



Justitiedepartementet

Registration no: Ju2022/02173

Sent via email to: ju.remissvar@regeringskansliet.se

Copy to: ju.L3@regeringskansliet.se

Consultation response from Spotify AB re. the report “An inalienable right to compensation?” SOU 2022:23

1. Summary

Spotify AB (“**Spotify**”) welcomes the report “An inalienable right to compensation”, Swedish Government Official Report, SOU 2022:23 (hereinafter the “**Report**”, authored by the Committee) and supports the Committee’s conclusions.

Spotify agrees with the Committee’s recommendations to (i) not introduce a non-waivable remuneration right and (ii) limit any right for a rightsholder to claim additional compensation to contractual parties only. These conclusions are in line with Spotify’s opinion shared with the Committee in November 2021 (attached as **Appendix A**).

Spotify limits its comments to the matters set out above and will not address other proposals discussed in the Report.

2. Comments on the Report

Spotify agrees with the Committee's conclusion to not recommend an introduction of a non-waivable right to remuneration and will elaborate below on relevant considerations discussed in the Report.

a) *There is no case for making streaming service providers liable to pay additional remuneration*

Spotify notes that the concern that authors and performers should receive inequitable remuneration for on-demand use of their works would not be addressed by the inquired non-waivable remuneration right. The Report neither makes a case that streaming service providers are contributing to low remuneration levels, nor concludes that they are being particularly suitable, whether financially or administratively, to assume liability to pay additional remuneration directly to authors and performers.

First, the Committee recognizes that the levels of remuneration received by authors and performers are affected by the fact that supply exceeds demand on the creative/cultural market, creating a "winner-take-all dynamic".¹ Thus, increasing remuneration levels would arguably require revenues to be redistributed from more successful works to those that are less so, and/or the latter to be subsidized.² In light of this, the inquired remuneration right would in effect serve as a quasi-tax levied on streaming services to redress a perceived or actual market failure to equitably compensate some authors and performers. Implementing such a solution would require a larger and more in-depth inquiry that comprehensively addresses the market dynamics and structures, including the terms on which revenues should be redistributed and which supply chain organizations are most suitable to either administratively redistribute revenues or *de facto* bankroll subsidies. Spotify posits that service providers should not be involved in this arrangement. Spotify pays roughly 2/3 of its music revenues from premium subscriptions and advertisements to rightsholders³ and the remaining 1/3 must cover Spotify's costs for e.g. R&D, platform support, maintenance, cloud providers, payment processors, ad serving, customer service, sales, marketing, and content creation (much of which replace analogue distribution costs and marketing costs that traditionally have been borne by record labels).

Second, the Committee appears to conclude that the remuneration paid for on-demand access is on a par with that paid for other exploitations – including direct transfers (e.g. linear radio), and public performances (e.g. at clubs and gyms)⁴ – and that the advent of streaming services has not put authors and performers in a less favorable position

¹ The Report, p. 120-121.

² The Committee concludes that (i) although most authors and performers receive relatively low remuneration levels from on-demand streaming, a minority receives significant remuneration levels, and (ii) low remuneration levels are not necessarily unfair – see e.g. the Report, pages 107-108.

³ See further details on <https://loudandclear.byspotify.com/>, c.f. the Report, p. 85.

⁴ The Report, p. 109.

than before.⁵ Spotify agrees with this conclusion and reiterates that streaming services use their revenues to pay for distribution and marketing of copyrighted material, which exploiters traditionally have not. In light of this, the inquired remuneration right against streaming services appears to be misdirected if the aim is to address a general concern that authors/performers are not equitably compensated for the exploitation of their works on the market.

Third, and finally, insofar as the Committee identifies remuneration imbalances on the market, they appear to arise at an earlier stage in the supply chain. The Committee concludes that authors and performers often have to deal with commercial and economic considerations that they lack sufficient experience to assess and could have inferior bargaining power to original acquirers (i.e. not streaming service providers), which may lead them to assign their works on unfavorable terms and conditions.⁶ Spotify notes that this situation cannot – and should not – be resolved by granting authors and performers the right to claim additional remuneration from third-party streaming service providers. Contractual regulation directed at the root cause is more likely to achieve the desired outcome (see (c) below).

b) It is doubtful whether a non-waivable right to remuneration would have the intended effect

The Committee questions whether a non-waivable right to remuneration would serve the purpose of improving the ability for creators and performers to receive equitable remuneration. The Report *inter alia* recognizes that a non-waivable right of remuneration would lead to on-demand suppliers having to take into account the risk of becoming liable for additional remuneration when concluding license agreements, e.g. with publishers and labels. The publishers and labels might, in turn, lower the compensation paid to authors and performers which could ultimately result in their total effective remuneration remaining at current levels, or in some cases even lower.⁷ The Report highlights that on-demand service providers' willingness to pay for copyright ultimately depends on the willingness of consumers to pay for the services. Spotify notes that this will not be affected by a non-waivable right to remuneration.

