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How Spotify Killed the Radio Star: An Analysis on How the Songwriter Equity Act Could Aid the Current Online Music Distribution Market in Failing Artists

Caitlin Kowalke

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HOW SPOTIFY KILLED THE RADIO STAR: AN ANALYSIS
ON HOW THE SONGWRITER EQUITY ACT COULD AID THE
CURRENT ONLINE MUSIC DISTRIBUTION MARKET IN
FAILING ARTISTS

CAITLIN KOWALKE†

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I. INTRODUCTION

As technology continually evolves, unique challenges and opportunities are constantly presented to the music industry.* In today's music market, the Internet is creating a new crossroad for music distributors as well as consumers. The more readily available music becomes, the more rapidly consumers will expect it; and as is often the case with emerging technologies, copyright law has not been able to keep pace with such drastic changes.¹

Additionally, it appears that the economic value placed on music has decreased in our society. While legitimate music markets still exist, it is clear that consumers are just not willing to pay what they used to for physical albums.² Today's music industry is so centered on earning profits through album sales that it is missing out on the steadily growing number of people whose valuations for music have fundamentally shifted. While sharing music has always been a significant social practice³—with the

* For a shockingly accurate overview of the prominent issues in today's music market and how they should be confronted, see *The State of the Music Industry*, OATMEAL, http://theoatmeal.com/comics/music_industry (last visited Jan. 24, 2015).

¹ See *infra* Part III.A.

² According to a study by *Billboard Magazine*, overall album sales dropped 8.4% in 2013, decreasing by 26.6 million units over the course of the year. The report also indicates that physical CD sales “declined 14.5% to 165.4 million units, down from 193.4 million in the prior year.” Physical album sales still comprise 57.2% of music sales in the U.S.; however, digital sales account for 40.6% of album revenue. Ed Christman, *Digital Music Sales Decrease for First Time in 2013*, BILLBOARDBIZ (Jan. 3, 2014), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5855162/digital-music-sales-decrease-for-first-time-in-2013>.

³ When discussing music piracy, many consumers automatically jump to consideration of online file sharing and downloading. However, according to the Recording Industry Association of America, “[r]egardless of the format at issue, the same basic principle applies: music sound recordings may not be copied or distributed without the permission of the owner.” This includes not only Internet copying, but also burning and distributing physical CDs. *The Law*, RIAA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_la_w (last visited Nov. 11, 2014). For a more comprehensive discussion of how CD burning contributed to loss in revenue in the music industry before widespread

increase of illegal downloading sites, and the growing ease of sharing music with friends⁴ through digital media connections—the importance of creating a marketplace that is mutually beneficial to publishers and consumers is increasingly important.⁵ In short, the current music market is in dire need of an *effective* response to online music piracy.

While the negative effect of online music piracy cannot be overstated, fair compensation issues do not cease with societal habits of illegal downloading. When evaluating today's online music market, it is clear that the business model that top-distribution services are utilizing is also failing artists.⁶ In February 2014, members of Congress and advocates of increasing artist compensation joined forces to create the Songwriter Equity Act of 2014 (SEA). Proposed changes would alter both sections 114(i) and 115 of the Copyright Act, which proponents of the bill believe prevent songwriters from receiving royalty rates that reflect a fair

online file-sharing, see Gwendolyn Mariano, *Music Industry Sounds Off on CD Burning*, CNET NEWS (June 11, 2002), http://news.cnet.com/Music-industry-sounds-off-on-CD-burning/2100-1023_3-935120.html. Additionally, for a brief overview of unauthorized copying of music pre-Internet piracy, see Danwill David Schwender, *Reducing Unauthorized Digital Downloading of Music by Obtaining Voluntary Compliance with Copyright Law Through the Removal of Corporate Power in the Recording Industry*, 34 T. JEFFERSON L. REV. 225, 235-38 (2012).

⁴ Not only has online music piracy become a more accessible option for consumers, industry experts also suggest that today's society is failing to recognize music as intellectual property. Danwill David Schwender provides a helpful example in stating, "a person who purchases music on a compact disc, listens to it, and then gives the album to a friend can no longer listen to that compact disc until it is returned or repurchased. But a person sharing a digital music file over a peer-to-peer network does not sacrifice the original digital music file." Schwender, *supra* note 3, at 244.

⁵ Successful songwriter Rivers Rutherford stated that "[t]he irony of the digital age is it's getting harder and harder to make a living as a songwriter, even though our music is being heard by more people in more places than ever before." Andrew Watt, *Songwriter Equity Act*, GIBSONS NEWS (May 30, 2014), <http://www.gibsonssolicitors.com.au/news/songwriter-equity-act/>.

⁶ See *infra* Part VI.C.i.a.

market value for the use of their intellectual property.⁷ There is very little industry debate over the necessity of section 114(i) reform, which currently limits federal rate courts from considering royalty rates as a relevant standard for regulating performance royalty rates for songwriters and composers.⁸ However, the proposed increase to the mechanical royalty rate under section 115 is significantly more problematic and would likely cause a detrimental spike in costs across the music industry.⁹ While SEA is admirable in its mission to grant artists more financial return for their work, it would add considerably to music production costs—including transaction costs, which music pirates are already avoiding.

A more efficient approach to battle artist compensation issues in the music industry would be to convert to a model emulating television's recent switch to online streaming distribution.¹⁰ At a nominal fee, consumers may be more willing to compromise between paying for full, physical albums and illegally obtaining music.¹¹ While the current online music distribution market is on the right track, there is still significant work to be done in advancing the industry's business practices to provide adequate payment for the artist whose work is currently being accessed by millions of consumers at little or no cost.¹²

⁷ See *infra* Part IV.A.

⁸ See *infra* Part II.C.

⁹ See *infra* Part V.A.

¹⁰ See generally, Scott Hervey, *The Future of Online Music: Labels and Artists*, 15 *TRANSNAT'L LAW* 279, 284 (2002).

¹¹ A report by CNN suggests that younger generations are more apt to stream music rather than own it outright. According to Paul Resnikoff, publisher and editor-in-chief of Digital Music News, “[w]e are already seeing a trend on the aggregate with the lack of music ownership.” Jareen Imam, *Young Listeners Opting to Stream, Not Own Music*, CNN TECH (June 16, 2012), <http://www.cnn.com/2012/06/15/tech/web/music-streaming/>.

¹² See *infra* Part VI.C.i.b.

II. WHAT OWNERSHIP RIGHTS ARE SONGWRITERS GUARANTEED UNDER CURRENT COPYRIGHT LAW?

A. Mechanical Licenses

Copyright protection has been a matter of relentless controversy throughout modern history. Technological advancements have also greatly affected copyright protection and fair compensation for artists. Debates concerning copyright protection in an evolving musical industry first arose in 1908, when composers began to lobby Congress for a legislative change granting them exclusive rights to authorize the mechanical reproductions of their works in response to *White-Smith Music Publishing Co. v. Apollo Co.*¹³ At this time, the player piano was popular in the United States, and copyright owners had concerns about their right to control the reproduction of their works on piano rolls. The technology used to broadcast audio transmissions was also not widely available at the time the 1909 Copyright Act was debated. Congress did not extend copyright protection to sound recordings on records even though this medium was becoming more widespread because the average consumer did not have the ability to copy records.¹⁴

¹³ 209 U.S. 1, 18 (1908). In *White v. Apollo*, the Supreme Court ruled that manufacturers of music rolls for player pianos did not have to pay royalties to the composers. The Court stated that piano rolls were parts of the machine that reproduced the music, rather than copies of the plaintiffs' copyrighted sheet music. *Id.* The case likely caused Congress's intervention to create a compulsory license for the manufacture and distribution of such "mechanical" embodiments of musical works through an amendment to the Copyright Act of 1909. See EDWARD SAMUELS, *THE ILLUSTRATED STORY OF COPYRIGHT*, 33–38 (2000), available at <http://www.edwardsamuels.com/illustratedstory/isc2.htm>.

¹⁴ Even forty years later, it was more efficient to record a live performance onto vinyl than to copy a record. See Robert P. Merges, *One Hundred Years of Solitude: Intellectual Property Law, 1900–2000*, 88 CALIF. L. REV. 2187, 2195 (2000).

In addition to technological limitations to potential infringement, it is also possible that Congress did not consider sound recordings to be “writings” as provided for in the Constitution at the time of drafting. Congress was mainly concerned with providing protection for musical compositions on a written page, “securing to the composer an adequate return for all use made of his composition and at the same time prevent[ing] the formation of oppressive monopolies.”¹⁵ Accordingly, copyright protection did not extend to recordings of a composition onto a physical medium but only the written composition itself. Therefore, when the United States Supreme Court held that piano rolls were not “copies” of the composers’ works, but physical parts of the piano itself, Congress was forced to tailor the Copyright Act of 1909 to include a compulsory license for the manufacture and distribution of such “mechanical” embodiments of musical works. Under modern copyright law, section 115 of the 1976 Copyright Act¹⁶ grants songwriters the right, with certain restrictions,¹⁷ to

¹⁵ See, e.g., Proposed Conclusions of Law, Jointly Submitted by Sirius Satellite Radio, Inc. and XM Satellite Radio Inc. at 10, n.2, Adjustment of Rates & Terms For Preexisting Subscription Servs & Satellite Digital Audio Radio Servs, No. 2006-1 CRB DSTRA (October 1, 2007), available at <http://www.loc.gov/crb/proceedings/2006-1/pff-cl/10-1-07-sdars-joint-proposed-conclusions-of-law.pdf>.

¹⁶ Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2556 (1976).

¹⁷ 17 U.S.C. § 115(a)(1) (2012) (“A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.”).

make and distribute “mechanical reproductions”¹⁸ of their compositions.¹⁹

B. Compulsory Licenses

In addition to the creation of mechanical licenses, Section 115 of the Copyright Act established a compulsory license for the reproduction and distribution of nondramatic musical works.²⁰ Under the compulsory licensing system, a songwriter has the exclusive right to make the first mechanical reproduction of his or her work.²¹ Once the original copy of the composition has been published, however, the copyright owner is compelled to license his or her work to any party who meets the requirements of the license.²² This right is primarily associated with performers

¹⁸ Originally, reproductions were referred to as “mechanical” because the composition was being “mechanically” recorded on media such as a phonography record or piano roll. Today, “mechanical reproductions” are referred to as “phonorecords” and come in formats such as compact discs, cassette tapes, records, and even digital phonorecords such as MP3s. *See Section 115 Compulsory License: The Register of Copyrights Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary*, 108th Cong. (2004) (statement of Marybeth Peters, Register of Copyrights, Copyright Office), available at <http://www.copyright.gov/docs/regstat031104.html>.

¹⁹ 17 U.S.C. § 115 (2012).

²⁰ 17 U.S.C. § 115(a)(1) (2012) (“When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work.”).

²¹ *Id.*; see Mary Jane Frisby, *Rockin’ Down the Highway: Forging a Path for the Lawful Use of MP3 Digital Music Files*, 33 IND. L. REV. 317, 325 (1999).

²² Generally, these requirements include royalty payment to the copyright owner at a set statutory rate, adequate notice of a request to use the compulsory license, and adequate reporting of the provisions from the license. *See* 17 U.S.C. § 115(b)(1)—(c) (2012).

recording “covers” of songs composed and originally performed by another artist.²³

Songwriters have the exclusive right to publicly perform their own compositions.²⁴ “Traditionally, this right was primarily implicated by broadcast analog radio and television”²⁵ However, in today’s ever-evolving tech-savvy society, digital broadcasters, webcasting, satellite radio, and some online music services frequently implicate this right.²⁶ In order to better “administer these rights on behalf of songwriters,” entities known as Performance Rights Organizations (PROs) were established.²⁷ Currently there are three operating PROs: the American Society of Composers, Authors, and Publishers (ASCAP),²⁸ Broadcast Music,

²³ This right does not extend to artists who merely publish works similar in nature or content to the original copyrighted work. *See, e.g., Peters v. West*, 692 F.3d 629, 633 (7th Cir. 2012).

²⁴ As held in *Hulex Music v. Santy*, “[i]n order to show copyright infringement, a plaintiff must establish five elements: (1) the originality and authorship of the works involved, (2) compliance with the formalities of federal copyright law, (3) rightful proprietorship of the copyrights as issue, (4) that the copyrighted works were performed publicly for profit, and (5) a lack of authorization by the owner of the owner’s representative for the alleged infringer to publicly perform the works.” 698 F. Supp. 1024, 1030 (D.N.H. 1988).

For a more current example illustrating songwriters’ exclusive right to publicly perform their own compositions, see *Severe Records, LLC. v. Rich*, 658 F.3d 571 (6th Cir. 2011).

