

12-12-2017

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Recommended Citation

Frances Lewis, *Slipping Through the Cracks: How Digital Music Streaming Cuts Corners on Artists' Royalty Revenues Globally*, 43 Brook. J. Int'l L. 297 (2017).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol43/iss1/31>

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SLIPPING THROUGH THE CRACKS: HOW DIGITAL MUSIC STREAMING CUTS CORNERS ON ARTISTS’ ROYALTY REVENUES GLOBALLY

INTRODUCTION

At a time when the digital delivery of music is becoming a larger percentage of the music business, demand for music is at an all-time high.¹ In today’s digital era, certain categories of income streams have taken a predominant role in artists’ royalty monies as digital musical consumption and income have steadily increased in the past decade.² Sound recording performance rights, or “neighbouring rights,”³ which compensate the master holder of the song⁴ and the artist when music is publicly

1. Hannah Ellis-Peterson, *Streaming Growth Helps Digital Music Revenues Surpass Physical Sales*, GUARDIAN (Apr. 12, 2016), <https://www.theguardian.com/music/2016/apr/12/streaming-revenues-bring-big-boost-to-global-music-industry>.

2. Digital streaming has grown to produce substantial revenue in recent years. See Anabelle Gauberti, *Neighbouring Rights in the Digital Era: How the Music Industry Can Cash In*, COPYRIGHT TRADEMARK L. BLOG, LEXISNEXIS (Oct. 26, 2016), <https://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/archive/2015/10/26/neighbouring-rights-in-the-digital-era-how-the-music-industry-can-cash-in.aspx>. In fact, “while recorded music sales of physical products have declined 66 percent since their high in 1999, revenues from overall neighbouring rights have increased dramatically, reaching Euros 2.034 billion globally in 2013.” *Id.*

3. Neighbouring rights are the rights that “neighbour” the copyright in the musical composition. See George Howard, *Neighboring Rights: What They Are and Why They Matter*, TUNE CORE (July 19, 2012), <http://www.tunecore.com/blog/2012/07/neighboring-rights-what-they-are-why-they-matter.html>. Unfortunately, only artists who are residents in signatory countries to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of 1961 (collectively, the “Rome Convention”) are eligible to receive these royalties. *Id.* Most notably, the United States is not on this list. *Id.*

4. Typically, an artist who has signed a record deal with a record label relinquishes their “master rights” in a sound recording to the record label itself. See Keith Hatschek, *Retaining Your Master Rights is Smart Business*, DISC MAKERS BLOG (Apr. 16, 2013), <http://blog.discmakers.com/2013/04/retaining-your-master-rights-smart-business/>. This means that, in such a scenario, the artist no longer retains the rights to their sound recordings. *Id.* Record labels get away with this because they provide most of the funding for the recording process and release of the record. *Id.*

performed, have implicitly become a growing source of revenue for artists as digital streaming has surged.⁵ Ten countries, however, control 82 percent of worldwide royalties through the neighbouring rights market, with the United States at the top of the list (28 percent), closely followed by the United Kingdom (12 percent) and France (11 percent).⁶

Music streaming services appeal to people across the globe because one can simply pay a flat monthly fee⁷ for an unlimited amount of music they do not actually own, as opposed to paying for individual tracks from providers like iTunes.⁸ The appeal is that users can stream more music than they would have if they had to pay for each individual track. The problem, however, is that even the globe's most popular digital service providers, such as Spotify⁹ and Rhapsody,¹⁰ often choose expediency over licenses by selling music to subscribers without either negotiating direct licenses (obtained directly from the copyright holder)¹¹ or

5. Gauberti, *supra* note 2.

6. The top ten markets and the percentage of the royalties they control worldwide are as follows: The United States (28 percent), the United Kingdom (12 percent), France (11 percent), Japan (7 percent), Germany (7 percent), Argentina (3 percent), the Netherlands (3 percent), Canada (2 percent), and Norway (2 percent). *See id.*

7. *See* Sarah Mitroff, *Spotify, Apple Music, Radio and Rhapsody: Which Music Streaming App Is Right For You?*, CNET (Apr. 7, 2016), <https://www.cnet.com/how-to/best-music-streaming-service/>.

8. iTUNES, <http://www.apple.com/itunes/> (last visited Oct. 3, 2017). In recent years, even providers like iTunes that offer the sale of individual tracks have jumped on the streaming trend, where “Even Apple—whose pay-per-song iTunes once seemed like the future—has doubled-down on iTunes Radio, its music-streaming Pandora competitor.” Ben Taylor, *By the Numbers: The Streaming Music War (and Who's Winning)*, TIME (Aug. 14, 2014), <http://time.com/3109273/streaming-music-services-compared/>.

9. SPOTIFY, <https://www.spotify.com/us/> (last visited Jan. 16, 2016).

10. NAPSTER, <http://us.napster.com> (last visited Jan. 16, 2016).

11. One must first obtain permission to reproduce, perform, or distribute a copyrighted work from the copyright owner himself—known as a “direct license.” Rich Stim, *Copyright and Compulsory Licenses*, NOLO, <http://www.nolo.com/legal-encyclopedia/copyright-compulsory-license.html> (last visited Jan. 16, 2017). There are other circumstances, however, when one may utilize a copyrighted work without the copyright owner's permission, so long as the relevant legal rules are followed and fees are paid—known as a “compulsory license.” *Id.* Music companies and webcasters are among those who use compulsory licenses most frequently. *Id.* The United States Copyright Office sets a statutory “Mechanical Royalty Rate,” which one must abide by and pay out to the copyright holder, along with sending notice of their use of

pursuing compulsory licenses (obtained without express permission from the copyright holder).¹² This issue has caused big name artists, such as Taylor Swift, Adele, and several others, to famously withhold their music from digital streaming services, such as Spotify, for fear their art is being devalued.¹³ This has created a challenging atmosphere for often exploited artists, making it more important now than ever before for artists to receive the credit they deserve.¹⁴

One legal tool available to exploited artists that gives them the ability to advocate for themselves and similarly situated artists is to challenge the major digital providers through class action lawsuits.¹⁵ In a class action lawsuit, an individual or a small group of individuals can represent and bring a suit on behalf of a large group.¹⁶ In the past decade, artists who have been exploited by powerful digital streaming websites have used class action lawsuits to protect their musical works, ensuring that they receive appropriate royalties and credit for their compositions.¹⁷

the copyright to the copyright holder if they plan on obtaining a compulsory license. *Id.*

12. See *id.*; *Spotify Settles \$43 Million Class Action Copyright Lawsuit*, FORBES (June 1, 2017), <https://www.forbes.com/sites/legalentertainment/2017/06/01/spotify-settles-43-million-class-action-copyright-lawsuit/#20e5b36a1e3f> [hereinafter FORBES]; In the United States, in 1998, as part of the Digital Millennium Copyright Act, Congress extended the § 114 compulsory license to include webcasting and amended § 112 of the Act to cover the server copies necessary for digital transmissions, enabling webcasters like Spotify and Rhapsody to pursue compulsory licenses. See U.S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE 75–77 (2015), <http://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf> [hereinafter U.S. COPYRIGHT OFF.].

13. See Charlotte Hassan, *Reasons Why Some Artist Absolutely Hate Spotify...*, DIGITAL MUSIC NEWS (Mar. 21, 2016), <https://www.digitalmusicnews.com/2016/03/21/why-artists-pull-their-music-from-spotify-but-not-youtube/>.

14. U.S. COPYRIGHT OFF., *supra* note 12, at 18.

15. See FORBES, *supra* note 12.

16. *Class Action*, BLACK'S LAW DICTIONARY, <http://thelawdictionary.org/class-action/> (last visited Oct. 3, 2016).

17. For recent case law in which a group of individuals brought a class action on behalf of themselves and similarly-situated holders of mechanical rights in copyrighted musical works used without first obtaining a license, see FORBES, *supra* note 12.

It is only within the past three years, however, that major European powers, like the United Kingdom¹⁸ and France,¹⁹ with the enactment of the Consumer Rights Act (CRA)²⁰ and the Loi Hamon,²¹ respectively, have adopted this predominantly United States phenomenon of class action litigation into their legal systems. The problem, however, is that class action lawsuits prove to be more restrictive in scope under U.K. and French law. Only those with material damages²² can bring suit, which are something artists exploited by digital streamers often cannot establish.²³ Further, class action laws are so new in the United Kingdom and France that there are doubts as to their effectiveness, as class action litigation has rarely been utilized since their enactment.²⁴ Since the United Kingdom and France are two of the countries with the highest concentration of the neighbouring rights market, ranking only behind the United States,²⁵ it is imperative for artists in the United Kingdom and France to utilize this tool. Artists must band together to bring action against

18. The United Kingdom enacted The Consumer Rights Act 2015 on October 1, 2015. See *Collective Actions: UK Guide*, ASHURST (July 26, 2017), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguides---collective-actions/> (last visited Oct. 23, 2017); Clive Coleman, *US-Style Class Actions Introduced in UK*, BBC (Oct. 1, 2015), <http://www.bbc.com/news/uk-34402483>.