Contrary to the desired effect, the Committee recognizes that the introduction of a non-waivable right to remuneration could hamper the willingness of organizations to invest in copyright material on the relevant market.⁸ It would further be difficult to foresee and determine the financial consequences of making copyrighted material available on

⁵ The Report, p. 110.

⁶ The Report, p. 117.

⁷ C.f. the Report p. 109, 157. The Committee notes that the increase of compensation for one group may have a detrimental effect on the remuneration to other contributors. Further, certain groups such as studio musicians, who often agree to an upfront payment which guarantees a risk-free fixed compensation, might end up receiving a reduced remuneration if the compensation would be premised on subsequent revenue from when the works is made available on-demand.

⁸ The Report, p. 159.

demand and, in turn, the value of such copyrighted material. Spotify shares this concern and notes that current levels of remuneration paid to rightsholders by streaming services are based on the transfer of all associated rights. Legislation conditioning or limiting this arrangement would effectively devalue the exclusive rights transferable by the authors and performers and lead to renegotiations of existing licensing agreements. This would mainly serve to weaken the bargaining power of authors and performers vis-à-vis publishers and labels. Ultimately, the potential benefits of a non-waivable remuneration right would likely be illusory.

Spotify would like to highlight that the introduction of a non-waivable remuneration right would rather result in (i) increased transaction costs, (ii) disruption to the market by imposing an obligation on streaming service providers to pay remuneration to third parties with whom they have not entered into a contract, and (iii) a risk of “double payments” while existing licensing agreements remain in place. These costs and risks have been described more comprehensively in Spotify’s previous response, Appendix A, and could also further weaken the negotiation position of authors and performers when assigning their rights or negotiating future exploitation of the works.

c) Any measure to redress potential imbalances at the transfer of authors’ and performers’ exclusive rights should be addressed in a contractual context

The Committee concludes that it is difficult to reconcile a non-waivable right to remuneration with fundamental property rights principles, and questions whether it is reasonable to require subsequent acquirers to compensate authors/performers for unfair terms agreed with the original acquirer, regardless of whether the subsequent acquirer has paid equitable compensation for the use. It seems unreasonable and foreign to Swedish civil law principles to impose obligations on third parties relating to circumstances over which they have no control. In the same vein, the Committee concludes that it is difficult to justify removing authors’ and performers’ ability to freely exercise and transfer their exclusive right to supply the works and performances on demand.⁹

Spotify agrees with the above and is of the view that a non-waivable remuneration right would likely be incompatible with fundamental property law principles, both in relation to the limitation on authors’ and performers’ right to dispose of their exclusive rights, the impact on the value of existing acquired rights (e.g. by labels) as well as in terms of imposing obligations on third parties such as streaming service providers.

In terms of the current remuneration chain, Spotify does not pay or have contractual relationships with authors and performers directly. As a streaming service provider, Spotify has licensing agreements in place with rightsholders (e.g. record labels, publishers, and collective management organizations), which in turn compensate authors and performers. Authors and performers are free to transfer their exclusive rights

⁹ The Report, p. 160-161.

to third parties such as record labels, but can also elect to self-release and distribute the recordings on Spotify instead, using aggregators/distributors such as CD Baby, Distrokid or Amuse, should they find the profit-sharing arrangement offered by record labels to be unfair.¹⁰ Spotify has no control over how its payouts are apportioned by rightsholders and paid out to the contributors to the works, and is not privy to the license terms agreed when the exclusive rights are originally transferred from the authors and performers.