²⁵ Skyla Mitchell, *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L.J. 1239, 1252 (2007).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* In 2013, ASCAP collected over \$945 million in licensing fees and distributed \$851 million in royalties to its members. While ASCAP is a not-for-profit organization, it ran with a 12.1% operating expense ratio in 2013. THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, 2013 ANNUAL REPORT 17 (2013). As of July 2013, ASCAP membership included over 500,000 songwriters, composers, and music publishers. THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, <http://www.ascap.com/about> (last visited Nov. 14, 2014).

Inc. (BMI),²⁹ and the Society of European Stage Authors and Composers (SESAC).³⁰ Combined, ASCAP and BMI represent roughly 97% of all American compositions.³¹ All three PROs offer radio stations the use of a blanket license, which is a set fee that allows each station the use of any composition represented by the PRO.³² After deducting overhead costs, the profits made from each blanket license agreement are then distributed as royalty payments to all represented songwriters.³³

In 2004, The Copyright Royalty and Distribution Reform Act³⁴ created a board of Copyright Royalty Judges (CRJs, or sometimes

²⁹ In fiscal year 2013, BMI collected over \$944 million in licensing fees and distributed \$814 million in royalties. BROADCAST MUSIC INC., <http://www.bmi.com/press/entry/563077> (last visited Nov. 14, 2014). BMI tracks public performances for 8.5 million works, and collects and distributes licensing revenues for those performances as royalties to the over 650,000 composers, songwriters, and music publishers it represents. BROADCAST MUSIC INC., www.bmi.com/about (last visited Nov. 14, 2014).

³⁰ SESAC is the smallest of the three PROs in the United States, representing just over 9,000 authors and composers. However, SESAC is also the fastest-growing PRO in the United States. Unlike ASCAP and BMI (both not-for-profit organizations), SESAC retains some income as profit. Additionally, unlike the other prominent PROs, SESAC does not offer open membership. In order to benefit from the organization, members must be approved to join. SESAC, www.sesac.com/About (last visited Nov. 14, 2014).

³¹ Mitchell, *supra* note 25, at 1252 (citing Michael A. Einhorn, Intellectual Property and Antitrust: Music Performing Rights in Broadcasting, 24 COLUM. J.L. & ARTS, 349, 349 (2001), available at <http://www.musicdish.com/mag/index.php3?id=3823>).

³² *Id.* For a more detailed explanation of how blanket license agreements are executed, see Neil Conley, *The Future of Licensing Music Online: The Role of Collective Rights Organization and the Effect of Territoriality*, 25 J. MARSHALL J. COMPUTER & INFO L. 409, 422–23 (2008).

³³ Mitchell, *supra* note 25, at 1253. Generally, there is a 50/50 distribution of royalty payments between writers and publishers. Conley, *supra* note 32, at 423.

³⁴ Copyright Royalty and Distribution Reform Act of 2004, Pub. L. No. 108-419, 118 Stat. 2341 (enacted through 17 U.S.C. §114(f) (2006)), available at <http://copyright.gov/title17/92appc.pdf>. See also, Peter Dicola & Matthew Sag, *An Information- Gathering Approach to Copyright Policy*, 34 CARDOZO L.

referred to simply as the Copyright Royalty Board (CRB)) responsible for determining the rates and terms for statutory licenses.³⁵ Under the Copyright Royalty and Distribution Reform Act, “statutory rates” are set through either voluntary negotiations or trial-type hearings before the panel of three CRJs.³⁶ When calculating royalty rates, CRJs are expected to focus on four main objectives.³⁷ In order to maintain an equal balance between artists and distribution companies, royalty rates must be set to maximize availability of song uses; afford a fair return to the copyright owner and a fair income to the song user that reflects the roles of each; and minimize the disruptive impact on the structure of the industries involved.³⁸

While the CRB is aware of copyright holder and user needs when setting the statutory royalty rate, due to burdensome monthly payment provisions of Section 115 and competition among composers, the statutory terms are rarely followed.³⁹ The statutory mechanical rate merely represents a ceiling⁴⁰ for voluntary

REV. 173, 231–33 (2012) (discussing the Copyright Royalty and Distribution Reform Act of 2004 and its impact on the current music industry).

³⁵ Mitchell, *supra* note 25, at 1250.

³⁶ 17 U.S.C. § 115(c)(3)(C) (2010); 17 U.S.C. § 803 (2010).

³⁷ Mitchell, *supra* note 25, at 1250 n.69 (quoting 17 U.S.C. § 801(b)(1)); Recording Indus. Ass’n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 13 (1981).

³⁸ Recording Indus. Ass’n of Am. v. Copyright Royalty Tribunal, 662 F.2d 1, 13 (1981).

³⁹ See Howard B. Abrams, *Copyright’s First Compulsory License*, 26 SANTA CLARA COMPUTER & HIGH TECH. L.J. 215, 234–39 (2010).

⁴⁰ There are many advocates pushing for an alteration of the mechanical royalty rate system, in that a minimum rate would be established, replacing the current maximum rate (i.e., a floor rather than a ceiling). Mitchell, *supra* note 25, at 1243. While this is not an entirely deficient idea, it does have some flaws. Due to unevenness in bargaining power, artists do frequently agree upon a mechanical rate significantly lower than the statutory rate. Mitchell, *supra* note 25, at 1249; Abrams, *supra* note 39, at 235. Record companies have the power to force artists to settle at a low rate, and should a minimum royalty rate be the new industry standard, it is likely that most record companies would still be able to negotiate agreements at the lowest legal limit. *Id.* at 235.

negotiations between a music publisher, the composition's copyright holder, and the licensee.⁴¹

C. Section 114 Limitations

Not only are composers burdened by the potential for less-than-desirable royalty payments under Section 115, they are also subject to further rate limitations under section 114 of the Copyright Act. In cases where the royalty rate is reached through negotiation, interested parties discuss rates and terms with SoundExchange,⁴² and present those to the CJRs for adoption. If the judges adopt the agreement, it will be available for opt-in by any similarly situated parties. Any parties who have not negotiated agreements through SoundExchange may present their agreement to the CRJs, who will conduct a rate setting arbitration to establish

⁴¹ Most record contracts pay mechanical royalties at approximately three-fourths of the statutory rate. Hervey, *supra* note 10, at 289. Additionally, through controlled compositions clauses, artists are frequently limited in the number of tracks on which mechanical royalties will be paid (typically ten out of the average twelve songs on an album). *Id.* This will result in an additional loss in profits to the artist. For more information on controlled composition clauses in contractual agreements in the music industry, see Hervey, *supra* note 10, at 289.

⁴² Prior to 1995, (under 17 U.S.C. 114(g)(2)(A)), recording companies and their artists were not entitled to receive payment for the public performance of their sound recordings. However, as a result of The Digital Performance Right in Sound Recordings Act of 1995 and The Digital Millennium Copyright Act of 1998, a performance right for sound recordings was granted. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (1995); The Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (1998). Accordingly, under current copyright law it is now required that users of music pay the copyright owner of the sound recording for the public performance of that music. 17 U.S.C. § 114 (2012). This notably includes any online music transmissions of the recording. SoundExchange is a not-for-profit organization that collects royalties on behalf of sound recording copyright owners and features artists for non-interactive digital transmissions, including satellite and Internet radio. For more information about the licenses granted by SoundExchange and its royalty distribution process, see SOUNDEXCHANGE GENERAL FAQ, www.soundexchange.com/generalfaq (last visited Sep. 6, 2014).

royalty rates. However, under Section 114(i) of the Copyright Act,⁴³ federal rate courts are forbidden from considering sound recording royalty rates when determining what performance royalty rates should be for songwriters and composers. Not only does Section 114(i) prevent the rate courts from using mechanical royalties as a standard for performance royalties, this section also precludes PROs from presenting this as an argument in a court of law.⁴⁴ As a result, “digital streaming services often pay an unfair royalty rate to the artists that they feature.”⁴⁵

III. INDUSTRY LIMITATIONS ON MUSICAL COPYRIGHT TODAY

A. Emerging Technology as a Constant Threat to Copyright Protections

Rapidly emerging avenues of technology are readily rendering Section 115 more ineffective against copyright challenges. The decentralized nature of the Internet poses a significant difficulty in tracking and policing online copyright infringement, especially since most illegal music distribution takes place through peer-to-peer file sharing.⁴⁶ No central authority exists to help control the

⁴³ 17 U.S.C. § 114(i) (2012). (“License fees payable for the public performance of sound recordings under section 106(6) shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted by section 106(6).”).

⁴⁴ Kyle Duncan, *The Songwriter Equity Act*, AMPED BLOG (June 24, 2014), <http://theampedblog.com/2014/06/songwriter-equity-act/>.

⁴⁵ *Id.*

⁴⁶ Most piracy activity occurs through peer-to-peer (P2P) file sharing. P2P file sharing occurs when digital media is distributed using a software program that searches for other connected users wishing to trade electronic books, music, movies, or games. Since P2P file sharing transactions occur between individual users, it is difficult to track every illegal interaction, especially considering the widespread nature of the practice. John C. Boehm, *Copyright Reform for the*

relentlessly expanding scope of online behavior.⁴⁷ This, coupled with the seemingly virtual anonymity of the Internet, contributes to the constant infringement of copyrights, in particular music sharing.⁴⁸

Napster was the predominant pioneer among peer-to-peer file-sharing software.⁴⁹ However, on December 6, 1999, several record companies filed an action against Napster for vicarious and contributory copyright infringement.⁵⁰ After proving that individual users of Napster were the primary infringers of copyright law, the Ninth Circuit held that Napster users, by illegally uploading and downloading music files, were in violation of copyright holders' exclusive rights of reproduction and distribution.⁵¹ While the court did not entirely shut down Napster, the court did place several heavy constraints on the system.⁵² After

Digital Era: Protecting the Future of Recorded Music Through Compulsory Licensing and Proper Judicial Analysis, 10 TEX. REV. ENT. & SPORTS L. 169 at 179 (2009); see also Hisanari Harry Tanaka, *Post-Napster: Peer-to-Peer File Sharing Systems Current and Future Issues on Secondary Liability Under Copyright Laws in the United States and Japan*, 22 LOY. L.A. ENT. L. REV. 37 at 40–42 (2001).

⁴⁷ While deterrence against pirating music online through increased penalties to individuals has been visited, such drastic measures are unlikely to be adopted. Boehm, *supra* note 46, at 207–08.

⁴⁸ *Id.* at 198.

⁴⁹ Napster's MusicShare software, which was available as a free download from Napster's website, allowed users to search for and trade MP3 music files among anyone else using the software. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

⁵⁰ *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 898, 900 (N.D. Cal. 2000), *aff'd in part, rev'd in part sub*, 239 F.3d 1004 (9th Cir. 2001), *aff'd*, 284 F.3d 1091 (9th Cir. 2002).

⁵¹ *Napster*, 239 F.3d at 1014. The court found that Napster had contributory liability, because it knew, or had reason to know, of direct copyright infringement by its users. *Id.* at 1020–24. Additionally, the court held that the site had a right to supervise and direct financial interest in the activities of its users. *Id.*

⁵² *Id.* at 1028. Napster was required to remove any user file from the system's music index if Napster had reasonable knowledge the file contained a plaintiffs' copyrighted works. *A&M Records, Inc. v. Napster, Inc.*, No., 2001

three months of monitoring by the district court, it determined that Napster was not in satisfactory compliance with the requirements of the enforced injunction. After the unsuccessful trial period, the court ordered Napster to close.⁵³

While Napster is no longer in existence, there is a continued abundance of illegal online peer-to-peer file-sharing hosts. Lawsuits similar to the one brought against Napster are fairly common; however, with the ever-evolving nature of technology, it is difficult to keep up with every new avenue of illegal online distribution.⁵⁴ Due to the vast availability of unauthorized copies of digital phonorecords, consumers are now able to download nearly any sound recording they wish, usually free of charge. While there is a successful legitimate online market⁵⁵ for downloaded music, it fails to keep up with the never-ending number of sites providing free downloads.⁵⁶

WL 227083, at 1 (N.D. Cal. 2001) aff'd, 284 F.3d 1091 (9th Cir. 2002). In turn, the plaintiffs were ordered to give Napster notice of specific files they knew to be infringed upon. *Id.*

⁵³ A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001).

⁵⁴ For further examples of post-Napster litigation surrounding illegal online music distribution, see *MGM Studios, Incorporated v. Grokster, Limited*, 259 F. Supp. 2d 1029, 1031-33 (C.D. Cal. 2003) (holding that when a party distributes a device that can be used to infringe copyright, it is liable for the resulting acts of infringement by third parties) and *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003).