19. France enacted the Loi Hamon on March 17, 2014. See *Introduction of Class Actions in France: A Growing Threat to Professionals?*, LATHAM & WATKINS (Mar. 25, 2014), <https://www.lw.com/thoughtLeadership/lw-france-class-action-law> [hereinafter LATHAM & WATKINS].

20. See *Collective Actions: UK Guide*, *supra* note 18.

21. The Loi Hamon was enacted in March of 2014 and entered into force on October 1, 2014. See LATHAM & WATKINS, *supra* note 19.

22. Class action litigation in France is limited to services provided, sales of products, and damages caused by unfair competition. See Von Emmanuel Brouquier, *Class Actions in France—What You Need to Know*, GEN RE (May 21, 2015), <http://de.genre.com/knowledge/blog/class-actions-in-france-what-you-need-to-know.html>; LATHAM & WATKINS, *supra* note 19.

23. Since October 1, 2014, when the “Hamon” law entered into force, only six class actions have been brought. See Lionel Lesur, *French Class Action Has Less Impact Than Expected*, MCDERMOTT WILL & EMERY (Feb. 9, 2016), <https://www.mwe.com/en/thought-leadership/publications/2016/02/french-class-action-law-has-less-impact>.

24. See *id.*; Molly Herron, *UK Competition Class Action Regime Out of the Starting Blocks*, HERBERT SMITH FREEHILLS (July 22, 2016), <https://www.herbertsmithfreehills.com/latest-thinking/uk-competition-class-action-regime-out-of-the-starting-blocks>.

25. See Gauberti, *supra* note 2.

global providers, such as Spotify and Rhapsody, who dominate the digital market.²⁶

This Note argues that the restrictiveness of the class action regimes in the United Kingdom and France are posing a disservice to artists who are not being credited for their musical compositions.²⁷ Part I of this Note will provide a brief outline of the digital music marketplace in the twenty-first century,²⁸ the influential role of digital music providers,²⁹ and why it is important for them to ensure artists are credited for their compositions. Part I will also discuss the role that the top three players³⁰ in neighbouring rights revenues pose in the digital music marketplace, which is now dominated by online streaming services. Part II will provide an overview of the class action system in the United States, identify the costs and benefits to class action litigation as a tool for artists in the United States, and detail how artists in the United Kingdom and France could benefit from a more effective class action system.³¹ Part III will provide an overview of the current state of group litigation in the United Kingdom, the significant changes introduced by this new regime, and how artists are still limited in the types of claims they can bring, even with the passage of the CRA.³² Part IV will provide

26. Digital revenues now account for 46 percent of total music industry revenues, where four of the world's top ten markets' digital channels account for the majority of revenues. See Gauberti, *supra* note 2; Ellis-Peterson, *supra* note 1.

27. The United Kingdom and France have limited the type of litigants who can bring a group claim, restricting exploited artists' ability to bring them. See *Collective Actions: UK Guide*, *supra* note 18; LATHAM & WATKINS, *supra* note 19.

28. See generally Brittany Alexandra Buckley, *Digital Takeover: The Reality of Music in the Twenty First Century* (2012) (unpublished SPEA Undergraduate Honors thesis, Indiana University), https://spea.indiana.edu/doc/undergraduate/ugrd_thesis2012_bsam_buckley.pdf; Alex Beram, *Selling Music in the 21st Century*, MUSIC BUS. J. BERKLEE COLLEGE OF MUSIC (Jan. 2009), <http://www.thembj.org/2009/01/selling-music-in-the-21st-century/>.

29. See Andre Evren, *Tracing the History of Music Streaming, and Why It's More Important Now Than Ever*, BIT OF NEWS (June 17, 2015), <http://news.bitofnews.com/tracing-the-history-of-music-streaming-and-why-its-more-important-now-than-ever/>.

30. The top three players in the neighbouring rights marketplace are the United States, the United Kingdom, and France. See Gauberti, *supra* note 2.

31. Especially since the United Kingdom and France are two of the world's largest markets for neighbouring rights, it is imperative for their legal structures to encompass a remedy for exploited artists. See *id.*

32. See *Collective Actions: UK Guide*, *supra* note 18.

an overview of the current law and state of group litigation in France, the major differences between French and U.S. class action laws, and how the crucial differences in the French law affect exploited artists in France.³³ Finally, Part V will propose a solution, which calls for the United Kingdom and France to take steps towards following the U.S. class action model³⁴ by reforming their current legislation through passing an amendment or adopting new legislation entirely.

I. THE DIGITAL MUSIC MARKETPLACE IN THE TWENTY-FIRST CENTURY

This Part will examine the digital music marketplace in the twenty-first century. It will also explain the influential role of digital music providers and why it is imperative for artists to have legal recourse when they are not receiving adequate royalties.

A. What is the Digital Music Marketplace in the Twenty-first Century and Who Are the Major Players?

There is no doubt that music is an integral part of society.³⁵ When artists share their creativity and musical ideas, however, they are entitled to compensation.³⁶ It is also apparent that digital music streaming is on the rise, as digital revenues now account for 45 percent of total music industry revenues and streaming proves to be the industry's fastest growing revenue source.³⁷ While technology progresses and continues to develop,

33. See LATHAM & WATKINS, *supra* note 19.

34. See FED. R. CIV. P. 23.

35. Music has even been referred to as the "greatest creation of man," as it has therapeutic effects, such as reducing stress, improving sleep quality, and enhancing blood level function. See George Rachiotis, *The Importance of Music in Our Daily Lives*, TRUTH INSIDE OF YOU (Sept. 17, 2014), <http://www.truthinsideofyou.org/importance-of-music-daily-lives/>; *Not So Fair After All—International Aspects of the Fairness in Music Licensing Act of 1998*, 14 TRANSNAT'L L. 435, 436 (2001) [hereinafter TRANSNAT'L L.]; Scott Christ, *20 Surprising, Science-Backed Health Benefits of Music*, GREATIST (Dec. 12, 2013), <http://greatist.com/happiness/unexpected-health-benefits-music>.

36. See TRANSNAT'L L., *supra* note 35, at 436.

37. At the close of 2015, the International Federation of the Phonographic Industry (IFPI), a not-for-profit international organization that represents record labels globally, reported total industry global revenues at 39 percent physical format sales, 45 percent digital revenues, 14 percent performance rights,

the physical and digital world will continue to intertwine.³⁸ Scholars note that the 2001 release of the iPod was a pivotal transition into the digital music era that is undergoing a perpetual evolution into the digital future, stating that:

We quickly moved from bulky Sony Walkmans, to the click-wheel iPods with mini-hard drives, to now having flash memory. CDs, the previously disruptive technology that sent vinyl albums into the dustbin of history, were quickly displaced by digital music files and portable music players. This transition in our culture from a physical to a digital world has occurred at an impressive, if not dizzying, pace. From smartphone apps to digital music streaming services, our world has replaced the tangible and the analog with the digital.³⁹

Music streaming has greatly evolved since the inception of the internet.⁴⁰ Napster, the first streaming on-demand music subscription service offering unlimited access to a large music database for a flat monthly fee, launched in 1999, quickly becoming the fastest growing business ever, holding records over Google and Facebook.⁴¹ Although peer-to-peer music sharing previously existed on the web, Napster made it easier than ever for users to access one massive marketplace and predicted the success other digital music streaming providers could have in the future.⁴² Napster did, however, experience the same difficulties music streaming providers do today, where they had to amass extensive music libraries to offer to subscribers in a short amount of time, which resulted in adding music to its service without acquiring proper licenses. Making Napster's music race

and 2 percent synchronization rights. *See An Explosion in Global Music Consumption Supported by Multiple Platforms*, IFPI (Sept. 13, 2016), <http://www.ifpi.org/facts-and-stats.php>.

38. For example, most of the buttons on smart phones are now 'virtual' icons on a screen, rather than physical, mechanical objects. *See* Timothy R. Holbrook & Lucas S. Osborn, *Digital Patent Infringement in an Era of 3D Printing*, 48 U.C. DAVIS L. REV. 1319, 1321 (2015).

39. *See id.* at 1321.

40. In 1990, the online world took its most recognizable form when Tim Berners-Lee invented the World Wide Web. *See* Evan Andrews, *Who Invented the Internet?*, HISTORY (Dec. 18, 2013), <http://www.history.com/news/ask-history/who-invented-the-internet>.

41. *See* Evren, *supra* note 29; GOOGLE, <http://www.google.com> (last visited Oct. 18, 2017); FACEBOOK, <https://facebook.com> (last visited Jan. 16, 2017) [hereinafter FACEBOOK].