If the aim of the inquired right is to ensure that authors and performers are given fair remuneration when they transfer or license their exclusive rights, Spotify contends that it is more appropriate to target potential imbalances at the point where they arise and tie any measures to the relevant contracts where the exclusive rights from the author/performer are initially transferred – thereby improving the bargaining position of authors/performers in relation to their contracting counterparties. A regulation which targets potential unfairness in the contract regulating the transfer of the authors' and performers' rights also has the benefit of applying to other types of exploitation of copyrighted works, such as radio or public performances, instead of being limited to on-demand streaming¹¹. There are several additional benefits. First, it does not require interference with freedom of contract – a principle that is emphasized by the DSM Directive (EU) 2019/790 in its provisions on appropriate and proportionate remuneration.¹² Second, it acknowledges that authors and performers obtain different levels of investment and help in return for license rights (e.g. a risk-free upfront payment, marketing, logistical and touring support, creative refinement, and recording infrastructure), which naturally leads to different terms and compensation models. Third, it does not devalue the exclusive rights of authors and performers to the detriment of their negotiation positions when they wish to assign their rights. In summary, it redresses imbalances where they arise, namely between the contractual parties at the point at which the rights are originally transferred, rather than imposing obligations on third parties such as streaming providers.

As noted in the Report, such provisions are already in the works and will be implemented by way of the Government's bill 2021/22:278, which *inter alia* will confer a right on authors and performers to claim additional reasonable compensation in cases where the original remuneration is unreasonably low having regard to subsequent developments. Besides being the most appropriate solution, it also appears irreconcilable, or at least overlapping, with the inquired non-waivable right of remuneration. Spotify notes that implementing both of these mechanisms would risk overcompensating authors and performers and impede the functioning of the market.

¹⁰ This is a fairly common arrangement, see pages 72-73 of the Report.

¹¹ C.f. Section 2(a), second argument, above.

¹² Article 18.2 states that “[i]n the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests”.

3. Conclusion

In conclusion, Spotify agrees with the Committee's conclusions that (i) a non-waivable remuneration right in the form discussed in the Report should not be introduced, and (ii) any right to claim additional compensation should be limited to claims against contractual parties and not be extended to third parties, such as streaming services.

We note that the Report discusses a number of different forms of a collectively managed non-waivable remuneration right, without identifying any form which would serve its purpose and improve the position of authors and performers. The Report therefore leaves many issues unresolved. For example, it is not clear (i) what form such additional non-waivable remuneration right would take, (ii) the basis for calculation of additional remuneration, including whether contractually agreed compensation (throughout the supply chain) should be taken into account, and (iii) how an additional remuneration right would be implemented in practice and apply to the various parties in the industry, including the impact on existing licensing agreements. Furthermore, the Report does not offer any conclusions on how such a right would interplay with measures to implement the DSM Directive (such as the upcoming rights to claim additional reasonable compensation), broader civil law regimes, or the right to property. For the sake of good order, Spotify notes that these issues, among others, would have to be considered in more detail if this proposal – contrary to the Committee's recommendation – were to move forward.

Spotify AB's response to Justice Department's memorandum "Utkast till avsnitt om framväxten av streamingtjänster", hereinafter referred to as the "Draft"

Sent via email to the following addresses: dag.mattsson@dom.se;
ricardo.valenzuela@regeringskansliet.se; ju.registrator@regeringskansliet.se

Attn:

Dag Mattsson, Special Investigator

Ricardo Valenzuela, Secretary

On behalf of Spotify AB ("Spotify"), we wish to address a selection of the questions raised in the Draft.

Stockholm and Brussels, November 19, 2021

Best regards,

Olivia Regnier, Director, European Policy Affairs

Regan Smith, Head of Public Policy, Government Affairs

Jens Gyllenberg, Senior Legal Counsel

Benjamin Helldén-Hegelund, Senior Legal Counsel

Adam Weissbach, Senior Legal Counsel (*contact person for this matter, email address: aweissbach@spotify.com*)

Introduction

Spotify AB ("Spotify") appreciates this opportunity to assist the committee in reviewing the issues raised in committee directive Dir. 2021:31 (the "Committee Directive") and the Draft on the Growth of Streaming Services (Sw. *Utkast till avsnitt om framväxten av streamingtjänster*) (the "Draft"). Spotify wishes to contribute to the discussion on the current market conditions and whether it is appropriate to provide authors and performers with a non-waivable (mandatory) right to additional remuneration for making their works available on-demand.