⁵⁵ iTunes, a media player, library, and mobile device application developed by Apple Inc., legally generated over \$12 billion in downloaded music profits in 2013 alone. Owen Thomas, *iTunes is a Bigger Business Now than Apple was in 2004*, BUS. INSIDER (JAN. 9, 2013, 10:33 PM), <http://www.businessinsider.com/itunes-sales-2013-1>; see also APPLE INFO, www.apple.com/about (last visited Nov. 11, 2014) (describing current company news and profit information).

⁵⁶ According to Billboard Biz (the online music business extension of Billboard Magazine), in 2013, digital track sales fell 5.7% from 1.34 billion units to 1.26 billion units. This was the first time in iTunes' thirteen-year history that the store finished the year with a decrease in digital music sales. Ed Christman, *Digital Music Sales Decrease for First Time in 2013*, BILLBOARD MAG. (Jan. 3, 2014, 9:21 AM EST), <http://www.billboard.com/biz/articles/news/digital-and-mobile/5855162/digital-music-sales-decrease-for-first-time-in-2013>.

For those seeking legitimate copyright usage of a particular work, frustration and uncertainty are often experienced due to complicated notice and reporting procedures, which frequently lead to prohibitive transactional costs and delays. In addition to a general lack of clarity regarding which activities require which licenses, Section 115 has hindered online music providers in their attempts to effectively combat piracy.⁵⁷ Since businesses that wish to take advantage of a compulsory license must engage in a costly search⁵⁸ for the song's copyright owner, Section 115 notice provisions are burdensome on potential licensees. Should a business fail to locate the correct copyright holder, it must file an intent-to-use claim with the Copyright Office for a twelve-dollar fee.⁵⁹ In accumulating initial search and Copyright Office administrative fees, use of a compulsory license can be

⁵⁷ See Mitchell, *supra* note 25, at 1257.

⁵⁸ 17 U.S.C. § 115(b)(1) (2006). In order to independently search for a copyright owner, a party must manually check the Copyright Office's records, a task that can only be performed by traveling to the Copyright Office in Washington D.C. Should the party wish to avoid the necessary trip to Washington, the Copyright Office will undertake the burden of the record search. However, while estimates vary, the expense of a search is typically \$200 per hour, with a two-hour minimum. While some parties, particularly large distribution corporations, are financially able to pay these exorbitant fees, not all copyright owners file ownership rights with the Copyright Office. Therefore, after the time and expense allotted for the search, the party may still be unclear as to whom royalty payments are owed. In considering these substantial costs, which are all incurred in pursuit of a nine-cent license, it is obvious why potential licensees would be deterred from seeking a license under section 115, let alone a massive collection of them needed to create appealing options for consumers. U.S. COPYRIGHT OFFICE, CIRCULAR 4: COPYRIGHT OFFICE FEES (2014) (discussing fees associated with Copyright Office), *available at* <http://copyright.gov/circs/circ04.pdf>.

⁵⁹ Compulsory License for Making and Distributing Phonorecords, Including Digital Phonorecord Deliveries, 69 Fed. Reg. 11,566 (March 11, 2004). A party may not take advantage of this option if she has not already executed the manual copyright search. While it may seem a twelve-dollar fee alone is not particularly significant, when multiplied by the thousands of songs that an online provider may wish to make available, it is clear how quickly the cost could become prohibitive.

exorbitantly expensive and time consuming. Additionally, Section 115's reporting requirements that require a licensee to submit monthly and audited annual statements of accounts to the copyright owner are extensive and complex.⁶⁰

B. Unequal Bargaining Positions Between Songwriters and Music Publishers

Not only are composers faced with the harsh reality of expanding online music piracy, they are also continually forced to confront severe disparity in publishing negotiations. While changes in technology have caused major changes in music distribution, many artists still seek a traditional relationship with a publishing company.⁶¹ In all relationships formed between a songwriter and music publisher, the songwriter provides the creative product and the music publisher holds the capital and managerial ability.⁶² Since most songwriters (essentially all songwriters at the beginning of their careers) do not have the financial resources to self-publish their compositions,⁶³ it is practically required that the songwriters

⁶⁰ 37 C.F.R. § 201.19 (2006).

⁶¹ In today's online society, where it can feel as if fame is one MySpace posting away, it may seem that a music publisher's role has diminished. However, Budi Voogt, author of *The Soundcloud Bible* and founder and president of Heroic Recordings, comments on the continued importance of this role in the digital age, "They [the publishers] will register your works with the right associations, administer your royalty income and most importantly, create commercial opportunities. . . . Of course, you can decide not to do this and manage your repertoire independently. Beware that this is a very time consuming and diligent task, as the publishing landscape is intricate and highly technical." Paul Resnikoff, *Now You Know Everything About Music Publishing...*, DIGITAL MUSIC NEWS (Feb. 28, 2014) <http://www.digitalmusicnews.com/permalink/2014/02/28/understandpublishing>.

⁶² See Don E. Tomlinson, *Everything that Glitters is Not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT. L.J. 85, 93–101 (1995).

⁶³ Many modern music fans are beginning to believe successfully creating and marketing an album is as easy as setting up a webcast or starting an online fan page to sell albums. However, even the most simplistic of albums require a great deal of financial support to stand a chance at profitable success. Recording spaces and quality equipment are essential to an album's success, and it is not

seek the assistance of a music publisher. This somewhat forced relationship automatically places professional songwriters at an extreme bargaining disadvantage.⁶⁴ Historically, in contracts between songwriters and music publishers, very few terms are negotiable.⁶⁵ Courts have little issue identifying the problems associated with unequal bargaining positions in the formation of a contract between songwriters and music publishers;⁶⁶ however,

uncommon for different parts of each record to require separate recordings of each element laid into each musical track. Once all the elements for each track are recorded, a sound mixing process must occur. Professional mixers estimate this process can take roughly six to eight hours per song, which, should an artist choose to splurge on this process, would add significant time and cost.

So realistically, what could be the cost of producing an album? According to John Feldmann, who has served as executive producer for bands such as Panic! At the Disco, The Used, and Good Charlotte, “I think to record a full-length album, [the budget is] anywhere between \$40,000 and \$150,000. But for me to do a record for \$50,000, I’ve got to be pretty passionate about the music.” While being less sure of an album’s going rate, Producer Mark Trombino, who has worked with bands such as Blink-182 and Jimmy Eat World, agrees album production is no small undertaking. “The cost of recording these days can vary so wildly that I have no idea what the average is,” he says. “I know some major labels are still spending a couple hundred thousand dollars on albums, while most indies are spending \$30,000. My budgets are typically somewhere in between.” While there will always be individuals creating albums in their basements, it’s doubtful the quality will ever reach a professional level. In an already competitive market, a sub-par product is unlikely to yield great profits. Emily Zemler, *On the Record: The True Cost of Recording*, THE ALTERNATIVE PRESS (Feb. 28, 2011) http://www.altpress.com/features/entry/on_the_record_the_true_cost_of_recording.

⁶⁴ Schwender, *supra* note 3, at 232. (“Theoretically, copyright law in the United States strikes a balance between artists and consumers—granting limited, exclusive, private rights to induce creators to produce original works in return for a vast public domain of works. The balance, however, actually weights heavily in favor of publishers, especially in the music recording industry.”).

⁶⁵ Hal I. Gilenson, *Badlands: Artist-Personal Manager Conflicts of Interest in the Music Industry*, 9 CARDOZO ARTS & ENT. L.J. 501, 535 (1991).

⁶⁶ See *Harry Fox Agency, Inc. v. Mill Music, Inc.*, 543 F. Supp. 844, 859 (S.D.N.Y. 1982), (“Because of the impossibility of predicting the commercial value of a work upon its creation and because of the weak bargaining position of [songwriters], they are sometimes assigned their copyrights in return for very little remuneration, such as small lump-sum payments or inadequate royalty

before showing a party in the weaker position any contractual leniency, courts insist that the party prove substantive unconscionability or unfairness in the terms of the contract itself.⁶⁷ While some artists seek the assistance of a publisher mainly for promotional purposes,⁶⁸ when it comes to collecting royalty profits, composers are getting a raw deal.⁶⁹ This is especially

rates, and were thus prevented from sharing fairly, if at all, in the rewards from works that later became commercial successes.”).

⁶⁷ Unlike procedural unconscionability, which relates to unfair business procedure in relation to the transaction, substantive unconscionability requires unfairness of the contract itself. In *Croce v. Kurnit*, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984), Ingrid Croce, widow of a singer-songwriter Jim Croce, argued that the relationship between her husband and his music publisher at the beginning of his career was unconscionable. The court concluded that the contracts formed between the two parties could not be rescinded on the basis of unconscionability: “[T]he contracts were hard bargains, signed by an artist without bargaining power, and favored the publishers, but as a matter of fact did not contain terms which shock the conscious or differed so grossly from industry norms as to be unconscionable by their terms. . . . Because of the uncertainty involved in the music business and the high risk of failure of new performers, the contracts, though favoring the defendants, were not unfair.” *Id.* at 893.

While the holding of this case is clear, should we really conform songwriter-music publisher contracts to an industry standard that may be unfair to creative professionals? In creating a system where one “side” of the industry has an extreme bargaining advantage over the other, it appears courts determining the validity of these contracts are entirely ignoring the issue of unconscionability. For further information concerning contracting unfairness in the music industry, see Gilenson, *supra* note 65, at 515–19.

⁶⁸ Douglas Wolk, music industry author and critic, states that only 6% of performers actually make money from recording revenues. “Recordings are how listeners generally spend the most *time* experiencing music, but not how we spend the most *money* experiencing music. In practice, recordings mostly serve as promotion for the other ways musicians make money: performing, most of all, but also salaries for playing in orchestras and other groups, session work, and so on.” Douglas Wolk, *How Ashamed Should You Feel About Using Spotify?*, SLATE GROUP (Aug. 21, 2013, 6:30 AM) http://www.slate.com/articles/business/moneybox/2013/08/spotify_and_pandora_artist_payments_not_as_exploitative_as_they_re_made.html.

⁶⁹ Many artists are now turning to social media to speak out against the despairingly low royalty payments they are afforded, particularly by newer online streaming sites. See *infra* Part VI.C.i.a. See also Paul Resnikoff, 16

relevant when considering the exceptionally low royalty payments provided for artists through up-and-coming online streaming sites.⁷⁰

IV. PROPOSED REFORMATION EFFORTS OF THE SONGWRITER EQUITY ACT

A. Changes Proposed by the Songwriter Equity Act

The Songwriter Equity Act (SEA) intends to revise both Section 115 and Section 114 of the Copyright Act. Advocates of SEA suggest that alterations would allow songwriters to receive better performance and mechanical royalty rates.⁷¹ Since Representative Doug Collins⁷² introduced SEA on February 25, 2014, it has gained “sixteen co-sponsors in the House and has been referred to the subcommittee on courts, intellectual property, and the Internet.”⁷³ Following SEA’s first introduction in the U.S. House of Representatives, the bill also gained momentum with

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

⁷⁰ See *infra* Part VI.C.i.a.

⁷¹ See Press Kit, Rep. Doug Collins, Paul Williams, David Israelite, Michael O’Neill & Daryl Friedman, Songwriter Equity Act Press Kit (Feb. 25, 2014), http://www.bmi.com/images/news/2014/SEA_press_kit.pdf [hereinafter Songwriter Equity Act Press Kit]; see also Duncan, *supra* note 44.

⁷² Doug Collins serves as a Republican Congressman for the 9th District of Georgia. *Biography*, CONGRESSMAN DOUG COLLINS, <http://dougcollins.house.gov/biography> (last visited Nov. 15, 2014).

⁷³ Ed Christman, *Songwriter Equity Act Picks Up Momentum in Senate, Aims to Modernize Copyright Law*, BILLBOARD (May 12, 2014, 8:39 PM), <http://www.billboard.com/biz/articles/news/publishing/6084822/songwriter-equity-act-senate-copyright-law>; see Collins *Introduces Songwriter Equity Act*, CONGRESSMAN DOUG COLLINS (Feb. 25, 2014), <http://dougcollins.house.gov/press-releases/collins-introduces-songwriter-equity-act/>; see also Nate Rau, *Ga. Congressman Doug Collins Vows to Fight for Songwriters*, TENNESSEAN (Mar. 19, 2014, 6:14 PM), <http://www.tennessean.com/story/news/politics/2014/03/19/ga-congressman-doug-collins-vows-to-fight-for-songwriters/6630207/>.

three Senators introducing their version for the Senate.⁷⁴ While Senators Lamar Alexander,⁷⁵ Bob Corker,⁷⁶ and Orrin Hatch⁷⁷ still acknowledge the importance of the existing four considerations used by the CRB when determining royalty rates, their proposed legislation also stresses the need to “achieve fair market value when setting songwriter publishing rates on digital music services.”⁷⁸

SEA proposes an amendment to federal copyright law regarding the exclusive rights of sound recording copyright owners to remove a provision under Section 114 of the Copyright Act that prohibits license fees payable for the public performance of sound recordings from being taken into account in any administrative,

⁷⁴ See Songwriter Equity Act of 2014, S. 2321, 113th Cong. § 2 (2014); 160 Cong. Rec. S 2910 (daily ed. May 12, 2014) (introduction of senate bill 2321, Songwriter Equity Act of 2014); Christman, *supra* note 73.

