusual endeavor, especially in the United States. Windfall profits taxes are exceptional and have historically been reserved for wartime, when certain companies exploit changes in the economy to extract higher-than-ordinary profits.⁴³⁹ Moreover, any excess profits tax is likely to still leave some excess profits, and finding the optimal tax rate to disincentivize particular conduct is no simple task.⁴⁴⁰ Additionally, Universal and Sony both have foreign ownership.⁴⁴¹ Although there have been recent statutory changes to attempt to capture more income tax from foreign companies operating in the United States, the efficacy of those initiatives has yet to be seen.⁴⁴² Furthermore, the labels make their money from intellectual property, which they can easily move into tax haven countries to minimize liabilities.⁴⁴³ Any tax regulation would need to account for these circumstances. A tax solution is not a panacea, either. Although taxes may encourage the labels to adjust their behavior in positive ways, one trade-off of such a narrow solution is that it does not broadly address competitive issues arising from MFNs and tying-like behavior across all industries. The proposed taxes are meant to be a nudge, not a shove.

⁴³⁹ Tarcísio Diniz Magalhães & Allison Christians, *Rethinking Tax for the Digital Economy After COVID-19*, 11 HARV. BUS. L. REV. ONLINE 1, 8 (2021), https://journals.law.harvard.edu/hblr/wp-content/uploads/sites/87/2021/08/TDM_AC_Proof_S21.pdf [<https://perma.cc/V9AC-MPNS>]. Outside wartime, windfall profits taxes are rare. For example, in the 1980s, following the “cartelization” of Middle East oil producers, Congress enacted a windfall profits tax on producers. Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1546–48 (1999).

⁴⁴⁰ Jonathan S. Masur & Eric A. Posner, *Toward a Pigouvian State*, 164 U. PA. L. REV. 93, 100–02 (2015) (discussing methods to calculate a socially optimal tax rate). Taxes that seek to eliminate negative externalities (Pigouvian taxes) are optimal when they can be set at a rate “equal to the harm that the firm imposes on third parties.” *Id.* at 95. In this case, such rate would be near-impossible to determine (as is also the case with cigarettes).

⁴⁴¹ See *Universal Music Group*, *supra* note 295 (detailing the foreign companies that have an ownership interest in Universal, including Vivendi with 10%, Pershing Square Holdings with 10%, and a “Tencent-led consortium” with 20%); *Stock Information*, SONY, <https://www.sony.com/en/SonyInfo/IR/stock/information.html#block4> [<https://perma.cc/29C4-WUUM>] (listing the major shareholders in Sony Entertainment, including the Master Trust Bank of Japan, which holds 19%).

⁴⁴² See, e.g., 26 U.S.C. § 951A(a) (2017) (requiring that any “person who is a United States shareholder of any controlled foreign corporation” include their “global intangible low-taxed income” in their gross income).

⁴⁴³ See Ana Maria Santacreu & Jesse LaBelle, *Profit Shifting Through Intellectual Property*, 2022 ECON. SYNOPSIS 1, 1 (“In this essay, we show that large movements of IP toward low-tax jurisdictions is indeed a channel through which multinational corporations shift profits abroad.”). At least one label (Universal) states that it does not partake in such practices. UNIVERSAL MUSIC GRP. N.V., TAX POLICY, https://assets.ctfassets.net/e66ejtqbazg/4QHARXCaFwKIbQwlqWSozt/e3caf4f69417deca06dd961566d1742d/UMG_Tax_Policy.pdf [<https://perma.cc/NB4X-DGNZ>].

Lastly, transparency is also a powerful disinfectant. The MFNs, as well as other parallel terms, are publicized because regulators, policymakers, industry experts, and the labels themselves have openly acknowledged them.⁴⁴⁴ Yet, we do not know exactly how the mechanics of the terms work, how much the labels are gaining from the MFNs, the specific language used, or whether there is even more consistency among agreements than has been reported.⁴⁴⁵ The labels and the services both point to the need to protect business-sensitive information by insisting upon redactions of the contract provisions in regulatory reports, yet the parallel terms cannot be terribly sensitive if they are so standardized.⁴⁴⁶ Another solution would require the CRB (and other relevant regulators) to deem contract provisions that are substantially similar across the major label license agreements to be *not* competitively sensitive, and therefore not subject to redaction in regulatory reports. Transparency of the details of these terms would enable academics and economists to perform more rigorous studies around the competitive effects of parallel contracting. More practically, however, the threat of disclosure (of the MFNs, especially) could be sufficient to compel the labels to do away with the terms altogether, thereby breaking the governance structure built into the contracting regime.

CONCLUSION

Braiding has undoubtedly facilitated socially beneficial innovations, as scholars originally described. Such positive outcomes, however, are not predetermined. Braiding can also enable dominant market players to control a downstream market and stifle innovation. The major labels show just how this can be accomplished through their parallel imposition of information-sharing contract provisions that are interwoven with trust. A homogenous market is the result. Policymakers have numerous options to address the labels' behavior, including legislative and regulatory changes. Those options include tailored approaches that re-jigger the labels' incentives, and in doing so, generate a market solution to encourage innovation.

⁴⁴⁴ See *supra* note 236 and accompanying text (discussing that MFNs have been well-publicized for years).

⁴⁴⁵ See EU UMG Decision, *supra* note 181, at 191 (suggesting that the exact MFNs (as of 2012) may vary among licenses).

⁴⁴⁶ See Order Soliciting Proposed Redactions, In the Matter of Determination of Rates and Terms for Digital Performance of Sound Recordings and Making of Ephemeral Copies to Facilitate Those Performances (Web V), No. 19-CRB-0005-WR (2021-2025) (June 11, 2021), <https://app.crb.gov/document/download/25333> [<https://perma.cc/5KL5-2U9R>] (requesting that parties identify portions of the Copyright Royalty Judges' final determination for redaction).