42. *See* Evren, *supra* note 29.

even more difficult, record labels were hesitant to grant licenses because they could not find a way to make the services profitable.⁴³ Napster inevitably met its demise just two years after its emergence, as it was crushed by lawsuits for copyright violation.⁴⁴

Since the creation of Napster, companies buying into the music streaming race have developed Napster spinoffs, utilizing the large music database for a fixed monthly fee concept, ranging from the current players, such as Pandora internet radio, to Spotify's music streaming service.⁴⁵ The major complaint, however, with all of the music streaming service providers, is that artists are receiving dismal royalties, while the providers often choose to play now and pay later when they provide songs on their servers that they have not acquired proper licenses for.⁴⁶ It is Apple's nearly half-a-trillion-dollar industry,⁴⁷ however, that has facilitated the international music streaming race in the past decade.⁴⁸

The iPod opened the doors to digital music streaming because, although it was not the first music player,⁴⁹ the iPod was the

43. *See id.*

44. Although many artists did not have any clear response towards Napster, some artists publicly commented in favor of the service, while their record labels quietly attempted to have their music removed from it. *See Evren, supra* note 29.

45. MusicNet launched right after Napster's collapse, providing a new service where users could pay a monthly subscription fee to access a large database of music. *See Evren, supra* note 29. MusicNet was defeated by its fee that gave 91 percent of the profits to record labels, leaving performers with a fraction of a penny per play. *Id.* Pandora Radio launched in 2004, creating personalized music radio stations. *Id.* Only 5 percent of users, however, actually pay for the \$10 USD a month uninterrupted streaming, where the remaining 95 percent listen for free (though interrupted by occasional advertisements). *Id.* It was Spotify's launch that finally had something most comparable to Napster's service. *Id.* Its service, however, is concerning to many people, as it promotes the shift away from music ownership. *Id.*

46. *See Evren, supra* note 29.

47. As of May 2016, Apple has a market cap of around \$495 billion USD. *See Paul Monica, Google is Worth More than Apple*, CNN MONEY (May 12, 2016), <http://money.cnn.com/2016/05/12/investing/apple-google-alphabet-most-valuable/>.

48. *See Evren, supra* note 29.

49. Music devices have transformed in the past fifty years. *See Music Device Timeline*, TIME TOAST TIMELINES, <https://www.timetoast.com/timelines/music-device-timeline> (last visited Oct. 16, 2016). From the invention of the cassette in 1971, to the Walkman in 1979, the compact disk in 1982, the discman in

first device to simplify synching with digital music collections on personal computers.⁵⁰ Premium international subscription services, such as Spotify, Rhapsody, and YouTube,⁵¹ have seen a dramatic expansion in subscribers since the data was first compiled in 2010.⁵² According to the International Federation of the Phonographic Industry (IFPI),⁵³ a not-for-profit international organization registered in Switzerland that represents the interests of the recording industry worldwide, there is an estimated 68 million people now paying a music subscription, compared to 48 million in 2014 and just 8 million in 2010.⁵⁴ The subscription value of streaming services of Spotify alone has reached \$68 million USD, a growth of 66 percent from 2014.⁵⁵ Unfortunately, as the amount of music consumption has risen, the gap between the amount of music consumed and the cash earned by artists has also increased.⁵⁶

Competing to maintain its prominence in the consumer market,⁵⁷ it is no surprise that when international music streaming became possible,⁵⁸ Apple wanted to secure itself a spot in the music streaming market, where music fans increasingly embrace subscriptions over pay-per-song services, such as iTunes.⁵⁹ It is Spotify, however, that is the undisputed king of streaming

1984, the mp3 in 1997, and finally to the iPod in 2001. *Id.* The iPod has continued to dominate the music player scene, as more than 1 billion apple devices are in active use around the world. *Id.*; Nick Statt, *1 Billion Apple Devices are in Active Use Around the World*, VERGE (Jan. 26, 2016), <http://www.theverge.com/2016/1/26/10835748/apple-devices-active-1-billion-iphone-ipad-ios>.

50. *Apple Unveils New, Faster iPod Touch with Streaming Service in Mind*, BILLBOARD (July 15, 2015), <http://www.billboard.com/articles/business/6633593/new-ipod-touch-apple-music> [hereinafter BILLBOARD].

51. YOUTUBE, www.youtube.com (last visited Oct. 3, 2017).

52. *An Explosion in Global Music Consumption Supported by Multiple Platforms*, IFPI (Sept. 13, 2016), <http://www.ifpi.org/facts-and-stats.php>.

53. *See* IFPI, www.ifpi.org/ (last visited Jan. 16, 2016).

54. *See* Holbrook & Osborn, *supra* note 38.

55. *See* Ellis-Peterson, *supra* note 1.

56. *See id.*

57. BILLBOARD, *supra* note 50.

58. Digital music streaming became possible after the invention of the internet in the early 1990s. *See* Evren, *supra* note 29.

59. In fact, Apple seems to always stay two years ahead of its competitors in releasing products out into the physical and digital marketplace. *See* Tim Bajarin, *6 Reasons Apple is so Successful*, TIME (May 7, 2012), <http://techland.time.com/2012/05/07/six-reasons-why-apple-is-successful/>; BILLBOARD, *supra* note 50.

music.⁶⁰ Now in fifty-eight countries,⁶¹ Spotify has raised over 500 million USD, while its user base exceeds 50 million people globally, with 12.5 million paying subscribers.⁶² With such a predominant influence globally for a major streaming service, it is highly concerning that it took Spotify two years to complete their music licenses.⁶³ Further, Spotify's competitors, like Rhapsody (which recently bought a rebranded, fully licensed Napster), Rdio,⁶⁴ and Google Play Music⁶⁵ pose a huge headache to record labels, music publishers, and performing-rights societies struggling to keep up with all of the current and emerging technologies to ensure artists are receiving royalties due.⁶⁶

60. Spotify sits on its throne as king of music streaming:

With a reported paid user base surpassing 20 million subscribers—not to mention an astronomical 55 million additional listeners on its free, ad-based service—the Swedish-born service currently trounces its competition, most of which boast a few million users at best. Its biggest competitor? Apple Music, a subscription-only service that, as of January 2016, is reported to have at least 10 million subscribers. Although that is less than half the size of Spotify's paying user base, it's impressive when you consider the short time since the platform's release and Spotify's substantial head start.

See Rick Stella & Brandon Widder, *Spotify vs. Apple Music: Who Wins the Ultimate Streaming Showdown?*, DIGITAL TRENDS (Mar. 7, 2016), <http://www.digitaltrends.com/music/apple-music-vs-spotify/>.

61. The United States, the United Kingdom, and France are among the list of the fifty-eight countries where Spotify offers its services. See John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or Its Foe?*, NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/revenue-streams>. The list of participating countries is growing every day. *Id.* Canada is the latest on the Spotify scene, as Canada allowed Spotify's services into its country in September of 2016. *Id.*

62. *Id.*

63. *Id.*

64. Rdio is the first modern music streaming service to arrive in the United States. See Casey Newton, *Why Rdio Died*, VERGE (Nov. 17, 2015), <http://www.theverge.com/2015/11/17/9750890/rdio-shutdown-pandora>.

65. GOOGLE PLAY MUSIC, <https://play.google.com/music/listen?gclid=CPDf0Nj-x9ECFULxDQodzGQPTA&gclsrc=ds> (last visited Jan. 16, 2017).

66. As John Seabrook explains:

With any given stream of a song there is a myriad of copyrights—performing and mechanical rights apply to both the recording and the composition—which makes sorting out

B. Why it Matters to Ensure Artists' Rights Against Digital Providers

The United States seems to be the most innovative and influential music culture in the world.⁶⁷ Artists from the United Kingdom,⁶⁸ however, have a prominent role in today's international music industry. In fact, in 2015, half of the top ten biggest-selling artists worldwide were British.⁶⁹ In an attempt to keep up with music licensing and respect sound recordings, the United Kingdom's Phonographic Performance Ltd (PPL),⁷⁰ the United Kingdom's collective rights organization, has compiled over 5.6 million recordings released in the United Kingdom, enabling them to work with major record labels and a range of overseas music licensing companies to include worldwide data.⁷¹ The PPL is not the only force in the United Kingdom taking initiative to protect its artists' works.⁷² The United Kingdom's Copyright Hub⁷³ is a resource for all, as it offers information about copyright law and website links to licensing organizations in an

who's owed what no easy matter . . . YouTube, which is by far the largest streaming-music site in the world (it wasn't designed that way—that's just what it became), is notorious among rights holders in the music industry for its measly and erratic payouts.

See Seabrook, *supra* note 61.