⁷⁵ Andrew Lamar Alexander is a Republican United States Senator from Tennessee, having served since 2003. See *About/Lamar Alexander*, U.S. SENATOR LAMAR ALEXANDER, <http://www.alexander.senate.gov/public/index.cfm/lamaralexander> (last visited Nov. 15, 2014).

⁷⁶ Bob Corker is a Republican United States Senator from Tennessee, having served since 2007. See *Biography*, U.S. SENATOR BOB CORKER, www.corker.senate.gov/public/index.cfm/biography (last visited Nov. 15, 2014).

⁷⁷ Having served seven terms as a member of the Republican Party, Orrin Grant Hatch is a United State Senator from Utah and the most senior Republican Party member in the United States Senate. See *Biography*, U.S. SENATOR ORRIN HATCH, <http://www.hatch.senate.gov/public/index.cfm/biography> (last visited Nov. 15, 2014). Hatch has also worked as a professional songwriter, writing mostly worship songs, but also achieving mainstream success. See Jesse Fox Mayshark, *Orrin Hatch, Lyricist*, N.Y. TIMES (July 16, 2006), www.nytimes.com/2006/07/16/weekinreview/16word.html. For information on Senator Hatch’s political career, see U.S. SENATOR ORRIN HATCH, www.hatch.senate.gov/public (last visited Nov. 9, 2014). To read more about Hatch’s career in songwriting and music management, see Jesse Fox Mayshark, *Orrin Hatch, Lyricist*, N.Y. TIMES (July 16, 2006), <http://www.nytimes.com/2006/07/16/weekinreview/16word.html>.

⁷⁸ Christman, *supra* note 73 (“The new legislation aims to charge the CRB with replicating the rate levels that would be achieved in a market with a willing seller and a willing buyer.”); see also Songwriter Equity Act Press Kit, *supra* note 71.

judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works for the public performance of their works.⁷⁹ In amending Section 114(i) of the Copyright Act, a rate court would be allowed to consider all relevant evidence presented by the parties when determining songwriter compensation.⁸⁰ This amendment would grant each individual rate court discretion in how evidence provided in each case should be considered in the decision-making process.⁸¹ Advocates of the SEA proposal have high hopes that when establishing rates and terms for each agreement, CRJs will base their decisions on economically fair marketplace quotas as well as information presented by the participating parties.⁸² In theory, mechanical rates would be based on what a willing consumer would pay the artist for their work, and in turn, a more objective mechanical rate would be used to establish performance rates paid by digital streaming services.⁸³

SEA also suggests replacement of the insufficient royalty rate currently used by the CRB; the new rate to determine mechanical royalties would more accurately reflect free-market conditions.⁸⁴

⁷⁹ See Songwriter Equity Act Press Kit, *supra* note 71.

⁸⁰ “Section 114(i) of title 17, United States Code, is amended to read as follows:(i) Effect on Royalties for Underlying Works. It is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights granted in section 106(6).” H.R. 4079, 113th Cong. § 2 (2014), *available at* <https://www.congress.gov/bill/113th-congress/house-bill/4079/text>.

⁸¹ See Songwriter Equity Act Press Kit, *supra* note 71.

⁸² See Songwriter Equity Act Press Kit, *supra* note 71. “We are simply asking Congress to take the evidentiary blinders off of the judges who control a significant portion of our writers’ income. We believe that an open and full picture of the market will permit our rate court to recognize the value of musical works.” *Id.* (quoting BMI CEO Michael O’Neill).

⁸³ See *id.*

⁸⁴ See *id.* The standard royalty rate per song made and distributed on or after January 1, 2006, is 9.1¢ per song or 1.75¢ per minute of playing, whichever amount is greater. 37 C.F.R. § 255.3(m) (2014). For more information about how compulsory license rates for sound recordings of nondramatic musical

However admirable this goal may be, SEA omits any suggestions on how the government should establish a fair market value for royalty payments of each song.

B. Reactions to the Songwriter Equity Act

For songwriters, this pending legislation appears to be nothing but good news.⁸⁵ Even with potentially higher streaming prices for consumers, changes would reflect a marketplace in which those responsible for music composition would be more reasonably compensated for their work.⁸⁶ In a press kit presented by the House,⁸⁷ David Israelite, President and CEO of the National Music Publishers Association,⁸⁸ illustrated the importance of improvement concerning the manner in which the CRB evaluates songwriter royalties. Israelite noted that while a mechanical royalty rate of two cents per song was set in 1909,⁸⁹ the same rate has only

works have been altered over time, see 1 HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 5.28 (2d ed. 2013).

According to advocates of the bill, “[t]his minimal increase is due to current law, which directs the Copyright Royalty Board (CRB)—the government body responsible for setting the rate—to apply a standard that does not reflect market value.” Songwriter Equity Act Press Kit, *supra* note 71.

⁸⁵ Songwriter Equity Act Press Kit, *supra* note 71. As Paul Williams, President and Chairman of the Board for ASCAP, has stated, “[b]y updating the outdated provisions of the Copyright Act in Sections 114(i) and 115, Congress has an opportunity to modernize the music licensing system so that songwriters and composers can thrive alongside the businesses that use our music.” *Id.*

⁸⁶ While many sources are quick to jump to the conclusion that an increased mechanical royalty rate will benefit composers, there is currently no authority on how great an impact there could be.

⁸⁷ Songwriter Equity Act Press Kit, *supra* note 71.

⁸⁸ The National Music Publishers Association (NMPA) is a trade association for the American music publishing industry. With over 3,000 members, the organization aims to “protect its members’ property right on the legislative, litigation, and regulatory fronts”. The NMPA has pursued litigation against numerous organizations participating in illegal music distribution, including YouTube, LimeWire, Kazaa, and Napster. *NMPA Mission Statement*, NAT’L MUSIC PUBLISHERS ASS’N, <http://www.nmpa.org/aboutnmpa/mission.asp> (last visited Nov. 15, 2014).

⁸⁹ Copyright Act of 1909, Pub. L. No. 60-349, § 1(e), 35 Stat. 1075 (1909).

increased to 9.1 cents in today's market.⁹⁰ While a seven-cent difference may not seem staggering, he continues to illustrate a shocking parallel in that while a dozen eggs would have cost fourteen cents in 1909, the same amount of product would cost roughly three dollars in today's grocery stores.⁹¹ "[T]he standard rates of inflation seem to somehow not apply to songwriter," Israelite stated. "We must inject fairness into an outdated process that is undeniably stacked against songwriters and publishers, ensuring they are rightly compensated for their work."⁹²

In addition to the National Music Publishers Association, all three PROs have stated public support for SEA. Pat Collins, President and CEO of SESAC, gave overwhelming support for the bill, saying: "[o]ur goal is to maximize the value of the copyrights we represent on behalf of our songwriters and publishers. Passing this important legislation will help sustain that value and safeguard the intellectual property of our creators and copyright proprietors."⁹³ BMI CEO Michael O'Neill has also publicly praised the need for legislative change to copyright law, stating, "[t]his bill is an important step on the road to fairness for songwriters and music publishers. The current environment, where performance of sound recordings are valued at twelve times those of the musical compositions that underlie them, is untenable."⁹⁴ Paul Williams, President and Chairman of the ASCAP Board, concurs with fellow PRO executives: "The Songwriter Equity Act is an important first step toward a more effective and efficient

⁹⁰ Mechanical and Digital Phonorecord Delivery Rate, No. 2006-3 CRB DPRA, (2006) *available at* <http://www.loc.gov/crb/proceedings/2006-3/dpra-public-final-rates-terms.pdf>

⁹¹ Christman, *supra* note 73.

⁹² Neil Portnow, President and CEO of The Recording Academy, supports Israelite's stance in saying, "The Songwriter Equity Act will bring more fairness to those who write and compose the music loved worldwide All music creators deserve to be paid fair market value for their talents . . ." Songwriter Equity Act Press Kit, *supra* note 71.

⁹³ *Id.*

⁹⁴ *Id.*

licensing system that will benefit everyone—consumers, music licensees and the songwriters and composers who are the foundation of the rapidly changing music environment.”⁹⁵

While there is adamant support of the proposed legislation, not everyone in the industry is so hastily welcoming the legislation’s proposals. The National Association of Broadcasters⁹⁶ (NAB) is in public opposition of the pending legislation.⁹⁷ According to NAB Executive Vice President of Communications Dennis Wharton, the proposed legislation has the potential to impose “new costs on broadcasters that jeopardize the future of our free locally-focused service.”⁹⁸ Additionally, Wharton stated, “[w]hile this legislation raises important issues about the changes confronting the songwriter community, NAB objects to changes in law that would deal with the financial imbalance between songwriters and artists by subjecting free broadcast radio stations to new fees.”⁹⁹

Despite relatively minor concerns raised by organizations within the music industry, it is somewhat hard to detect a downside to the SEA proposal. However, while many regular citizens would

⁹⁵ *Id.*; see also, *ASCAP Applauds the Introduction of the Songwriter Equity Act*, AM. SOC’Y COMPOSERS, AUTHORS & PUBLISHERS (Feb. 25, 2014), <http://www.ascap.com/press/2014/0225-ascap-statement-on-sea.aspx>.

It is important to recognize ASCAP’s support of the bill is purely based on its belief that legislative changes will benefit the artists they support. Since ASCAP does not collect mechanical royalties, it is the one PRO that would see no financial gain in the bill’s possible passing. Ari Herstand, *Congress Wants to Hear Your Songs and Stories to Help Fix the Copyright Law*, DIGITAL MUSIC NEWS (Apr. 28, 2014), <http://www.digitalmusicnews.com/permalink/2014/04/28/songwriter-equity-act>.

⁹⁶ The National Association of Broadcasters (NAB) is a trade association, workers union, and lobby group that represents the interests of for-profit, over-the-air radio and television broadcasters in the United States. The NAB represents more than 8,300 radio and television stations and broadcast networks. NAT’L ASS’N OF BROADCASTERS, <http://www.nab.org> (last visited Nov. 15, 2014).

⁹⁷ See, Christman, *supra* note 73.

⁹⁸ *Id.*

⁹⁹ *Id.*

likely be in support of fair compensation for composers, there is a substantial likelihood that prices for music streaming services would significantly increase with legislative changes. “Raising the price of digital streaming would be the wrong technology call,” stated a recent editorial in *The Washington Times*, “the higher rates would be passed on to consumers.”¹⁰⁰ But why does it matter that streaming service costs could increase? Many consumers, while not completely enthused about raised prices, would still support fair compensation for the artists whose works they enjoy. However, should SEA proposals succeed, there is great potential for an abundance of artist compensation issues to accompany the legislative changes.

V. MUSIC INDUSTRY RECTIFICATION THROUGH THE SONGWRITER EQUITY ACT

Historically, changes in the music industry have been incremental; however, with the evolution of digital music, a more transformative change is necessary. Until recently, record companies had four major costs: recording, manufacturing, distribution, and promotion.¹⁰¹ While all four functions are necessary to the industry, all but recording have been removed or modified due to recent technological advancements in the Internet age.¹⁰² Solutions to correct issues within the music industry generally fall into three categories: statutory, administrative, and free-market approaches.¹⁰³ While there are strong advocates for

¹⁰⁰ Daniel Horowitz, *Editorial: Songwriter Equity Act Inequity*, WASH. TIMES (June 6, 2014), <http://www.washingtontimes.com/news/2014/jun/6/editorial-songwriter-inequity/>.

¹⁰¹ Steve Lawson, *Transformative Vs. Incremental Change*, MUSIC THINK TANK (Nov. 14, 2009), <http://www.musicthinktank.com/blog/transformative-vs-incremental-change.html> (explaining why changes in the music industry must occur at a quicker pace to keep up with current changes to online distribution services).

¹⁰² *Id.*

¹⁰³ Jared S. Welsh, *Pay What You Like—No, Really: Why Copyright Law Should Make Digital Music Free for Noncommercial Uses*, 58 EMORY L.J. 1495, 1528–30 (2009).

each type of reformation within the music industry, administrative and free-market solutions are likely to be highly time intensive without producing many benefits for the affected parties. Statutory changes, such as SEA, are increasing in popularity. However, these solutions would likely also be ineffective due to increased costs to consumers, which would only further society's tendency to resort to piracy.¹⁰⁴ A more realistic approach to combat the compensation issues present in the industry would be to switch over to a model mirroring television's recent switch to online streaming. For a nominal fee, consumers might be more willing to compromise between paying for full, physical albums outright and illegally obtaining music. While there currently are popular online distribution services available to consumers, these services are inadequate due to their inability to reasonably compensate artists.