At this stage, we mainly want to highlight a number of issues and questions to be considered in this review. In addition to the information about the current market conditions in the Draft and as set out below, Spotify notes that certain information is lacking, including: (i) what form the inquired additional remuneration right would take; (ii) how it relates to both EU harmonization within the area of copyright law and fundamental rights and freedoms, such as the right to own property and the freedom to conduct business; (iii) to whom such legislation would relate, e.g. streaming services providers or contractors such as record labels; and (iv) how it would be implemented in practice. However, these issues are of course only necessary to consider if a comprehensive market review establishes that there in fact exist circumstances on the national market that require intervention.

Streaming services have benefited the music industry as a whole

The advent of streaming services has greatly benefited the music industry, first in Sweden and subsequently worldwide. Following its peak in 2001, the global recorded music market – then ravaged by piracy and falling CD sales – declined by 40% between 2002 and 2015 until the trend was reversed and began climbing back to previous record levels thanks mainly to streaming services offered by e.g. Spotify.¹ Based on a "broad consensus across the sector", a U.K. House of Commons report credits streaming services for this remarkable return to revenue growth and reduction in piracy, exemplified by Sweden, where piracy was reduced by 25% only three years after Spotify's launch in 2008.² Furthermore, as noted in the Draft, the national market returned to growth already in 2010, only two years after Spotify's launch, and more than doubled before the end of the decade.³ In addition to reducing piracy, music streaming services have also reduced the need for private copying levies, as users are moving away from enjoying their music under the private use exception to directly licensed models in the streaming services. This benefits authors and performers and ensures that compensation is paid through fair and transparent payout models, rather than flat-rate levies.

Furthermore, music streaming services have democratized music demand. The costs associated with digital distribution are negligible in comparison to pushing physical records to market, enabling consumers access to – and authors and performers remuneration for – tracks which otherwise would not have been commercially viable.⁴ This trend is supercharged by editorial and algorithmic recommendations offered by streaming services. Only 16,000 artists made up 90% of the streams on Spotify in 2015, a number which has almost quadrupled since then, increasing to 57,000 by 2020, an achievement previously impossible due to finite limitations of how much a radio station can play and

¹ See e.g. the House of Commons Paper from the UK, published on 15 July 2021: Digital, Culture, Media and Sport Committee 2nd Report. Economics of music streaming Volume 2. Oral and written evidence (HC 50 incorporating HC 868 2019-21), para 17. Available for download here:

<https://committees.parliament.uk/publications/6739/documents/72525/default/> [2021-09-21].

² HC 50 incorporating HC 868 2019-21, para 17.

³ Draft on the Growth of Streaming Services, p. 4.

⁴ Cf. HC 50 incorporating HC 868 2019-21, para 125.

a physical record store can supply.⁵ Meanwhile, the number of artists whose catalogs generated recording and publishing royalties exceeding USD 10,000 also increased 80%, from 7,300 in 2017 to 13,400 in 2020.⁶ The broadening of demand means that more artists than before not only receive remuneration for recorded music but also are able to build fanbases and thereby generate revenues via other formats such as concerts, livestreams and merchandise sales.

Spotify recognizes that the pandemic has hit creators hard and deprived them of valuable live revenues, as highlighted in the statistics presented in the Draft regarding the traditional allocation between live and recorded revenues.⁷ While the challenges of the pandemic for creators are not to be minimized, it is notable that the negative effects have been partly offset by an increase of 18.5% in streaming revenues, growing the global recorded music market by a total of 7.4% during 2020.⁸ The temporary decline in concert revenues should not affect legislation which will apply long after the ongoing pandemic abates.

Current remuneration chain

The rightsholders to whom Spotify makes payouts most frequently are rightsholders such as publishers, record labels and collective management organizations (“CMOs”), which in turn compensate the authors and performers. This is because authors and performers are free to transfer their exclusive rights to third parties, which they in many cases elect to do. However, performers can instead choose to self-release their recordings, distribute them on Spotify using aggregators/distributors such as CD Baby, Distrokid, Amuse, or Tunecore, and do their own marketing through e.g. social media, should they find the profit-sharing with the record labels offered to be unfair.⁹

Spotify's music revenues from premium subscriptions and advertisements, respectively, go into two royalty pools, of which roughly 2/3 (or some 70%) are paid *pro rata* to rightsholders according to their stream share. Exact percentages are subject to confidentiality undertakings provided by Spotify to its contracting parties and vary from case to case. According to the U.K. House of Commons report,¹⁰ master rightsholders (i.e. record labels) in general receive approximately 78% of the revenues paid by streaming service providers to rightsholders, whereas composition rightsholders (i.e. CMOs and publishers) are paid approximately 22%.¹¹