67. Although the United States has the most innovative and influential music culture in the world, its system for enabling the paid use of music—and ensuring compensation for its creators—lags far behind. See U.S. COPYRIGHT OFF. *supra* note 12, at 12.

68. The most notable musicians of all time are from the United Kingdom, including The Beatles, The Rolling Stones, Led Zeppelin, David Bowie, Black Sabbath, and The Who. See Bonnie Stirnberg, *The 50 Best British Artists of All Time*, PASTE (Apr. 29, 2011), <https://www.pastemagazine.com/blogs/lists/2011/04/pastes-50-favorite-british-artists-of-all-time.html>.

69. In 2015, Adele, Ed Sheeran, One Direction, Coldplay and Sam Smith—all British artists—were the top ten biggest-selling artists worldwide. See Ellis-Peterson, *supra* note 1.

70. See *Who We Are*, PPLUK, <http://www.ppluk.com/About-Us/Who-We-Are/> (last visited Jan. 16, 2017).

71. PPLUK, <http://www.ppluk.com> (last visited Jan. 16, 2017).

72. See THE COPYRIGHT HUB, <http://www.copyrighthub.co.uk> (last visited Jan. 16, 2017) [hereinafter COPYRIGHT HUB].

73. *Id.*

attempt to make it easier for people, or music streaming services, to track down and obtain licenses for copyrighted works.⁷⁴ The PPL and Copyright Hub are vital to U.K. artists in today's era, where the U.K. market for recorded music has grown to £1.1 billion, with major record labels expecting sales in the coming year to represent at least 40 percent of their revenue, putting the United Kingdom at "the forefront of one of the largest markets in Europe for the adoption of streaming as a means of listening to music."⁷⁵

In France, as in most other developed nations, revenue from physical music sales have taken a plunge, while subscription-based audio streaming services have seen a leap in revenue.⁷⁶ France deserves attention, not only because it is one of the largest music markets in the world, but because it is home to Deezer, the world's second-largest music subscription service behind Spotify, which is changing consumer behavior in its home market.⁷⁷ Now available in the United States, Deezer's French music streaming service is another challenger in the ring with Pandora, Spotify, Apple Music, and Tidal, as it is available at a flat

74. See U.S. COPYRIGHT OFF. *supra* note 12, at 65–66.

75. In the United Kingdom, listeners spend an average of thirteen hours per month digitally streaming music. See Christian Harris, *Why Streaming Services Play a Vital Role in Building the New Music Economy*, DRUM (Feb. 16, 2016), <http://www.thedrum.com/opinion/2016/02/16/why-streaming-services-play-vital-role-building-new-music-economy>. The considerable amount of time these users are spending on streaming sites has prompted advertisers to make more of an effort to connect with such services, in hopes of gaining more visibility and engaging with a connected audience. *Id.*

76. Subscription-based audio streaming services have grown from about €34.8 million (\$46.2 million USD) to just under €48 million (\$63.7 million USD) in recent years. See *In France, Music Downloads Decline as Streaming Shows Promise*, EMARKETER (Feb. 11, 2015), <http://www.emarketer.com/Article/France-Music-Downloads-Decline-Streaming-Shows-Promise/1012012>.

77. Reporting a similar finding, Billboard released an article stating that "France's digital music market posted a 6-percent gain last year. Streaming revenue from subscription services like Deezer rose 35.2 percent, to €48.4 million (\$64.4 million USD). Ad-supported streaming grew 32.2 percent to €24.1 million (\$32.1 million USD)." See Glenn Peoples, *French Report: Streaming Revenues Grow in the Land of Deezer, But CS Still Dominate*, BILLBOARD (Feb. 4, 2015), <http://www.billboard.com/articles/business/6458461/france-music-industry-revenue-streaming-revenues-grow-cds>.

monthly rate and provides access to over forty million music tracks with six million users globally.⁷⁸

Many music lovers are turning to subscription or ad-funded streaming.⁷⁹ Not only are the digital music streamers failing to obtain all necessary licenses for each individual track, but streaming, like many facets of digital and internet music distribution, is failing to substantially pay artists.⁸⁰ A growing number of artists have boycotted digital streaming services, as they are increasingly worried about their income, or the lack thereof.⁸¹ Songwriters' concerns are vividly illustrated⁸² on widely used social media platforms, such as Twitter,⁸³ Instagram,⁸⁴ and Facebook.⁸⁵ Bette Midler, for example, emphasized the poor reality of music streaming services, as she tweeted, "@Spotify and @Pandora have made it impossible for songwriters to earn a living: three months streaming on Pandora, 4,175,149 plays = \$114.11."⁸⁶ Another prime example of artists receiving dismally low royalties, even when a song may be licensed appropriately, is exemplified by the songwriter Aloe Blacc's recent report, where he stated:

Avicii's release "Wake Me Up!" that I co-wrote and sing, for example, was the most streamed song in Spotify history and the

78. While Deezer currently has over 40 million tracks of music and 6 million users globally, Spotify has 70 million free users and 30 million paid subscribers, Apple Music has 15 million subscribers, and Tidal has 4.2 million. See Shelby Carpenter, *Deezer Music Streaming Service from France, Launches in US for First Time*, FORBES (July 19, 2016), <http://www.forbes.com/sites/shelbycarpenter/2016/07/19/streaming-service-deezer-enters-us-challenges-spotify-pandora/#193d2dc228b9>. Pandora reported it had 79.4 million monthly active listeners in the first quarter of this year. *Id.*

79. *See id.*

80. Many artists, including Taylor Swift and Adele, who are worried, and rightfully so, of not receiving adequate payment for their musical compositions on digital sites, have abstained from joining major digital music providers like Spotify and Deezer. See Paul Resnikoff, *Why Prince Hated Spotify, YouTube, SoundCloud, Apple, Music, Deezer, and Rdio*, DIGITAL MUSIC NEWS (Apr. 21, 2016), <http://www.digitalmusicnews.com/2016/04/21/why-prince-hated-spotify/>.

81. *See* U.S. COPYRIGHT OFF. *supra* note 12, at 75.

82. *See id.*

83. TWITTER, <https://twitter.com> (last visited Jan. 16, 2017).

84. INSTAGRAM, <https://www.instagram.com> (last visited Jan. 16, 2017).

85. FACEBOOK, *supra* note 41.

86. *See* @BetteMidler, TWITTER (Apr. 4, 2014, 5:47 PM), <https://twitter.com/bettemidler/status/452200886970769408?lang=en>.

13th most played song on Pandora since its release in 2013, with more than 168 million streams in the US. And yet, that yielded only \$12,359 in Pandora domestic royalties—which were then split among three songwriters and our publishers. In return for co-writing a major hit song, I've earned less than \$4,000 domestically from the largest digital music service.⁸⁷

Music streaming providers' response to the angered artists⁸⁸ has been that while they pay royalties to performers for the public performance of sound recordings, terrestrial radio⁸⁹ does not, so these royalties must be considered.⁹⁰ In fact, radio airplay is

87. Aloe Blacc, *Streaming Services Need to Pay Songwriters Fairly*, WIRED (Nov. 5, 2014), <http://www.wired.com/2014/11/aloe-blacc-pay-songwriters>.

88. For their part, the digital music services deny that they are the cause of the decline in songwriter income. See Andy Gensler, *Bette Midler Disparages Pandora, Spotify Over Artist Compensation*, BILLBOARD (Apr. 6, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6039697/bette-midler-disparages-pandora-spotify-over-artist>. Pandora, for instance, challenged the numbers cited by Midler and Blacc by publicizing the total amounts paid for all rights to perform the songs, including sound recording rights, stating that they paid \$6,400 USD in royalties in Midler's case and over \$250,000 USD for the plays of "Wake Me Up!". *Id.*; Alison Kosik, *The Puzzling and 'Antiquated' World of Music Royalties*, CNN MONEY (Nov. 17, 2014), <http://money.cnn.com/2014/11/17/media/aloe-blacc-music-royalties>; see also U.S. COPYRIGHT OFF. *supra* note 12, at 76.

89. Terrestrial radio has a limited broadcast market. See *Key Differences Between Terrestrial and Internet Radio*, TALKTAINMENT RADIO, <http://talktainmentradio.com/wordpress/key-differences-between-terrestrial-and-internet-radio/> (last visited Sept. 19, 2017). The waves of terrestrial radio emanate to a reserved terrestrial area and can only reach the population within the transmission area. *Id.* This is much smaller in scope to internet radio, which would reach a global population. *Id.*

90. The United States is one of the few industrialized countries that does not have broadcast performance rights for sound recordings. See *Public Performance Right for Sound Recordings*, FUTURE OF MUSIC (Nov. 5, 2013), <https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings>. As FUTURE OF MUSIC asserts:

This means that foreign broadcasters pay royalties to songwriters/composers and performers. But since there is no reciprocal right in the U.S., foreign performance rights societies cannot distribute these royalties to American performers. This leaves tens of millions of dollars of royalties on the table annually rather than in the pockets of American artists.