A. Statutory Reformation: The Songwriter Equity Act is Not the Answer

While restructuring the Copyright Act is generally debated, there is little argument to proposed section 114(i) alterations. Section 114(i) prevents the establishment of a fair and efficient rate-setting procedure, but "there is no policy justification for retaining this provision, which favors one group of rights holders

¹⁰⁴ See Ram D. Gopel, G. Lawrence Sanders, Sudip Bhattacharjee, Manish Agrawal & Suzanne C. Wagner, *A Behavioral Model of Digital Music Piracy*, 14 J. ORGANIZATIONAL COMPUTING & ELECTRONIC COMMERCE 89 (2004) ("Economic incentives to pirate digital audio include the high costs of purchasing legitimate copies of audio CDs . . . higher music purchasing cost would increase the payoff from piracy, *ceteris paribus*. Such an increase in the payoff would naturally increase the likelihood for piracy.").

Additionally, as a general note, statutory amendments do not historically always lead to changes in social practice. For example, the Civil Rights Act of 1968 outlawed discrimination based on race. While much of today's society would agree racial discrimination is an issue of the past, it still runs rampant in today's culture. See, e.g., Deuel Ross, *Pouring Old Poison Into New Bottles: How Discretion and the Discriminatory Administration of Voter ID Laws Recreate Literacy Tests*, 45 COLUM. HUM. RTS. L. REV. 362, 364 (2014).

over another based solely on being the first to achieve their ‘place at the table.’”¹⁰⁵ By allowing artists and PROs to present mechanical royalties as a standard for performance royalties, there is a greater likelihood that the music market will more fairly compensate artists.

Unlike the section 114(i) reformation, which has been fairly well received, the statutory change in section 115 of the Copyright Act is a hot-button topic in Congress and among today’s music industry professionals. In a statement for the July 2005 Senate hearing, the Register of Copyrights, Marybeth Peters, argued that the bulk of consumers would choose to use a legal downloading service over illegal file sharing options if the service could offer an equivalent product:

Right now, illegitimate services clearly offer something that consumers want: lots of music at little or no cost. They can do this because they offer people a means to obtain any music they please without obtaining the appropriate licenses. However, under the complex licensing scheme engendered by the present section 115, legal music services must engage in numerous negotiations with publishers and record companies, which result in time delays and increased transaction costs. In cases where they cannot succeed in obtaining all of the rights they need in order to make a musical composition available, the legal music services simply do not offer that selection, thereby making

¹⁰⁵ Mary LaFrance, *From Whether to How: The Challenge of Implementing a Full Public Performance Right in Sound Recordings*, 2 HARV. J. SPORTS & ENT. L. 221, 261 (2011).

them less attractive to the listening public than the pirates.¹⁰⁶

While Peters makes a valid point concerning the complexity of the current licensing process and suggests a drastic reformation of section 115, such a dramatic change could cause even more confusion for those seeking out these licenses.¹⁰⁷

Supporters of statutory changes argue that such alterations should be made to streamline the Copyright Act.¹⁰⁸ In *Reforming Section 115: Escape from the Byzantine World of Mechanical Licensing*, Skyla Mitchell identifies record companies as being affected by amendments to section 115 in two major ways: cover songs and piracy.¹⁰⁹ Mitchell states, “[i]t is questionable how much the record companies rely on cover songs for income; but to the extent they do, it is clearly in their best interest to maintain a compulsory license with a statutory rate ceiling.”¹¹⁰ The more pressing issue addressed by record companies is concern over piracy. It would be more beneficial for record companies to focus on streamlining the licensing process, which would enable them to provide new products and media formats capable of competing with pirated offerings.¹¹¹ The SEA is a textbook example of a legislative push towards statutory change.

¹⁰⁶ *Music Licensing Reform: Hearing Before the Subcomm. on Intellectual Property, Comm. on the Judiciary*, 109th Cong. 120 (2005) (statement of Marybeth Peters, Reg. Copyrights).

¹⁰⁷ For a complete analysis of Marybeth Peters’ Senate address concerning copyright reformation and its potential impact on the music industry, see William Henslee, *Marybeth Peters is Almost Right: An Alternative to her Proposals to Reform the Compulsory License Scheme for Music*, 48 WASHBURN L.J. 107, 118–22 (2008).

¹⁰⁸ See Welsh, *supra* note 103, at 1530 (summarizing various statutory reform methods advocated by various experts in American copyright law).

¹⁰⁹ Mitchell, *supra* note 25, at 1260.

¹¹⁰ *Id.*

¹¹¹ *Digital Music Licensing and Section 115 of the Copyright Act: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 15 (2005) (statement of Lawrence

While increasing the minimum royalty rates paid to composers could positively impact the music industry, the fact remains that people are still illegally downloading significant amounts of music in spite of the copyright laws that are already in place, causing massive losses in profits to music production companies.¹¹² In contrast to proposals suggesting changes to the Copyright Act, some statutory proposals suggest changes be made to criminal law, such as making it a criminal offense to download music illegally from peer-to-peer servers.¹¹³ Enforcing criminal penalties would

Kenswil, President of e-Labs, Universal Music Group).

According to Kenswil, “[T]he antiquated structure of Section 115, with its one-song-at-a-time, one-publisher-at-a-time licensing model, is frustrating the introduction of [new technologies and distribution platforms] . . . [that] provide superior audio fidelity . . . as well as improved security to reduce the sting of piracy.” *Id.* at 35, 39.

¹¹² An analysis by the Institute for Policy Innovation stated that music piracy causes approximately \$12.5 billion in economic losses each year. Additionally, it results in 71,060 U.S. jobs lost, a loss of \$2.7 billion in workers’ earnings, a loss of \$422 million in tax revenues, \$291 million in lost personal income tax, and \$131 million in lost corporate income and production taxes. Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, INSTITUTE FOR POLICY INNOVATION (Aug. 21, 2007), http://www.ipi.org/ipi_issues/detail/the-true-cost-of-sound-recording-piracy-to-the-us-economy.

¹¹³ McGill suggests a warning system, which would alert habitual illegal downloaders that their activities are being monitored. David A. McGill, *New Year, New Catch-22: Why the RIAA’s Proposed Partnership with ISPs Will Not Significantly Decrease the Prevalence of P2P Music File Sharing*, 29 LOY. L.A. ENT. L. REV. 353, 360 (2009). Should this warning go unnoticed or, more likely, ignored, then Internet service to the consumer would be delayed or shut off. McGill also believes, regardless of the measures taken to stop illegal downloading practices, the right to file a lawsuit against the alleged infringer should be maintained. *Id.* at 353, 359.

Lawsuits against parties participating in illegal file sharing are rarely effective. However, there also appears to be no manageable way to protect copyrighted music without giving the music industry more power, which would likely lead to a greater restriction to the public in its personal use of music. The Recording Industry Association of America (RIAA) has proposed the Secure Digital Music Initiative, which would require all electronic devices that play music to install new protective mechanics. Such software would prevent users

have a radical effect on society. Prosecuting for damages that are grossly disproportionate to the crime of illegal downloading would be unconstitutional, and public protest could make this result exceedingly unlikely.¹¹⁴ While statutory approaches may appear as the best mode of change, they can only lay the groundwork for reformation.

Considering the ease with which recorded music is transferred among individuals online, parties other than the artist are able to reap benefits from the creation of this music.¹¹⁵ Since this creates high transaction costs, creators want to protect themselves against the threat of free riding by demanding a higher price for their works.¹¹⁶ While statutory reformation of section 115 of the Copyright Act is a plausible response to this issue, by increasing mechanical royalty rates, SEA reformation would actually add to costs of music production as well as transaction costs. Parties pirating music are effectively avoiding such costs. And, although it may seem counter-intuitive, digital distribution has actually reduced the risk that parties other than the artist will significantly benefit from distribution profits.¹¹⁷

from burning music CDs to or from a computer, downloading music, or transferring music to an MP3 player. While in theory this may seem like a successful approach, allowing the music industry control over what the public hears, what devices they use to listen to music, and how much an individual must pay for each use of a song is frighteningly restrictive. David Nelson, *Free the Music: Rethinking the Role of Copyright in an Age of Digital Distribution*, 78 S. CAL. L. REV. 559, 570–71 (2005).

¹¹⁴ Boehm, *supra* note 46, at 207 (proposing criminal enforcement as a deterrence method for illegal downloading).

¹¹⁵ Henry H. Perritt, Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTINGS COMM. & ENT. L.J. 259, 266 (2007).

¹¹⁶ *Id.* at 267.

¹¹⁷ For a study indicating the decrease in illegal online file sharing, see *Music File Sharing Declined Significantly in 2012*, NPD GROUP (Feb. 26, 2012), <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-npd-group-music-file-sharing-declined-significantly-in-2012/>. See generally Welsh, *supra* note 103, at 1525 (“[A]lthough the music industry claims otherwise, digital technology has actually reduced the risk of free-riding. It has done so both by

B. The Songwriter Equity Act's Limitations on Maximizing the Availability of Diverse Creative Works to the Public

The objectives by which mechanical royalties are established are defined in section 801 of the Copyright Act.¹¹⁸ While the CRB is responsible for balancing potential benefits to the public and fair compensation to the copyright holder, these considerations must also be balanced against the potential impacts of the rate on the music industry as a whole.¹¹⁹ While these objectives were followed during the initial fixation of the statutory rate, many practitioners in the music industry feel that recent rate courts have not been so diligent.¹²⁰

The CRB has long acknowledged the importance of allowing consumers access to an abundance of musical options.¹²¹ If music retailers and policy makers follow the intent of the Copyright Act, the royalty rate should provide incentive to create works for the benefit of the public.¹²² As with any service, the number and

reducing costs and by increasing demand for recorded music, making music that much easier to acquire legitimately and thus decreasing the relative risk of free-riding.”).

¹¹⁸ 17 U.S.C. § 801(b)(1) (2000).

¹¹⁹ David Kostiner, *Will Mechanicals Break the Digital Machine?: Determining A Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads*, 27 HASTINGS COMM. & ENT L.J. 653, 675 (2005).

¹²⁰ Abrams, *supra* note 39, at 235–37.

¹²¹ 160 CONG. REC. S3510 (daily ed. Apr. 25, 2006) (statement of Sen. Dianne Feinstein).

¹²² There is no debate that the CRB is charged with the responsibility of providing the public with as many musical offerings as possible. While it is still uncertain how potential changes under SEA would affect music dissemination, independent webcasters are currently combating paralleling issues with webcasting royalties. (A webcast is any media presentation distributed over the Internet to many simultaneous listeners or viewers.) With legislative changes intended to promote Internet usage by webcasters, many fear the decision to increase royalty rates will “stifle[] technological innovation and use, thereby eliminating forums that provide creative works to the public.” Sara O’Connell, *Counting Down Another Music Marathon: Copyright Arbitration Royalty Panels and the Case of Internet Radio*, 8 MARQ. INTELL. PROP. L. REV. 161, 177 (2004).

variety of artists represented in any given market will likely dictate its success with consumers.¹²³ As identified by David Kostiner, “[i]f the mechanical royalty rate paid to composers is disproportionate to the wholesale income realized by record labels, those labels may decide to decrease the availability of their online catalogs, depriving the public of an exciting, economical, and convenient method of purchasing music.”¹²⁴ If the mechanical rate were to be altered, it would likely make diverse creative works less available to the public.¹²⁵

While SEA proposals are admirable in their desire to more fairly compensate songwriters, a rise in current royalty rates will almost certainly result in higher price tags for consumers, hindering the ability to access inexpensive and diverse music.¹²⁶ Major labels, which are frequently owned by parent corporations, generally focus on maximizing profits through the release of only the most profitable works.¹²⁷ Considering that a handful of major

While the consequences policy makers are currently facing in response to heightened royalty rates for webcasters is not completely indicative of what could happen should the SEA bill pass, there is certainly a possibility for a similar negative response.

¹²³ David Kostiner, *Will Mechanics Break the Digital Machine?: Determining a Fair Mechanical Royalty Rate for Permanent Digital Phonographic Downloads*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 235, 247–48 (2004).

¹²⁴ *Id.* at 235.

¹²⁵ Jenna Hentoff, *Compulsory Licensing of Musical Works in the Digital Age: Why the Current Process is Ineffective and How Congress is Attempting to Fix It*, 8 J. HIGH TECH. L. 113, 126 (2008).

¹²⁶ Kostiner, *supra* note 123, at 245.