As noted in the Draft,¹² free (ad-supported) tiers typically generate less revenue than the premium tier. It should, however, be taken into consideration that the free tier serves as a channel for users who are converted into paying customers over time and thus generate additional revenue in the long term. In Spotify's experience, removing the free tier altogether has not led to similar conversion effects, driving users to other free alternatives or even piracy instead, which pay rightsholders less or

⁵ See Supplementary written evidence submitted by Spotify AB on 19 March 2021 to the Digital, Culture, Media and Sport Committee of the UK House of Commons, para 21, available here: <https://committees.parliament.uk/writtenevidence/24796/pdf/> [2021-09-30].

⁶ See <https://loudandclear.byspotify.com/#divContainerOverlay>.

⁷ Draft on the Growth of Streaming Services, p. 5 note 10.

⁸ IFPI, Global Music Report (2021), a summary of which is available here: <https://www.ifpi.org/ifpi-issues-annual-global-music-report-2021/> [2021-09-21].

⁹ Self-releasing artists represented 4.1% of the global recorded music market in 2019, see HC 50 incorporating HC 868 2019-21, para 105. With the current annual growth-rates of 30%, experts predict that self-releasing artists will account for 25% of the total global industry by 2026, see here: <https://www.rollingstone.com/pro/features/raine-group-independent-artists-2-billion-in-2020-967138/>. Further reading is available at <https://artists.spotify.com/help/article/getting-music-on-spotify> [2021-09-21]. Also, see HC 50 incorporating HC 868 2019-21, para 105.

¹⁰ HC 50 incorporating HC 868 2019-21 [2021-09-30], para 26.

¹¹ HC 50 incorporating HC 868 2019-21, para 44.

¹² Draft on the Growth of Streaming Services, p. 9.

nothing at all. Thus, the free tier maximizes revenue for both Spotify and rightsholders. Spotify also notes that the reimbursement numbers provided by STIM and presented in the Draft¹³ are not necessarily suggestive of the amounts paid to rightsholders in general, including performers, as STIM only collects remuneration for authors.

As of 2020, Spotify had paid over €21 billion in royalties to rightsholders, with €5 billion being paid in that year alone. Further information about the distribution of royalties can be found on Spotify's website Loud & Clear (<https://loudandclear.byspotify.com/>) created by Spotify to provide authors and performers with increased financial transparency. In this context it should be emphasized that Spotify only retains a cut of around 1/3, or some 30%, of the revenues. As a distributor, paying out some 70% of the revenues represents a substantial transfer of revenue to rightsholders, and significantly more than traditional means for distributing recorded music.¹⁴ Distribution has largely gone digital, and the costs for it has consequentially been reallocated from rightsholders to, and are borne by, streaming service providers.¹⁵ The providers also play a much more important role in the promotion and discovery of music than the traditional distribution. Such costs need to be covered by Spotify's cut of around 1/3, including costs for human capital, R&D, platform support and maintenance, cloud providers, payment processors, ad serving, customer service, and marketing - all of which are aimed at expanding revenue opportunities and generation for us, rightsholders, and authors.

In this context, it should also be noted that the streaming service industry is struggling and has yet to turn sustainable profit.¹⁶ Spotify's cumulative annual losses in the decade up to 2020 amount to €2.62 billion, with a net loss of €581 million in 2020 alone; and, in contrast to some of its competitors, Spotify cannot offset streaming losses in other business verticals.¹⁷ Changes that would overly disadvantage pure play providers would not only reduce competition and consumer choice, but would ultimately also lead to reduced overall revenue for creators.

At the same time, the report notes that certain rightsholders have seen their profits soar due to streaming. Between 2015 and 2019, major labels' turnover increased by 21%, their operating profit by 64% and their margin on turnover from 8.7% to 11.8%.¹⁸ In light of market concentration and the power of major labels, there is little evidence that recording-side rightsholders will reduce their fees if an additional new remuneration right is added. To the contrary, experiences in Spain (where there is similar legislation as subject to review pursuant to the Committee Directive) suggest the opposite. Thus, procuring an additional right for authors and performers to obtain additional remuneration out of streaming services providers – who historically have been unprofitable – does not seem like a sustainable approach.