Id. New media platforms that broadcast digital performances—webcasters, satellite radio, cable subscriber, channels—obtain licenses from ASCAP, BMI, and SESAC, which compensate the songwriters and publishers of the music

considered a public performance, in which only songwriters may generate performance royalties.⁹¹ So, terrestrial broadcasters (AM or FM stations) only pay the songwriters, as opposed to performers or sound recording copyright owners.⁹² It is not fair, however, for music streamers to use terrestrial broadcasters as an example because streaming services often have a global reach with some type of fee.

II. THE U.S. CLASS ACTION SYSTEM

This Part will examine the U.S. class action system under Rule 23 of the Federal Rules of Civil Procedure (FRCP), specifically detailing the types of cases that can be brought, who can represent the class, and what damages are available to the class members. This Part will also discuss the legal and financial advantages and disadvantages of these components, which will be further elaborated on in Part III of this Note.

Rule 23 of the FRCP governs class action proceedings in the United States.⁹³ The FRCP govern civil procedure for civil lawsuits in the federal system, and federal courts must apply state substantive law where state law is in question.⁹⁴ The federal courts almost always apply the FRCP, however, because although U.S. states may determine their own rules, which apply in state courts, most U.S. states have adopted rules based on the FRCP.⁹⁵ Important aspects of the U.S. class action system outlined in Rule 23 of the FRCP are that: (1) members can “opt-out,” (2) anyone may act as a class representative so long as they are competent, (3) each party bears its own legal costs, and (4) punitive damages are permitted.⁹⁶ In the United States, class actions can be filed on numerous grounds. For example, the quintessential types of class action are lawsuits brought by a class of plaintiffs affected by environmental issues (i.e., preventing pollution

they play. *Id.* Terrestrial radio, however, does not do so and, as FUTURE OF MUSIC asserts, “terrestrial radio is the only medium that broadcasts music but does not compensate artists or record labels for the performance.” *Id.*

91. Ken Consor, *What You Didn't Know About Radio Royalties*, SONGTRUST (Aug. 6, 2014), <http://blog.songtrust.com/publishing-tips-2/what-you-didnt-know-about-radio-royalties/>.

92. *Id.*

93. See FED. R. CIV. P. 23.

94. *Id.*

95. *Id.*

96. See *Frequently Asked Questions About Class Actions*, CALI, <http://www.classactionlitigation.com/faq.html> (last visited Sept. 19, 2017).

or contamination of their property), financial issues (i.e., predatory lending or financial securities fraud or misconduct), and civil rights issues, such as racial segregation in the 1950s or sexual discrimination.⁹⁷ Artists who are adversely affected by digital music streamers may use this tool in the United States, as their claim could qualify as a financial issue in which such artists have fallen victim to misconduct (for digital streamers' failure to obtain proper licenses).

In the United States, members of a class action lawsuit do not "join" the litigation.⁹⁸ Instead, they decide whether or not to "opt-out."⁹⁹ Once a claim has been filed and a court certifies that there are too many class members to be named in the litigation, a notice will be issued to each member of the class, giving each member the opportunity to decide whether they want to participate in the litigation.¹⁰⁰ Unless a potential class member specifically opts out, they will automatically be included in the litigation and its consequences.¹⁰¹ If, however, they chose to opt-out, they cannot benefit from any award or settlement achieved by the litigation.¹⁰² This is in contrast to an "opt-in" system, where each member has to take affirmative action to "opt-in" to the litigation.¹⁰³ It could be argued that "opt-in" systems are best, as only those who are proactive will benefit.¹⁰⁴ "Opt-out" regimes, however, are also beneficial, as they provide equal protection to each affected class member by informing them of the allegations

97. *Common Types of Class Action Lawsuits*, LAWINFO, <http://resources.law-info.com/class-action/common-types-of-class-action-lawsuits.html> (last visited Oct. 18, 2017).

98. *See* CALI, *supra* note 96.

99. *See id.*

100. *See id.* Along with notice regarding the class action lawsuit received in the mail, there will be instructions about how to opt-out of the lawsuit. *See How To Opt Out Of A Class Action Lawsuit*, WIKIHOW, <https://www.wiki-how.com/Opt-Out-of-a-Class-Action-Lawsuit> (last visited Oct. 18, 2017). If, for some reason, opt-out paperwork is not included, anyone could find such paperwork online, as a class action lawsuit usually has a website with all necessary paperwork available. *Id.* One should consult a lawyer before opting out, however, because such an action would mean that they would not be able to participate in any award granted by the court. *Id.*

101. *See* Linda Visser, *What Does it Mean to "Opt-Out" of a Class Action?*, SISKINDS LLP (June 19, 2013), <http://www.siskinds.com/what-does-it-mean-to-opt-out-of-a-class-action/>.

102. *Id.*

103. *Id.*

104. *Id.*

made by the suit, while also informing potential class members of their right to “opt-out.”¹⁰⁵

There is also an “adequacy-of-representation” requirement as to who can serve as a class representative.¹⁰⁶ In order to serve as a class representative, an individual must share interests of the class members that are so interrelated that the remaining class members will be fairly and adequately protected in their absence.¹⁰⁷ In order to “fairly and adequately protect” the class, the class representative must “represent the class, protect the interests of the class, understand the litigation, keep class counsel informed, cooperate and attend events when required, vigorously prosecute the litigation, provide notice to the class, and hire lawyers experienced in class action litigation.”¹⁰⁸ The benefit of this requirement is that class representatives will better protect the interests of the class if they are similarly situated. It may be argued, however, that a class representative may choose individual gain to the detriment of the class, regardless of their similar loss. Although a class representative may choose individual gain, this concern is often laid to rest when the class representative chooses the most experienced counsel possible, to the court’s satisfaction.¹⁰⁹

The U.S. system provides monetary advantages to class action members as well, as it is free to join a class action.¹¹⁰ U.S. attorneys are usually awarded a 25–35 percent fee out of the total class recovery (i.e., the total monetary award).¹¹¹ This means that attorneys pay all of the fees up-front and class members only bear a relatively small hit to their overall recovery if they

105. See *Opting Out of a Class Action*, <https://www.classaction.org/learn/class-action-opt-out> (last visited Sept. 19, 2017).

106. See Anna Prakash, *Class-Representative Adequacy: Preparing for and Responding to Attacks on Plaintiffs*, AM. BAR ASSOC. (June 3, 2014), <https://apps.americanbar.org/litigation/committees/classactions/articles/spring2014-0513-class-representative-adequacy-preparing-responding-attacks-on-plaintiff.html>.

107. See FED. R. CIV. P. 23(a)(4).

108. See *What is a Class Representative/Lead Plaintiff?*, STARR AUSTEN & MILLER, LLP (Sept. 19, 2017), <http://www.starrausten.com/resources/what-is-a-class-representative-lead-plaintiff/> [hereinafter AUSTEN & MILLER, LLP].

109. See *id.*

110. See *Does Joining A Class Action Lawsuit Cost Me Anything?*, CLASS ACTION, <https://www.classaction.com/faqs/joining-class-action-lawsuit-cost-anything/> (last visited Sept. 19, 2017) [hereinafter CLASS ACTION].

111. See *id.*

win their case.¹¹² If the United States had a loser-pays regime, many litigants would be deterred from bringing suit, as class action lawsuits usually involve multiple consumers with nominal damages, who would not want to risk paying expensive legal fees for their comparatively smaller loss. A loser-pays regime, however, would help deter frivolous litigation.

Finally, in the United States, class action litigants have a plethora of damages that they can seek, including statutory and punitive damages, as well as non-monetary injunctive and declaratory relief.¹¹³ Punitive damages serve the important social benefit of imposing harsh penalties on producers of products who may have large cash flows.¹¹⁴ If such producers are not hit with a fine big enough to catch their attention or hurt their wallet, they may continue taking advantage of the small consumer.

III. GROUP LITIGATION IN THE UNITED KINGDOM POST ENACTMENT OF THE CRA

In contrast to the U.S. class action system, the U.K. system, under the CRA, has proven to be far more restrictive. This Part will detail these restrictive aspects, specifically addressing who may act as a class representative, who must pay for the litigation, who determines the outcome, and what damages may be awarded.

The U.S.-style class action culture has emerged in the United Kingdom as a “collective actions,” where multiple claimants with similar claims seek a remedy against the same defendant(s).¹¹⁵ In 2015, collective actions were incorporated into the U.K.’s current system by the CRA, which “enables consumers and businesses to bring a private action for damages for losses suffered as a result of an infringement of EU or U.K. competition law on

112. *See id.*

113. *See Class/Collective Actions in France: Overview*, PRACTICAL LAW (Nov. 1, 2016), <http://us.practicallaw.com/1-618-0240#a353055> [hereinafter PRACTICAL LAW].