¹²⁷ In today’s market, major labels are more concerned than ever with producing enough hits to remain financially stable. According an opinion by Forbes Magazine, “big-business” record labels are in for a drastic change, and scrambling to make changes to meet the evolving music market. Richard Busch, *Major Record Labels as Dinosaurs?*, FORBES MAGAZINE, (Mar. 27, 2012, 1:05 PM) <http://www.forbes.com/sites/richardbusch/2012/03/27/major-record-labels-as-dinosaurs/>. “For decades the industry relied on a business model of selling massive amounts of copies of a few albums to finance the high-cost of producing records, plugging songs to radio, and overcoming the losses from

labels control 85% of the market—while hundreds of independent labels have the remainder—the distribution of wealth and resources is heavily slanted toward artists with previous mainstream success.¹²⁸ In addressing how many songwriters will actually see a tangible benefit from the new legislations, copyright lawyer Raymond Scott noted, “even if you double the relatively small performance royalty songwriters get each time their song is played, that won’t matter for songwriters who don’t get much of the pie ASCAP and BMI slices up; the real winner will be already successful songwriters whose songs are widely played in prominent places.”¹²⁹

Independent labels are continuing to rise in popularity among artists and are therefore also growing in total record sales nationally.¹³⁰ More intimate labels are a valuable alternative to

their other projects. Record companies used the clout of having access to recording studios and access to airplay on the radio to their advantage in contract negotiations with artists, which leveled their risk intake of the enormous costs and influence needed to both produce and push a record.” *Id.* However, with major changes, mainly technological ones, we may soon be noticing a change in major labels to more closely mirror independent competitors. “The major labels in the ’70s–’90s became experts at mainstream marketing in the days of a singular medium of either radio stations or, from the 1980s on, MTV. In the music scene of today there are multiple subgenres and blogs catering to niche audiences on the Internet, 500 cable channels, satellite radio, Internet radio, etc. Massive corporations are not built for this type of promotions, but a smaller record label, a small marketing firm or a motivated artist are.” *Id.*

¹²⁸ Peter Jan Honigsberg, *The Evolution and Revolution of Napster*, 36 U.S.F. L. REV. 473, 477 (2002).

¹²⁹ Julia Rogers, *Twitter and SoundCloud, Songwriter Equity Act and Electronic Dance Music News*, MUSICIAN COACHING: STRATEGY & BUSINESS PLANNING FOR MUSICIANS (May 25, 2014), <http://musiciancoaching.com/music-news-2014/twitter-and-soundcloud-songwriter-equity-act-electronic-dance-music/>.

¹³⁰ “Becoming an Indie Label signed artist has become a movement, a trend, some may even say a fad. But indie labels have created a true niche for themselves and their business has been booming. So much so, in fact, that many of the Major Labels are now beginning to embrace the Indie Label methods in order to achieve future growth as a company. While indie labels can’t offer the kind of funding for artists that the major labels can, they do offer many other

major labels, which, due to size and marketing expenditures, require their releases to appeal to an unrealistically large population in order to recoup the money invested in the release.¹³¹ Since independent labels are already more extensively affected by piracy and file sharing, they cannot afford to have their profit margins lessened any further.¹³²

By increasing the mechanical royalty rate even further, it is unlikely that independent labels will be able to afford marketing efforts to promote a variety of lesser-known artists.¹³³ A failure to

benefits that may be more important to the artist.” Johnathan Ostrow, *Indie vs. Major: Which Record Label Contract is Right for You?*, MUSIC THINK TANK (May 16, 2010), <http://www.musicthinktank.com/mtt-open/indie-vs-major-which-record-label-contract-is-right-for-you.html>.

¹³¹ Kostiner, *supra* note 123, at 256.

¹³² Most notably, the greatest downfall to artists in choosing an independent label is a general lack of funding. “A lack of funding means a smaller budget for recording, production of physical disks, packaging, distribution costs, tour support, merchandise, etc. Another significant issue caused by a lack of budget is that proper marketing for the artist is sacrificed, making the artists promote themselves if they want to be seen and heard.” Ostrow, *supra* note 130. Not only are artists somewhat more responsible for self-promotion, since profit margins are less stable to begin with, it is likely that independent labels will feel the effects of piracy and file sharing more abrasively. *Id.*

¹³³ The most recent increase in mechanical royalties greatly affected Internet radio stations of all sizes. Andrew Stockment, *Internet Radio: The Case for a Technology Neutral Royalty Standard*, 95 VA. L. REV. 2129, 2154–56 (2009) (“In 2008, CBS Radio took over the internet radio services of both AOL Radio and Yahoo! radio. Fred McIntyre, senior vice president of AOL Radio, said that royalties were too high to operate the business at a profit even before the CRB decision.”). According to one mid-size Internet radio station owner, “[t]his royalty structure would wipe out an entire class of businesses: small independent webcasters such as myself and my wife, who operate Radio Paradise. Our obligation under this rate structure would be equal to over 125% of our total income. There is no practical way for us to increase our income so dramatically as to render that affordable.” *Id.* at 2156 (citing Daniel McSwain, *Webcast Royalty Rate Decision Announced*, RAIN: Radio and Internet Newsletter (Kurt Hanson), Mar. 2, 2007, <http://www.kurthanson.com/archive/news/030207/index.shtml>). While this result will not definitively occur if SEA increases mechanical royalties in the music industry, there is definitely a strong possibility of a similar effect. Andrew Stockment,

support such artists would likely result in a diminished music variety, only providing opportunities for those reaching a certain threshold of popularity. Many labels, especially smaller independent ones, may decide not to make their music available online because lower profit margins could result from paying composers a statutory fee; this is especially true if the mechanical rate is set too high.¹³⁴ To create the most mutually beneficial marketplace, reformation should be focused on creating a system that represents more artists, therefore giving consumers a wider variety of options. In fear of hindering possibilities for less mainstream artists, music labels should be protected from overly burdensome royalty rates.¹³⁵

VI. ALTERNATIVE APPROACHES TO COPYRIGHT ACT REFORMATION

A. Administrative Proposals: Collective Licensing

A substantial number of concerned parties support modifications to copyright law through administrative proposals, which would remedy copyright issues through a collective license informally referred to as a blanket licensing scheme.¹³⁶ Proponents of administrative changes suggest implementing an organization

Internet Radio: The Case for a Technology Neutral Royalty Standard, 95 VA. L. REV. 2129, 1254–56 (2009).

¹³⁴ Kostiner, *supra* note 123, at 250.

¹³⁵ According to Gregory Alan Barnes, who serves as general legal counsel to the Digital Media Association, the potential for a heightened mechanical royalty rate would likely stifle music distribution across all platforms. “[A] key provision of the legislation seeks to raise the cost of doing business for online music stores and on-demand streaming services at a time when both music platforms are engaged in a fierce battle with pirate websites that provide access to unauthorized content for free.” Gregory Alan Barnes, *In Debate Over Compensation, Songwriter Equity Act is Off- Key*, CQ ROLL CALL (Apr. 14, 2014, 5 AM), http://www.rollcall.com/news/in_debate_over_compensation_songwriter_equity_act_is_of_f_key_commentary-232077-1.html.

¹³⁶ *Id.* at 1528; see also Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 695 n.51 (2009).

that would administer royalties for digital distribution purposes.¹³⁷ Under a blanket licensing proposal, a music service, such as iTunes, would negotiate and pay for a single license that would give the service provider the right to distribute any musical compositions that fall under the “blanket” of the agreement.¹³⁸

Considering this administrative view is based closely off the successful PRO model, it appears to be an appealing option in fairly distributing license proceeds.¹³⁹ Additionally, since the rate of this type of agreement would likely be extensively negotiated between the parties, there is a much greater probability that the final cost of a blanket license would more fairly reflect current market rates than the current statutory rate does.¹⁴⁰ However, if a collective licensing system were adopted to remedy the problematic section 115, the administration of this new blanket license would need to be evaluated.¹⁴¹ Additionally, restrictions under the current section 115 require licensing of musical works on a song-by-song basis, which would likely prevent companies from licensing large numbers of works at one time.¹⁴² The logistics of

¹³⁷ These methods generally track the common model used by PROs, in that they would gather blanket license fees from users, which would then be distributed to copyright holders according to the amount of use. See Jessica Litman, *Sharing and Stealing*, 27 HASTINGS COMM. & ENT. L.J. 1, 41–44 (2004).

¹³⁸ It was declared in 2001 that PROs (in the initial instance, BMI) had to make blanket licenses available. *United States v. Broad. Music, Inc.*, 275 F.3d 168, 171 (2d Cir. 2001). However, courts had to derive new formulas for the determination of blanket fees. *Broad. Music, Inc. v. DMX*, 726 F. Supp. 2d 355, 355–56 (2d Cir. 2012). See e.g., Carly Olson, *Changing Tides in Music Licensing? BMI v. DMX and In re THP*, 10 NW. J. TECH. & INTELL. PROP., 276, 282–284 (2012).

¹³⁹ Litman, *supra* note 137, at 41–44.

¹⁴⁰ Mitchell, *supra* note 25, at 1264; see *Bigger Than Grokster?*, THE 463: INSIDE TECHPOLICY, (June 23, 2005), http://463.blogs.com/the_463/2005/06/bigger_than_gro.html.

¹⁴¹ Anthony Reese, *Copyright and Internet Music Transmissions: Existing Law, Major Controversies, Possible Solutions*, 55 U. MIAMI L. REV. 237, 266–267 (2001).

¹⁴² See 17 U.S.C. § 115(b)(1) (2006); see also Brian Sanchez, *The Section 115 Mechanical License and the Copyright Modernization Act: The Hardships*

setting up a new, *effective* system of licensing would be daunting and require a significant amount of time and resources.¹⁴³ While it may be worth the time and resources necessary to create and maintain such a system, more efficient private contractual solutions exist.¹⁴⁴

B. Free-Market Proposals

Advocates of free-market proposals suggest taking no action in copyright reconstruction and instead recommend allowing the market to stabilize on its own.¹⁴⁵ Proponents of this theory believe that “as more consumer-friendly technologies develop and lure new users back from illegal file sharing, an economic equilibrium will ultimately occur.”¹⁴⁶ However, due to the vast changes to the music industry in the past decade, there is no support for suggesting that inaction would solve problems relating to lack of compensation for composers and financial deficits due to illegal downloading. Even if a balance between copyright law and emerging technology were struck, composers would likely face severe losses in the meantime.¹⁴⁷ A free-market and statutory hybrid proposal has also recently been considered; the proposal would modify the Copyright Act to benefit non-commercial sound recordings of music, allowing the public to share music so long as it is done without commercial profit.¹⁴⁸ While this possibility is obviously appealing to consumers, there is

of Legislating Music Industry Negotiations, 17 DE PAUL-LCA J. ART. & ENT. L. 37 at 64 (2006).

¹⁴³ *Id.*

¹⁴⁴ As discussed later in this piece, copyright law is likely not the best approach to a lasting change in the music industry. By forming private contractual agreements, a more sustaining, beneficial relationship will be formed between artists and distribution teams. *See infra* Part VI.C.

¹⁴⁵ *See* Welsh, *supra* note 103, at 1529.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1532.

no foreseeable way for the music industry to continue on such a financially lacking system.¹⁴⁹

C. Digital Distribution: The Answer Today's Music Market Has Been Searching For?

In an effort to cut distribution and promotional costs, many artists have already explored online distribution methods. Record labels may approach online distribution with a justifiable sense of hesitancy. By not selling full albums, there is a potential for some financial loss. However, in switching to an online distribution process, labels are virtually guaranteed extensive savings in packaging and shipping costs.¹⁵⁰ Additionally, transactions should be efficient and nearly faultless.¹⁵¹ Instead of having to find a record store that carries obscure works to purchase a full record, a buyer can download or stream individually chosen singles from services with unprecedented variety.¹⁵² In considering this more affordable option, artists, composers, labels, and consumers would all benefit, likely resulting in more music legally accessed by consumers overall.¹⁵³

¹⁴⁹ Johnathan Handel, *Uneasy Lies the Head that Wears the Crown: Why Content's Kingdom is Slipping Away*, 11 VAND. J. ENT. & TECH. L. 597, 633–36 (2009) (discussing the likelihood of potential suffering should the economic imbalance of the music industry continue).

¹⁵⁰ As Kostiner validly explains, “[t]hese costs make the distribution of less popular artists cost prohibitive because a significant investment is required for even the most limited release, especially when shipping charges to the thousands of disparate major and independent retail music outlets across the country are considered.” Kostiner, *supra* note 123, at 251.

¹⁵¹ *Id.*

¹⁵² See Alex Veiga, *Tough Tactics Give Music Industry New Sales Hope*, INFORMATION WEEK, (Jan. 12, 2004, 10:20 AM), www.informationweek.com/story/showArticle.jhtml?articleID=17300407.