It is questionable whether a non-waivable (mandatory) right would have the intended effect

It appears uncertain whether a non-waivable (mandatory) additional right of remuneration for on-demand availability, paid by streaming services providers and presumably administered by the CMOs that have advocated for it,¹⁹ would actually result in increased payments to authors and performers. Current levels of remuneration paid to rightsholders by streaming services providers are based on the transfer of all associated rights. Legislation amending that and conferring on authors and performers

¹³ Draft on the Growth of Streaming Services, p. 9.

¹⁴ For example, in 2013 BBC reported that approximately 40% of revenues from CD sales go to manufacturers, distributors, retailers and administrators: <https://www.bbc.com/news/magazine-23840744> [2021-09-21].

¹⁵ HC 50 incorporating HC 868 2019-21, paras 125-6 & 131.

¹⁶ HC 50 incorporating HC 868 2019-21, para 145.

¹⁷ HC 50 incorporating HC 868 2019-21, para 145.

¹⁸ HC 50 incorporating HC 868 2019-21, paras 42 and 110.

¹⁹ See Committee Directive, p. 4.

a non-waivable (mandatory) remuneration right that cannot be transferred or licensed would necessitate the renegotiation of existing agreements. Such an arrangement could even risk weakening the bargaining power of authors and performers vis-à-vis publishers and labels, as the value of their exclusive rights is reduced.²⁰ Ultimately, it would seem that the main differences would be (a) increased transaction costs (by adding a new party to collect a portion of the total remuneration); (b) the disruption of a functioning market (by imposing an obligation on streaming services providers to pay remuneration to parties with whom they have not concluded agreements); and (c) the creation of a risk of “double payments” while existing licensing agreements remain in place. The potential value for authors and performers is unclear and something Spotify encourages the committee to probe further.

A CMO administered non-waivable (mandatory) right of remuneration could risk impairing the existing infrastructure for paying reimbursement

It seems that the inquired non-waivable right of remuneration would require the creation and maintenance of comprehensive registers of all performers appearing on a track and the share of revenues to which they are individually entitled. In this regard, it should be noted that it is not clear from either the Committee Directive or the Draft whether potential legislation would only apply to (a) Swedish performers (would that then be defined on the basis of the performer’s citizenship and would that then need to be tracked for each performer?); (b) all performers globally in cases where sound recordings on which they perform are streamed in Sweden (if so, how would the Swedish CMO go about distributing such funds to these performers?); or a differently defined group.

Moreover, it would appear necessary to put in place a structure for ongoing reporting to the relevant CMO, including information allowing the CMO to distribute funds to performers (presumably on the basis of the popularity of the performer’s sound recordings). Spotify does not receive metadata identifying the relevant performers for every track. The CMO would also have to administer payments and distribute reports to these individuals, in essence taking over a responsibility that is currently borne by record labels. This is likely to significantly increase transaction and administration costs since information about performers' identities is not always known to the public and the CMOs. Thus, allowing a third party to administer payments seems impractical. Furthermore, given current payment routines and the quantities of data required, it seems likely that rerouting payments through CMOs would lead to longer payment distribution times than is currently the case.

Any non-waivable (mandatory) right of remuneration should not be asserted against streaming services providers

According to the Draft, the main impediment to authors and performers receiving fair and appropriate remuneration is that new or lesser-known authors and performers sometime agree to assign license rights in exchange for lump sums and relinquish rights to subsequently generated revenue.²¹ This also aligns with Directive (EU) 2019/790 on Copyright in the Digital Single Market (the “CDSM”).²² The U.K. House of Commons report and an European Commission impact assessment reach similar conclusions, but offer more detailed reflections on existing revenue-sharing between license transferors and transferees.²³ In Spotify’s view, these concerns are decoupled from streaming service providers, who do not have any contractual relationships with the individuals that the Committee Directive seeks to

²⁰ European Commission, Impact Assessment on the modernisation of EU copyright rules Part 1 – 3, SWD (2016) 301, Part 2, p. 30.

²¹ Draft on the Growth of Streaming Services, p. 6.

²² Recital 73, which deals with fair and proportional remuneration, e.g. states that “[a] lump sum payment can also constitute proportionate remuneration but it should not be the rule”.