114. Robert Clifford, *Positive Benefit in Punitive Damages*, CHICAGO TRIBUNE (Apr. 17, 1993), http://articles.chicagotribune.com/1993-04-17/news/9304170165_1_punitive-damages-tort-reform-health-care.

115. The U.K.’s current rules for collective litigation, together with other procedural and substantive features available to litigants, create a system distinct from other civil code jurisdictions. *See Collective Actions: UK Guide*, *supra* note 18. As of late, however, the U.K.’s procedures have been under review. *Id.* At the EU level, initiatives are under way to reform the procedures available for collective consumer and competition claims. *Id.*

an ‘opt-out’ basis, i.e. on behalf of an entire class of claimants . . . without the need to identify every individual claimant.”¹¹⁶ The CRA is the principal source of law in the United Kingdom for bringing a claim in multi-party litigation (i.e., litigation involving multiple claimants) which is to be a tool for, but not limited to, competition law claims, personal injury claims, and pension disputes.¹¹⁷ The CRA provides for an opt-in system where a class approved by the United Kingdom Competition Appeal Tribunal (CAT) may bring a claim for potential compensation.¹¹⁸ The CRA maintains a “loser-pays” cost rule, where only a judge can determine an outcome limited to nominal damages only.¹¹⁹

Although the collective actions system sounds similar to the U.S. class action law, there have been crucial protective measures put into place which distinguish the U.K.’s collective actions system significantly from the U.S. class action law. Specifically, as a result of the CRA’s passage, the major differences between the two class action systems, as exemplified in Ashurst’s¹²⁰ *Quickguides*, are as follows: (1) opt-in versus opt-out, (2) who may act as a class representative, (3) who pays, (4) whether the case will be brought before a judge or a jury, and (5) what type of damages will be permitted as recovery—if recovery is permitted.¹²¹

In the United Kingdom, the opt-in system, as previously described, is not available to all class action litigants.¹²² With the passage of the CRA, citizens of the United Kingdom may be subject to litigation on either an “opt-in” or “opt-out” basis, at the

116. *Collective Actions: UK Guide, supra* note 18. The CRA came into force on October 1, 2015. *See id.*

117. Frances Murphy, Omar Shah & Roderick Farningham, *Class/collective Actions in the UK (England and Wales) Overview*, PRACTICAL LAW, [https://uk.practicallaw.thomsonreuters.com/6-618-0351?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/6-618-0351?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1) (last visited Oct. 18, 2017).

118. *See Collective Actions: UK Guide, supra* note 18.

119. *See id.*

120. *See id.*

121. *See id.*

122. *See* COMPETITION APPEAL TRIBUNAL, <http://www.catribunal.org.uk> (last visited Sept. 19, 2017); *Collective Actions: UK Guide, supra* note 18; *The Basics, OUT-LAW.COM*, <http://www.out-law.com/page-5811> (last visited Nov. 7, 2016) [hereinafter *OUT-LAW.COM*].

election of the CAT.¹²³ The problem, however, is that only certain categories of lawsuits will be permissible to proceed on an opt-out basis, with all collective actions lawsuits proceeding on an opt-in basis.¹²⁴ The CAT will not even consider whether collective actions can be brought on an “opt-out” basis unless the claim deals with a breach of competition law.¹²⁵ This means that while class actions can be filed on numerous grounds,¹²⁶ citizens of the United Kingdom have a limited scope in the type of “opt-out” class action claims they can bring. The CAT will include an assessment of “both the suitability of the proposed class representative and the suitability of the claims for inclusion in collective proceedings.”¹²⁷ Artists who have been cheated out of digital royalties do not fit into the ‘competition law’ category, and thus any collective actions litigation initiated to advocate for artists’ rights is forced to proceed on an opt-in basis, leaving many artists, who should be receiving a cut of a potential settlement, out of the proceedings altogether.¹²⁸

The CAT rules, which went into effect on the same day as the CRA, also specify who may serve as a class representative.¹²⁹ Rule 78 specifically states that the CAT will authorize the class representative:

Only if the Tribunal considers that it is just and reasonable (i.e., whether the applicant would fairly and adequately act in

123. The CAT, which is a specialist judicial body with cross-disciplinary expertise in law, economics, business, and accountancy, hears and decides cases. *See id.*

124. *See Collective Actions: UK Guide, supra* note 18.

125. *See* OUT-LAW.COM, *supra* note 122; *see also Collective Actions: UK Guide, supra* note 18. Chapters I and II of the Competition Act of 1998 and the Enterprise Act of 2002 regulate anti-competitive behavior which may affect trade within the United Kingdom. *See* OUT-LAW.COM, *supra* note 122; *see also Collective Actions: UK Guide, supra* note 18. Anti-competitive behavior whose effect may reach not just within the United Kingdom, but beyond to other states within the European Union, are prohibited by Articles 101 and 102 of the Treaty on the Functioning of the European Union. *See* OUT-LAW.COM, *supra* note 122; *see also Collective Actions: UK Guide, supra* note 18.

126. *See Are US Style Class Actions Really Coming to the United Kingdom?*, LEXOLOGY (Feb. 1, 2016), <http://www.lexology.com/library/detail.aspx?g=978bda29-210f-4c05-8155-8ab5f87a28e9> [hereinafter LEXOLOGY].

127. *See Collective Actions: UK Guide, supra* note 18.

128. *See* OUT-LAW.COM, *supra* note 122.

129. *See* The Competition Appeal Tribunal Rules 2015, 2015 No. 1648, (Eng.) http://www.catribunal.org.uk/files/The_Competition_Appeal_Tribunal_Rules_2015.pdf [hereinafter Appeal Tribunal Rules].

the interests of the class members, has a material interest, is most suitable to represent, would be able to pay defendant's recoverable costs if ordered to do so, and would be able to satisfy any undertaking as to damages required by the tribunal for the applicant to act as class representative in the collective proceedings.¹³⁰

The CAT provides various factors to decide whether to authorize the proposed representative, including whether that person:

- a) Would fairly and adequately act in the interests of the class members;
- b) Does not have, in relation to the common issues for the class members, a material interest that is in conflict with the interests of class members;
- c) If there is more than one applicant seeking approval to act as the class representative in respect of the same claims, would be the most suitable;
- d) Will be able to pay the defendant's recoverable costs if ordered to do so; and
- e) Where an interim injunction is sought, will be able to satisfy any undertaking as to damages required by the Tribunal.¹³¹

In addition to the above factors, potential conflicts of interests may prevent someone, such as a law firm or a third-party founder, from being deemed a suitable class representative.¹³² This means that although the possibility of approval has been left open, how the CAT will approach this question in practice remains unknown.

As for who bears the cost of litigation in collective actions lawsuits, the United Kingdom chose to retain the "loser-pays" costs rule.¹³³ The loser-pays costs rule means that those who bring unsuccessful cases will be liable for costs, although the represented individuals or businesses will not themselves be liable.¹³⁴ The United Kingdom seems very wary of introducing a full blown 'U.S.-style class action regime.'¹³⁵ Retaining the "loser-pays"

130. *See id.* at 45, r. 78(2).

131. *See id.*

132. *See id.*; *Collective Actions: UK Guide, supra* note 18.

133. *See Collective Actions: UK Guide, supra* note 18.

134. *See id.*

135. *See id.*

costs rule is an attempt to prevent an overflow of unmeritorious litigation.¹³⁶ The U.K.'s rationale is that if the unsuccessful party is to bear the cost of litigation, then only those litigants with truly meritorious claims will come forth, as they will be relatively certain of receiving some level of damages.¹³⁷ In the United States, the normal costs rule is that each party bears its own legal costs.¹³⁸

Not only is the "opt-in"/"opt-out" barrier likely to prevent recovery for similarly positioned artist plaintiffs, but the "loser-pays" rule will surely have deterrent effects on litigants, who will be financially incapable of bringing a claim on their own, for fear of being forced to foot the bill of the potentially exorbitant litigation costs. The potential cost of litigation¹³⁹ against major companies, like Spotify or Deezer, collecting millions of dollars of revenue for tens of millions of subscribers each year, could be exorbitant.¹⁴⁰ Because it is currently unclear how the CAT will approach the question of who may be seen as an adequate class representative, there is much debate about what will happen if the CAT chooses a restrictive route in their analysis.¹⁴¹ Various

136. Unmeritorious claims not only waste the parties' time, but they flood the court systems as well. See *Frivolous Lawsuits*, NFIB, (Sept. 16, 2015), <http://www.nfib.com/content/issues/legal/frivolous-lawsuits-326/>; see also *Collective Actions: UK Guide*, *supra* note 18. The United Kingdom is concerned with frivolous lawsuits, and rightfully so, as the cost of litigation can be staggering. See *Collective Actions: UK Guide*, *supra* note 18.