¹⁵³ While the current legitimate online streaming market has not yet come close to reaching the profits necessary to recoup piracy losses, it is making a difference. According to a report by The New York Times, “Over the past year, however, Internet streaming services like Spotify, which offer free listening, supported by advertising or subscriptions, have gained a growing following.

While online distribution services of this nature exist, most notably Spotify¹⁵⁴ and Pandora,¹⁵⁵ they provide little to no benefit to artists. Considering society's drastic conversion to online media consumption, digital distribution is very likely the answer the industry has been searching for. However, should this be the case, current streaming services need to make some major alterations to provide artists with fair compensation.

Private contractual agreements are better suited than the suggested SEA modifications to address the increasingly low revenues of the music industry. Such an approach would still operate under section 115 of the Copyright Act, in that parties could negotiate royalty license fees for an amount less than that specified by the statutory rate.¹⁵⁶ Additionally, depending on the distribution service, negotiations over a sound recording under

Revenue from streaming is accelerating as growth in sales of digital downloads from services like Apple's iTunes slows." Even though physical album sales are dropping about 16% annually worldwide, digital source revenue is steadily increasing. Eric Pfanner, *Music Industry Counts the Cost of Piracy*, N.Y. TIMES (Jan. 21, 2010) http://www.nytimes.com/2010/01/22/business/global/22music.html?_r=0.

¹⁵⁴ Spotify is a Swedish commercial music streaming service, which launched in the United States in July 2011. The distribution site now caters to fifty eight different markets and hosts over forty million users, ten million of whom pay to use the upgraded version of the site. *Information: What is Spotify?* SPOTIFY, <https://press.spotify.com/us/information/> (last visited Nov. 4, 2014).

For media reaction to the site's original launch in the United States, see John D. Sutter, *What's this Spotify Thing All About?*, CNN TECH (July 15, 2011, 7:13 AM) <http://www.cnn.com/2011/TECH/innovation/07/14/spotify.us.why/>.

¹⁵⁵ Unlike Spotify, which lets users select music preferences on an individual basis, Pandora is a "free personalized internet radio." This means music selections are presented to the user through an automated music recommendation service. *What is Pandora?*, PANDORA, <http://help.pandora.com/customer/portal/articles/182180-what-is-pandora> (last visited Nov. 4, 2014).

¹⁵⁶ While advocates for statutory reform may view this negatively, it should not be considered a step back in industry change. If music production companies begin developing long-standing working relationships with online distributors, even negotiating at lower rates may be worth a financial sacrifice to secure a long-term business plan.

section 114 of the Copyright Act may still occur. However, by focusing on private contractual agreements, the industry is likely to save significant time and money. Instead of debating an entirely new structure for copyright law enforcement, the existing structure for online royalty distributions through SoundExchange could be maintained.¹⁵⁷ Most importantly, a proposal of this nature would more wholly address the problems inherent in the current copyright model while still reconciling consumer desires for affordable music selections with the music industry's desire to make money.

Online music distributors would benefit most from adopting a model similar to online television distributors such as Hulu¹⁵⁸ and Netflix.¹⁵⁹ These agencies are the television industry's answer to

¹⁵⁷ See Mitchell, *supra* note 25, at 1255.

¹⁵⁸ Hulu is an online subscription service that offers ad-supported, on-demand video streaming of TV shows, movies, trailers, and additional media content created by its affiliated networks. Since its creation in 2008, three of the four largest American television networks (ABC, Fox, and NBC) have privately contracted with the site to provide content for viewers. Additionally, in 2009 The Walt Disney Company announced it would join the venture, purchasing a 27% stake in Hulu. While the website started out as a free service, solely funded by advertising and commercial revenue, in 2010 HuluPlus was launched, which began charging users a nominal monthly fee for streaming access. While this new expense may have alienated some customers, HuluPlus gained more than 1.5 million paying customers within its first year of operation by expanding the content library for consumers. Mike Hopkins, Hulu CEO, reported the company would reach \$1 billion in revenue in 2013, and that the online service reached 5 million subscribers over the course of the year. Additionally, in 2013, Hulu reported expanding its "roster of advertisers" to more than 1,000 different brands. Mike Hopkins, *A Strong 2013*, HULU BLOG (Aug. 24, 2014), www.blog.hulu.com/2013/12/18/a-strong-2013/ (discussing the companies successes over the time of operation as presented by CEO Mike Hopkins). For general information about how Hulu Services operate, see *How Hulu Works*, HOW STUFF WORKS, www.howstuffworks.com/internet/basics/hulu.htm (last visited Nov. 4, 2014).

¹⁵⁹ Netflix, Inc. is an American provider of on-demand Internet streaming media available to viewers in North and South America, the Caribbean, and parts of Europe. The company originally started out in 1997 as a flat rate DVD-by-mail system in the United States. A mere two years later the company started its subscription-based digital distribution service. By June 2014, Netflix had a

visual digitalization, in that these agencies provide content for streaming at a minimal price and make up any lost revenue through advertising profits. In mirroring online television models, online intermediaries would earn profits through online advertising, which could in turn be used to pay record companies a negotiated royalty fee, a percentage of their profits, or a greater of the two amounts. Considering consumers are willing to pay for services such as Hulu and Netflix,¹⁶⁰ it is reasonable to believe a similar model could be replicated in the music industry. A digital distribution process could provide consumers with music that is more portable and less costly, both appealing aspects to today's market.¹⁶¹ Additionally, studies suggest that those who illegally download music are also those who purchase the most music.¹⁶² Therefore, there is a great potential for music distributors to save money while increasing their stream of revenue should the distributor choose to convert their market to a digital realm. By partnering with multiple online intermediaries who could offer

reported 50 million subscribers internationally. Unlike Hulu, Netflix negotiates with television companies on a show-by-show basis instead of presenting an entire network's lineup. Netflix has partnered with Paramount Pictures, Lions Gate Entertainment, and Metro-Goldwyn-Mayer, increasing the company's access to a wider selection of feature films. *How Netflix Works*, HOW STUFF WORKS, www.howstuffworks.com/netflix.htm (last visited Nov. 4, 2014).

¹⁶⁰ A 2014 report by *The Huffington Post* suggests that nearly a fifth of American Netflix or Hulu subscribers have "cut the cord" on traditional cable TV services. While that percentage is substantial, the same report states that statistic rises to 1 in 4 consumers without traditional cable services when considering young adults between the ages of 18 and 34. In the past 14 years, average cable bills, not including fees, promotions, or taxes have risen a staggering 97 percent. Therefore, consumers, especially financially strained younger adults, are in constant pursuit of more affordable options. Timothy Stenovec, *Yes, Netflix and Hulu are Starting to Kill Cable*, HUFFINGTON POST: TECH (Apr. 17, 2014, 3:44 PM), www.huffingtonpost.com/2014/04/17/netflix-cable_n_5168725.html.

¹⁶¹ See Perritt, *supra* note 115, at 311.

¹⁶² See, e.g., Ken Fisher, *Study: P2P Users Buy More Music; Apathy, Not Piracy, the Problem*, ARS TECHNICA (Mar. 20, 2006, 1:33 PM) www.arstechnica.com/uncategorized/2006/03/6418-2 (finding in a Canadian study that peer-to-peer downloaders bought more music).

advertising-supported, low-cost streaming and downloading, record companies could potentially increase profits while likely skirting further piracy issues.

It is evident that digital distribution methods are far more cost-effective than that of traditional physical retail.¹⁶³ Not only would transactional costs to consumers decrease, but so would costs incurred by creators.¹⁶⁴ Internet-based promotion and distribution are more cost-effective than traditional methods.¹⁶⁵ With the use of current technology, overall advertising and reproduction costs could drastically decrease.¹⁶⁶ A significant advantage accompanying the adoption of this model would be the ease with which the industry could benefit from such online music networks to cut down on promotion costs by relying on consumers to promote artists using grassroots methods.¹⁶⁷ In creating a more interactive online network of musical selections, the industry would have further opportunities to gather consumer information. In turn, there would likely be a vast improvement in the decisions of distributors as to what singles or artists should be further promoted.

The current music distribution market is frequently characterized as a conglomerate.¹⁶⁸ It is increasingly more

¹⁶³ See Perritt, *supra* note 115, at 298–300.

¹⁶⁴ See *id.* at 270.

¹⁶⁵ See *id.* at 298–99.

¹⁶⁶ See *id.* at 302.

¹⁶⁷ For example, both Netflix and Hulu services allow customers to leave comments about each television episode viewed, creating an open dialogue amongst all viewers. Both sites also allow for customer connection to other social media sites, increasing the likelihood customers will comment on their viewing experiences on a variety of online platforms.

¹⁶⁸ See, Jeffrey Gilbert, *The Dixie Chicks: A Case Study for the Politics of Hollywood*, 9 TEX. REV. ENG. & SPORTS L. 307, 312 (2008). See generally, Adam J. van Alstyne, *Clear Control: An Antitrust Analysis of Clear Channel's Radio and Concert Empire*, 88 MINN. L. REV. 627, 627-29 (2004) (explaining how consolidation within the music promotion industry can lead to irreparable harm to other related industries).

common for national media companies to purchase local stations, effectively placing all management and programming decisions under one uniform production system.¹⁶⁹ Conglomeration has especially impacted the diversity of programming on local radio stations,¹⁷⁰ resulting in concentrated “playlists” made at the national level, which leads to a common tendency for stations across the country to play the same songs.¹⁷¹ However, shifting the music market to digital distribution could help further the industry’s refocus on the singles sale market¹⁷² instead of

¹⁶⁹ This behavior dates back to the 1996 Telecommunications Act, which loosened restrictions on ownership of multiple stations. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁷⁰ The trend of music conglomeration amongst radio stations is greatly important to the digital market considering radio plays are still where the majority of consumers are first being introduced to music and artists. If an artist can get on the radio, there is a much greater chance for success. *See Music Discovery Still Dominated by Radio, Says Nielson Music 360 Report*, NIELSON, (Aug. 14, 2012) <http://www.nielson.com/content/corporate/us/en/press-room/2012/music-discovery-still-dominated-by-radio--says-nielson-music-360.html>.

¹⁷¹ Laura M. Holson explores the relationship between artist research and the narrowing of radio programming in stating, “as the world of radio hardens into an industry dominated by three or four major chains, the use of research is accelerating and has become far more sophisticated, leading to mounting criticism that the quest for ratings is homogenizing music radio and making it harder for a different sound to break through.” Holson also reports that a division of Clear Channel, the largest chain of radio stations, reportedly charges record labels up to \$20,000 per song to test unreleased music on audiences. She suggests that what was once a simple conversation amongst industry professionals determining what audiences might want to hear is now big business. While it is important for music distributors to cater to their audiences, today’s music industry may be taking matters a step too far. Laura M. Holson, *With By-the-Numbers Radio, Requests Are a Dying Breed*, N.Y. TIMES (July 11, 2002) <http://www.nytimes.com/2002/07/11/business/with-by-the-numbers-radio-requests-are-a-dying-breed.html>.

¹⁷² Services like iTunes and Amazon Prime are already allowing consumers to purchase single songs from many full albums, but by making the trend more widespread there is a greater chance for revenue since consumers appear somewhat hesitant to spend much on music purchases. Boehm, *supra* note 46, at 196.

traditional album distribution. It could also serve the CRB's goal of maximizing the availability of song usage.¹⁷³ If consumers are able to access wide selections of music for a standard, low monthly payment, the consumer may be more inclined to seek out new artists.¹⁷⁴ There is a great potential for artists to see abundant financial gains stemming from album sales where consumers were first exposed to their work on digital media platforms.¹⁷⁵ It stands to reason that the music industry could begin to focus more heavily

¹⁷³ As explained by one industry expert, "For the most part, each time a song is played on ad-supported Pandora or subscription-based Spotify, it reaches one person. Each time a song is played on the radio, it can reach thousands of people—but when you turn on a radio station, you don't know what you're going to hear. Musicians expand their audience when new listeners stumble upon their work, which is why getting airplay is so important to them. Neither Pandora nor Spotify currently has anywhere near as many listeners as AM and FM radio—another reason it makes sense for them to pay less—but they also don't present the same kind of opportunities for discovering new music." So while distributing music online might be financially less profitable, new artists will still benefit from exposure that is uniquely accessible to online consumers. Wolk, *supra* note 68.

¹⁷⁴ Sites such as Spotify and Pandora *are* offering this distribution alternative already. However, as will be addressed later in this text, the rates at which both applications are currently running are ineffective in providing profits for the creators of the distributed music. *See infra* Part VI.C.i.a.