²³ HC 50 incorporating HC 868 2019-21, Chapter 3; European Commission, Impact Assessment on the modernisation of EU copyright rules Part 1 – 3, SWD (2016) 301, Part 2, pp. 29-31.

protect. While, as noted above, streaming services typically transfer a great proportion of revenues over to rights holders, such service providers are not privy to, and have no control over, the license terms that are agreed (or not agreed, in case of equitable remuneration) earlier in the supply chain. Requiring them to pay remuneration to CMOs or directly to authors and performers rather than redressing the imbalances where they actually arise, seems wrong-headed. In addition, requiring streaming services to pay a remuneration directly to performers or their collecting societies, while they are already paying recording companies royalties that include performers' fees, would risk creating an unfair double payment for streaming services. It appears the UK House of Commons report shares these views, recommending that future legislation rebalancing remuneration levels applies to the rightsholders rather than the streaming services.²⁴ At a minimum, any legislation attaching a new remuneration right to streaming services should also provide services with the clear ability to offset the costs of this additional right, without the need to negotiate this offset with the rightsholders.

Spotify also notes that it recently was proposed in Ds 2021:30 Copyright on the Internal Digital Market (Sw. *Upphovsrätten på den digitala inre marknaden*) ("Ds 2021:30") that, in accordance with Article 20 of the CDSM, authors and performers may be entitled to additional remuneration if the agreed levels in the contracts entered into are disproportionate to rightsholders' revenues (e.g. from streaming services providers).²⁵ It would seem contradictory to combine such provision with an additional remuneration obligation asserted against streaming service providers directly and the effects of this would therefore have to be thoroughly analyzed.

Any imbalances on the national market can be redressed by existing principles of contract law

Spotify posits that the identified imbalances, insofar as they exist, are most suitably dealt with by existing principles of contract law. Previous governmental inquiries have largely confirmed that Section 36 of the Contracts Act (1915:218) provides protection to authors and performers, and allows courts to adjust inequitable agreements, including by raising compensation levels and amending reimbursement models.²⁶ The same should hold true today. Indeed, it could be considered that authors and performers have been placed in a more beneficial negotiating position due to music streaming services and social networks. Never before have production equipment, marketing, fanservice, crowdsourcing and platforms been so accessible – and creators' dependency on third parties lower.

This approach is also suggested by the CDSM. Its preamble states that "*a remuneration adjustment mechanism should be provided for as regards cases where the remuneration originally agreed under a license or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer*". Section 36 is just that: a remuneration adjustment mechanism able to redress disproportionately low compensation levels. As already stated above, Spotify also notes that it was recently proposed in Ds 2021:30 that such specific rights to adjust contracts are introduced under Swedish copyright law to ensure that authors and performers receive fair and appropriate remuneration for their works.

There are several benefits to limiting any solution to identified imbalances, if any, to just the contract between, on the one hand, authors and performers and, on the other hand, publishers and record companies licensing such rights further to streaming service providers. First, it does not necessitate far-reaching interference with freedom of contract – a principle that is emphasized by the CDSM in its

²⁴ HC 50 incorporating HC 868 2019-21, 'Conclusions and recommendations', para 6.

²⁵ Ds 2021:30, p. 195-201.

²⁶ See Government Bill 1975/76:81 pp. 77 and 114; cf. Government Bill 1996:97:129, pp. 15-16; Swedish Government Official Reports (SOU) SOU 2010:24, p. 115.

provisions on appropriate and proportionate remuneration.²⁷ Secondly, the solution acknowledges that authors and performers obtain different levels of investment and help in return for license rights (e.g. an upfront payment, marketing, logistical and touring support, creative refinement, and recording infrastructure), which naturally leads to different terms and compensation models. Indeed, parties should only be restricted from entering into these sorts of arrangements if there is a concern over the extent of competition in the market due to license-acquirers abusing a dominant position.²⁸ Thirdly, it does not necessarily devalue authors' and performers' exclusive rights to the detriment of their bargaining positions. Fourthly, and finally, it redresses imbalances where they arise – i.e. the point at which rights are transferred – rather than focusing on extraneous parties such as streaming service providers.

²⁷ Article 18, Paragraph 2.

²⁸ Cf. European Commission, Remuneration of authors and performers for the use of their works and the fixations of their performances (2015), p. 154. Available for download here: <https://op.europa.eu/en/publication-detail/-/publication/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1> [2021-09-30].