137. See *Collective Actions: UK Guide*, *supra* note 18.

138. See *id.*

139. Although the cost of litigation in the United States is by far the highest compared to the rest of the world, the Institute for Legal Reform found that liability costs in the United Kingdom, Germany, and Denmark have risen between 13 percent and 25 percent per year since 2008. See U.S. CHAMBER INST. FOR LEGAL REFORM, INTERNATIONAL COMPARISONS OF LITIGATION COSTS: CANADA, EUROPE, JAPAN, AND THE UNITED STATES, at iii (June 2013), http://www.instituteforlegalreform.com/uploads/sites/1/ILR_NERA_Study_International_Liability_Costs-update.pdf

[hereinafter U.S. CHAMBER INST.]. In fact, "features of the legal environment in each country are highly correlated with litigation costs, implying that changes to the liability system may have a substantial effect on costs. A common law (rather than civil law) tradition and a high number of lawyers per capita are strong indicators of higher litigation costs." *Id.* at iv. The United Kingdom maintains one of the most expensive legal systems in the world. *Id.* at v.

140. See Carbenter, *supra* note 78; see also U.S. CHAMBER INST., *supra* note 139.

141. See *Collective Actions: UK Guide*, *supra* note 18.

legal practitioners in the United Kingdom have voiced their concerns as to possible approaches the CAT may take in deciding future cases, as it will directly impact whether individuals feel confident to bring a claim, knowing that they may have to foot the bill for expensive litigation proceedings should they take on the responsibility of leading a class. It is alarming that law firms, third party funders, and special purpose vehicles may not be suitable representatives.¹⁴² If such parties could potentially be unsuitable, who would ever be expected, or willing, to take on a significant risk of fronting the costs of litigation when their individual damages are exponentially smaller?¹⁴³

In addition to uncertainties about how the U.K.'s "opt-out" vs. "opt-in" distinction will apply, the potential for the CAT to apply a very narrow approach to who may serve as a class representative for collective actions, and the potentially deterring "loser-pays" cost rule, there is the added restriction that the outcome of collective actions are not to be determined by a non-partisan jury, but only by a judge.¹⁴⁴ Limiting collective actions to a scenario where only a judge can determine an outcome could be disastrous for litigants on both sides of a lawsuit. When a case is limited to one individual's decision, there is the chance that that individual may maintain a very narrow viewpoint and may not be adept at deciding the issue entirely on their own, and vice versa.¹⁴⁵ It is vital for litigants to be ensured the fairest procedures possible. A jury not only serves as a check on the judge's decision, but brings fresh insight from various backgrounds,

142. *See id.*

143. Although the CRA provides the option for CAT to order that all or part of any unclaimed damages be paid to the class representative in opt-out proceedings, with respect to costs and expenses incurred by the representative in the proceedings, it is unclear how this discretion will be exercised in practice. *See id.* As Ashurst's article asserts, "[t]he success of the new regime may therefore depend on the appetite of litigation funders to support class representatives, the mechanisms employed to mitigate the financial risk they face and the scope for claimant representatives to recover a return when bringing such actions." *See Major Overhaul of UK Competition Litigation Regime Enters into Force Today*, ASHURST (Oct. 1, 2015), <https://www.ashurst.com/en/news-and-insights/legal-updates/major-overhaul-of-uk-competition-litigation-regime-enters-into-force-today/> [hereinafter *UK Competition Litigation*].

144. *See Collective Actions: UK Guide*, *supra* note 18.

145. *See* Thomas Dalton, *What are the Advantages and Disadvantages of Having a Jury vs. Having a Judge Decide a Court Case?*, QUORA (Feb. 18, 2014), <https://www.quora.com/What-are-the-advantages-and-disadvantages-of-having-a-jury-vs-having-a-judge-decide-a-court-case.>

which may help to explain and justify a defendant or plaintiff's perspective.¹⁴⁶

Finally, as outlined in the CRA, the U.K.'s collective actions system does not award punitive damages.¹⁴⁷ Wronged musicians do not fall into the category of plaintiffs who may be awarded punitive damages, as they are not commercial consumers. Therefore, they will be limited in their recovery based on the United Kingdom's unwillingness to award punitive damages in all cases, and instead be left with only nominal monetary damages.¹⁴⁸

Although the CRA was only passed within the last two years, it is safe to say that its restrictions on collective action lawsuits will make artists less likely to challenge digital streaming companies who have either failed to acquire licenses or pay proper royalties. The opt-in restriction, the CAT prerequisites for who may act as a class representative, the "loser-pays" winner's costs approach, the non-jury requirement, and the failure to award punitive damages will certainly further the United Kingdom's objective of deterring frivolous or speculative claims. It will also prove damaging for artists, who may be left without the necessary tools to vindicate their rights.¹⁴⁹

IV. GROUP LITIGATION IN FRANCE UNDER THE LOI HAMON

France's class action system, under the Loi Hamon, is even more restrictive than the United Kingdom's system. This Part will detail this restrictiveness, specifically the opt-in system, who may act as a class representative, what court has jurisdiction, and the type of compensation available to litigants.

Just one year before collective action law emerged in the United Kingdom, the Loi Hamon was enacted in France in March 2014, in relation to consumer and competition law matters.¹⁵⁰ Since the Loi Hamon's enactment on October 1, 2014,

146. *See id.*

147. *Collective Actions: UK Guide*, *supra* note 18.

148. *See Punitive Damages*, THOMSON REUTERS, <http://uk.practicallaw.com/7-107-7085> (last visited Jan. 16, 2017).

149. *See LEXOLOGY*, *supra* note 126.

150. Lesur, *supra* note 23.

only six¹⁵¹ class action lawsuits have been brought throughout France.¹⁵²

The following conditions must be satisfied in order to bring any class action under the Loi Hamon: (1) two or more consumers must be placed in a similar or identical situation; (2) the consumers must suffer individual financial losses resulting from a tangible damage; (3) the losses must arise from the same breach of legal or contractual obligation(s) by one or several professional(s), the claim must be in connection with the sale of goods or provision of services, or as a result of the same anti-competitive practices; and (4) only approved¹⁵³ national associations can bring class actions (i.e., Familles de France and Union Nationale des Associations Familiales [Unaf]).¹⁵⁴ The fact that only an approved national association may bring a class action is the most limiting prong, as there is no approved association that includes the rights of wronged musicians.¹⁵⁵ Furthermore, France's class action laws under the Loi Hamon are further restricted by the

151. To date, there is no available case law pertaining to the Loi Hamon. See Alexandre Biard, *Class Action Developments in France*, STANFORD (Aug. 2016), http://globalclassactions.stanford.edu/sites/default/files/documents/FRANCE_0.pdf. The five class actions that are currently pending are: (1) *Association UFC Que Choisir v. Foncia* (October 2014), (2) *Association CLCV v. Axia and AGIPI* (October 2014), (3) *Association Confédération Nationale du Logement (CNL) v. Immobilière 3F* (November 2014), (4) *Association Confédération Syndicale des Familles v. Paris Habitat-OPH*, (5) *Association Familles Rurales v. SFR* (May 2015). *Id.* In addition to these five pending lawsuits, it is alleged that Association Familles Rurales has filed a class action against a camping company, "Manoir de Ker An Poul." *Id.*

152. As Lionel Lesur asserts:

Class actions are clearly not as popular as had been hoped, at least not yet. Indeed, of the (only) six procedures brought before the French Courts, four were brought around one month after the law came into effect, and all relate to consumer matters. One action led to a €2 million settlement intended to compensate the damages suffered by 100,000 consumers who had been required to pay excessive charges for elevator tele-surveillance.

See Lesur, *supra* note 23.

153. To be approved as a national association, the group must comply with the conditions set out by Article R. 411-1 of the French Consumer Code. See Lesur, *supra* note 23. Only fifteen associations are currently authorized to bring class actions. *Id.*

154. See LATHAM & WATKINS, *supra* note 19; Lesur, *supra* note 23.

155. See Lesur, *supra* note 23.

“opt-in” versus “opt-out” distinction, who may act as a class representative, and how compensation is awarded.

France’s restrictive class action laws are based only on an “opt-in” system versus an “opt-out” system.¹⁵⁶ As previously discussed, an “opt-in” system will only allow named litigants¹⁵⁷ to benefit from any potential settlement or award.¹⁵⁸ This means that potential litigants who should recover, but are either unaware of the pending action or do not opt-in, will not receive any part of the settlement or award, should there be any.¹⁵⁹

Who may bring a French class action is also significantly limited in scope.¹⁶⁰ The French law entitles only accredited consumer associations to represent consumers and bring a class action before the courts.¹⁶¹ For an association to qualify, it must be effective and publicly active in pursuing consumer interests, have existed at least one year, and have a threshold of individually paid-up members.¹⁶² The problem with this criteria, however, is that there are currently only fifteen clearly identified consumer associations who may bring a class action due to this restrictiveness, with no currently approved association encompassing musicians on that list.¹⁶³

Moreover, in France, only high courts of first instance have jurisdiction over class action procedures.¹⁶⁴ If the defendant is located in France, a suit is limited to the court that is territorially competent and closest to where the defendant is established.¹⁶⁵ If the defendant, however, is located outside of France, the Paris High Court of First Instance, known as the Tribunal de grande instance de Paris, is the only competent court.¹⁶⁶ This means

156. See *The French Class Action and the English Group Litigation Order: Two Collective Actions Restoring Equality of Arms Between Victims*, LE PETIT JURISTE (Sept. 22, 2015), <http://www.lepetitjuriste.fr/droit-compare/the-french-class-action-and-the-english-group-litigation-order-two-collective-actions-restoring-equality-of-arms-between-victims/>.

157. See Visser, *supra* note 101.

158. This will allow for more similarly situated individuals/plaintiffs to benefit from a ruling in their favor. See *UK Competition Litigation*, *supra* note 143.

159. See LATHAM & WATKINS, *supra* note 19.

160. See *Collective Actions: UK Guide*, *supra* note 18.

161. See LE PETIT JURISTE, *supra* note 156.

162. Lesur, *supra* note 23.

163. See Biard, *supra* note 151, at 2.

164. See *id.*

165. See *id.*

166. See *id.*

that artists from France are limited to the jurisdiction of the Paris High Court of First Instance should they want to bring a claim against digital music streaming companies headquartered outside of France.¹⁶⁷ Limiting jurisdictions in which a litigant can bring a claim could pose as a disservice to artists who want to choose a different venue, for whatever reason.

Finally, courts in France do not award punitive damages.¹⁶⁸ French courts have declared that punitive damages may be awarded, so long as the punitive damage award is not disproportionate to the damage caused to the plaintiffs by the breach of contract.¹⁶⁹ The entire purpose of a class action lawsuit is to compensate the pecuniary loss of victims, which is why damages are limited to the loss suffered.¹⁷⁰ This means that musicians who have been wronged are limited in their recovery. The inability to win punitive damages also means that digital music streaming companies, who are taking advantage of utilizing musician's compositions without acquiring proper licenses, will not be deterred by harsh damages.¹⁷¹

In short, the restrictiveness of the opt-in system, who may act as a class representative, what court has jurisdiction, and the type of compensation available under the Loi Hamon is so limiting that artists have little hope in their battle against digital music streaming companies. As such, immediate action must be taken to adequately protect artists' rights against exploitation.

V. SOLUTION

While the United States provides flexibility for litigants to file class action lawsuits, the United Kingdom and France are overly restrictive, which harms the interests of artists and devalues their work. This Part proposes a solution to this restrictiveness, calling for legal reform in the United Kingdom and France where

167. *See id.* at 2.

168. *See* Ron Soffer et al., *The Recognition of Punitive Damages by French Courts: The End of the "Punitive Damage War"*, SOFFER, www.nysba.org/Sections/International/Seasonal...24/Panel_24_Soffer_paper.html. Punitive damages are often larger than nominal damages. *See* PRACTICAL LAW, *supra* note 113.

169. Soffer, *supra* note 168; PRACTICAL LAW, *supra* note 113.

170. Because class actions are geared towards compensating the pecuniary loss of victims, moral damages cannot be compensated in a class action. *See* PRACTICAL LAW, *supra* note 113.

171. *See id.*

they respectively alter their laws to mirror the U.S. class action model.

A. Need for a Solution

The digital delivery of music is currently at an all-time high. Artists, however, are financially suffering as a result of it, as digital providers, such as Spotify and Rhapsody, digitally stream their music without negotiating proper licensing fees. Class action litigation is the most powerful tool artists have to assure that their rights are protected. The U.S. class action system, which allows for (1) members to “opt-out,” (2) anyone to act as a class representative so long as they are competent, (3) each party to bear its own legal costs, and (4) punitive damages,¹⁷² provides artists proper access to the court system and effective legal remedies. The same, however, cannot be said for artists in the United Kingdom and France, where (1) members must “opt-in” to litigation, (2) class representatives are more limited, (3) the losing party pays litigation costs, and (4) punitive damages are not permitted. In order to safeguard the financial situation of all artists, the United Kingdom and France must adopt a class action regime that is the same as the U.S. system. If the United Kingdom and France were to do so, it would insure artists a more optimal tool to vindicate their rights.

B. Implementation

As class action lawsuits have proven to be successful in the United States, countries, such as the United Kingdom and France, who have budding class action laws, should modify their current class action legal models, as the U.S. class action model seems to be the most effective means for exploited artists to advocate for their rights and receive appropriate digital royalty revenue against powerful international music streaming providers.¹⁷³ The United Kingdom and France could reform their current legislation to provide for (1) an “opt-out” regime, (2) anyone to act as a class representative so long as they are competent

172. See CALI, *supra* note 96.

173. As of 2016, iHeartRadio has 85 million registered users, Apple Music has 54.5 million subscribers, and 8tracks (an internet radio) has 17 million monthly active users. See Craig Smith, *How Many Users Do Spotify, Pandora, iHeart Radio, Apple Music and Other Top Music Streaming have?*, DMR (July 24, 2016), <http://expandedramblings.com/index.php/how-many-people-use-spotify-pandora-music-streaming-services/>.

(i.e., allow for exploited individuals who do not fit into a “consumer” category to bring suit against digital music providers who are selling their music databases without properly obtaining licenses for each individual track or album), (3) each party to bear its own legal costs, and (4) allow for punitive damages.

Although the United Kingdom and France have not adopted the U.S. class action system in its entirety,¹⁷⁴ the United Kingdom and France have already opened the door towards reflecting the U.S. class action model in their own legal systems. Further, since the United Kingdom and France have adopted such legislation within the last four years,¹⁷⁵ they are clearly open to reform. Now that a few years have passed since the U.K.’s and France’s respective laws have been adopted, it is as great a time as ever for them to reconsider how such laws should be structured, whether that be by passing an amendment or adopting new legislation entirely. It is imperative for them to further these efforts to fully adopt the U.S. class action model.

CONCLUSION

Despite the small group¹⁷⁶ of musicians speaking out and posting on social media against music streamers who pay out dismal revenues or fail to acquire proper licenses, many artists stand to suffer in the future if this continues. Thus, class action litigation is an important tool, if not the most important tool, for artists to advocate for themselves and other similarly situated artists to make sure that they are receiving the monies they are due. Such major digital streaming services take advantage of less famous artists, who may not have enough social presence to be a dominating force against the major music streaming providers with millions of subscribers.¹⁷⁷ Class action litigation may serve as a

174. Although beyond the scope of this Note, recent scholars have commented on the flaws of class action litigation and how it has evolved over time in the United States. See Linda S. Mullenix, *Ending Class Actions as We Know Them: Rethinking the American Class Action*, EMORY UNIVERSITY SCHOOL OF LAW, <http://law.emory.edu/elj/content/volume-64/issue-2/thrower-symposium-articles/rethinking-american-class-action.html> (last visited Jan. 16, 2017).

175. *Collective Actions: UK Guide*, *supra* note 18; LATHAM & WATKINS, *supra* note 19.

176. See Paul Resnikoff, *16 Artists That Are Now Speaking Out Against Streaming...*, DIGITAL MUSIC NEWS (Dec. 2, 2013), <http://www.digitalmusicnews.com/2013/12/02/artistspiracy/>.

177. Artists who rank among the top most followed people on Facebook, Instagram, and Twitter arguably have more leverage against digital music

tool for artists who do not have as high of an income as musicians on global top forty lists, so that they may assert their rights without fear of the potential costs of pursuing litigation against powerful music streaming providers. Therefore, it is imperative for the United Kingdom and France to provide for a system in which their respective class action laws can incorporate (1) an “opt-out” regime, (2) anyone to act as a class representative so long as they are competent, (3) each party to bear its own legal costs, and (4) allow for punitive damages.

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streamers, making them able to fight for their monies more adequately. See Jordan Bishop, *These Are the 10 Most Followed People on Instagram*, FORBES (Dec. 4, 2016), <http://www.forbes.com/sites/bishopjordan/2016/12/04/most-followed-instagram/#50167fad3084>. It is the less famous artists, with a smaller following and lower grossing salaries, who are taking the real brunt of the digital music streaming evasion of acquiring adequate licenses. *Id.* Artists, such as Selena Gomez and Taylor Swift, who have around 100 million followers on Instagram, have the most leverage against digital music streaming services. *Id.*

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