¹⁷⁵ A parallel for potential success can be drawn in looking at Netflix's critically acclaimed television series *House of Cards*. While Netflix will not announce the number of viewers tuning in for the program, one CNBC source estimated "some 16 percent of Netflix users on one particular Internet service . . . watched at least one episode of the show." Jenny Cosgrave, *Viewers 'Binge' on 'House of Cards' After Netflix Record High*, CNBC (Feb. 17, 2014, 7:19 AM), www.cnbc.com/id/101421361#. Regardless of the number of viewers, Netflix is seeing notable increases in share prices in response to the program's success. *See id.* But how does Netflix's success with original programming translate into future sales? While the program is continually available on Netflix, the company is now also producing the series on DVD and Blu-Ray format. A similar system could easily be implemented in the music industry. By allowing consumers to sample many artists and albums for a low monthly price, but still retaining the option to sell fans of each given album a hard or digital copy to add to their collections, production companies could profit from more avenues while still conforming to consumer demand.

on finding and promoting artists. National Public Radio publicly advocates for online music distribution sites to serve as a platform for music discovery,¹⁷⁶ where consumers can locate artists they enjoy and then choose the best method of supporting those artists.¹⁷⁷ Since there could be increased attention directed toward singles as an assessment for artist success over digital distribution channels, it is likely that producers would save on production costs of unsuccessful works.¹⁷⁸

¹⁷⁶ “Spotify (and/or its many cousins) works well as [a] try-it-before-you-buy-it discovery engine. You can’t discover a new favorite band if you’ve never heard its music, so take advantage of the many different ways to stumble upon great stuff and then make purchases as an informed consumer.” Stephen Thompson, *The Good Listener: Does Using Spotify Make You a Bad Person?*, NPR (Sept. 26, 2013, 3 PM), <http://www.npr.org/blogs/allsongs/2013/09/26/226468333/the-good-listener-does-using-spotify-make-you-a-bad-person>.

¹⁷⁷ *See id.* “[D]ig into the tremendous array of ways to sustain the livelihood of musicians whose work sustains *you*. Contribute to their Kickstarter campaigns if they exist. Go to their concerts and encourage your friends to join you – and, while you’re there, buy a T-shirt or music directly from the band itself. Champion the music you love on social media; that word of mouth means a lot, both financially and for morale.” *Id.*

¹⁷⁸ As explained by George Howard, a former mid-size record label president who currently works as an entertainment firm advisor and associate professor of music business and management at Berklee College of Music, “it’s now easier than ever to create and release music, artists are freed from the one-album-every-eighteen-months cycle that raised the stakes (and the cost of failure) to such a scary degree.” George Howard, *Sign and Fail: How the Traditional Music Industry Killed Culture*, TUNECORE (Dec. 1, 2011), <http://www.tunecore.com/blog/2011/12/sign-and-fail.html>. Howard finds the gradual switch from old music business where “you essentially got one shot” to a more flexible system encouraging to the promotion of a wider variety of artists. *Id.* He further states, “I strongly believe that this not only results in a higher chance of success for artists, but also in a more diverse musical landscape. This is because no one, *no one* knows what the market wants, and for too long people thought they did. This resulted in a lot of music being put into the market just because it resembled something else that had been successful.” *Id.*

i. Fixing the Current Online Music Distribution Model

As earlier mentioned, there are financially successful online distribution services available to music consumers.¹⁷⁹ It is easy to identify these services as a viable alternative to statutory reformation. However, under current models of online music distribution, artists are not compensated fairly enough to promote continuation of their work.¹⁸⁰ And while it may appear that online music distribution services are taking financial advantage of the artists they supposedly support, this is not necessarily the case. Online music distribution, as it operates today, is just not profitable enough to sustain adequate artist payment.¹⁸¹ The online music industry needs to find a way for current distribution services to incentivize artists to continue creating musical works through increased revenue.¹⁸²

¹⁷⁹ For purposes of this article, focus will solely rest on majority distributors. Majority distribution services do little pre-selection for the artists they work with in exchange for the best prices on the music market. See Budi Voogt, *The Indie Musician's Guide to Digital Distribution*, HYPEBOT.COM (Nov. 26, 2013), <http://www.hypebot.com/hypebot/2013/11/the-indie-musicians-guide-to-digital-distribution.html>. Conversely, selective distributors pre-select their clients in an attempt to work only in promotion of a certain type of artist. See *id.* iTunes and Spotify are both majority music distributors. While Pandora is technically labeled as an online radio service, the site still grapples with the same compensation issues as other music distribution services.

¹⁸⁰ See David Lowery, *My Song Got Played on Pandora 1 Million Times and All I Got Was \$16.89, Less Than What I Make from a Single T-Shirt Sale!*, TRICHORDIST (June 24, 2013), <http://thetrichordist.com/2013/06/24/my-song-got-played-on-pandora-1-million-times-and-all-i-got-was-16-89-less-than-what-i-make-from-a-single-t-shirt-sale/>.

¹⁸¹ See Paul Resnikoff, *Streaming Services Will Never Become Profitable, Study Finds...*, DIGITAL MUSIC NEWS (Feb. 18, 2014), <http://www.digitalmusicnews.com/permalink/2014/02/18/profitless> (“‘The streaming business has to slowly move from a free economy to a paid economy as the sustainability of an ad-supported revenue model is a big question mark.’”).

¹⁸² “‘The number one concern of the individual songwriters and composers we represent is getting fair payment from digital services,’ Paul Williams, president of the American Society of Composers, Authors, and Publishers told Wired. ‘Whenever I meet with members from all genres of music who are

a. Challenges Facing Today's Online Music Distribution Model

There is no arguing that online music distribution services are rapidly becoming integrated into our everyday lives.¹⁸³ With exponentially growing popularity, it would appear these sites are actually indicating a rise in artist compensation. However, while these services are legal, many consumers are unaware of how artists are negatively impacted by the staggeringly low royalty payments made to those artists whose works are accessible on such sites.¹⁸⁴ “It’s a big conundrum,” stated Brian Zisk, the founder of

struggling to make ends meet, that’s the thing they ask about most. They know that streaming is growing, and they don’t want to be left out in the cold in terms of having their creative work valued fairly.” Graeme McMillan, *Is Pandora Really Short-Changing Songwriters?*, WIRED (July 3, 2013, 6:30 AM), <http://www.wired.com/2013/07/david-lowery-pandora/>.

¹⁸³ “In 2014, Pandora reached 200 million users, with nearly 70 million active each month. By comparison, Spotify has about 40 million users as of 2014, 10 million of them premium subscribers.” *Spotify vs. Pandora*, DIFFEN, http://www.diffen.com/difference/Pandora_vs_Spotify (last visited Nov. 15, 2014).

¹⁸⁴ Countless artists have published their royalty payment records from online distribution sites in an effort to illustrate to consumers the harm of using services like Pandora and Spotify. One such artist is Damon Krukowski, of Galaxie 500 and Damon & Naomi, who issued the following statement: “Consider Pandora and Spotify, the streaming music services that are becoming ever more integrated into our daily listening habits. My BMI royalty check arrived recently, reporting songwriting earnings from the first quarter of 2012, and I was glad to see that our music is being listened to via these services. Galaxie 500’s ‘Tugboat’, for example, was played 7,800 times on Pandora that quarter, for which its three songwriters were paid a collective total of 21 cents, or seven cents each. Spotify pays better: For the 5,960 times ‘Tugboat’ was played there, Galaxie 500’s songwriters went collectively into triple digits: \$1.05 (35 cents each). To put this into perspective: Since we own our own recordings, by my calculation it would take songwriting royalties for roughly 312,000 plays on Pandora to earn us the profit of one-- one-- LP sale.” Damon Krukowski, *Making Cents*, PITCHFORK (Nov. 14, 2012), <http://pitchfork.com/features/articles/8993-the-cloud/>.

SF MusicTech Summit.¹⁸⁵ “[W]e are never going back to the days when people can sell tens or millions of CDs. So then the question is: How does the compensation happen.”¹⁸⁶

While copyright law has remained unchanged in addressing artist compensation issues, many industry experts and performers have publicly spoken out against the online distribution model. In June 2013, David Lowery, guitarist for the rock band Cracker, published his earnings from online distribution services, creating a significant buzz throughout the music community.¹⁸⁷ In his public statement, *My Song Got Played on Pandora 1 Million Times and All I Got Was \$16.89, Less Than What I Make From a Single T-Shirt Sale!*, Lowery urged fellow artists to announce their earnings from online distribution sites as well.¹⁸⁸

After Lowery’s initial attack on the online distribution system, Sasha Frere-Jones, a staff writer and pop-music critic for *The New Yorker*, was one of the first to address the issue:

¹⁸⁵ “The SF MusicTech Summit brings together visionaries in the evolving music/business/technology ecosystem, along with the best and brightest developers, entrepreneurs, investors, service providers, journalists, musicians, and organizations who work with them at the convergence of culture and commerce. We meet to do business and discuss, in a proactive, conducive to dealmaking environment.” SF MUSICTECH SUMMIT, <http://www.sfmusictech.com> (last visited Nov. 9, 2014).

¹⁸⁶ Andrew Leonard, *The Music Industry is Still Screwed: Why Spotify, Amazon and iTunes Can’t Save Musical Artists*, SALON (June 20, 2014, 6:44 AM), http://www.salon.com/2014/06/20/the_music_industry_is_still_screwed_why_spotify_amazon_and_itunes_cant_save_musical_artists/.

¹⁸⁷ See Wolk, *supra* note 68. See generally Lowery, *supra* note 180 (Lowery’s published earnings).

¹⁸⁸ See Lowery, *supra* note 180. In response to Lowery’s commentary on poor online distribution profits, English singer-songwriter Sam Duckworth published proof that one month of 4,685 plays on Spotify earned him less than 20 pounds. See Wolk, *supra* note 68. While the artist feels cheated by such low profit margins, author Douglas Wolk does put this statistic in some interesting perspective. “That might well be the case. If we’re getting into hypotheticals, though, how many of those listeners might have bought the album, or come to one of Duckworth’s shows, *because* they heard the stream and were impressed by what they heard?” *Id.*

The shortest version is that the Spotify model does not favor new artists. The larger grumbling about streaming services in the musician community is that the various services, which are governed by fluid and complex laws that are changing as we speak, favor nobody but the major labels that helped fund and grow some of them.¹⁸⁹

While Spotify routinely declines comment on its royalty rates, according to a pool of music executives who have negotiated with the company, Spotify pays roughly 0.5 to 0.7 cents per stream for its paid tier, and as much as 90 percent less for free account holders.¹⁹⁰

For artists whose income is reliant on royalties, the biggest concern is whether streaming will put an end to CD and download sales by offering a cheap or free alternative. However, it is best to keep in mind that streaming services are a relatively new offering. As aptly stated by Donald Passman, a well-recognized music attorney, “Artists didn’t make big money from CDs when they were introduced, either. They were a specialty thing, and had a lower royalty rate. Then as it became mainstream, the royalties went up. And that’s what will happen here.”¹⁹¹ While it is uncertain this hunch will prove true, it is clear the online distribution model is not completely flawed. The music industry needs to search for modifications to the already functional system that will more fairly compensate artists.¹⁹²

¹⁸⁹ Sasha Frere-Jones, *If You Care About Music, Should You Ditch Spotify?*, NEW YORKER (July 19, 2013), <http://www.newyorker.com/culture/sasha-frere-jones/if-you-care-about-music-should-you-ditch-spotify>.

¹⁹⁰ Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, N.Y. TIMES, Jan. 28, 2013, available at <http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html?pagewanted=all>.

¹⁹¹ *Id.*

¹⁹² According to one source encouraging change in the online distribution industry, “The key to a future where streaming may be the preferred delivery method is dependent upon more variations and flexibility in the business model than currently offered by Spotify. There are a range of opportunities in exploring

*b. Solutions for a More Collectively Beneficial Digital
Distribution Service*

While it is clear that current online music distribution services are not adequately serving artists, the business model is not a lost cause. It may take some time for developers to create an environment that is beneficial to all parties involved; however, there are steps that can be taken to initiate change.

The first alteration in working toward fair artist compensation would be raising service subscription fees. Both Pandora and Spotify currently offer a free tier of subscription.¹⁹³ While this is ideal for consumers, there is no benefit to anyone involved in creating the music they are accessing. Television distribution sites have recognized significant success with free limited trials, but after a temporary period, rates are always raised to a more fiscally sustainable level.¹⁹⁴

business models that allow for streaming rentals, and limited access to different material at different times.” *Why Spotify is Not Netflix (But Maybe it Should Be)*, TRICHORDIST (Oct. 17, 2013), <http://thetrichordist.com/2013/10/17/why-spotify-is-not-netflix-and-why-it-maybe-should-be/>.

¹⁹³ While both Spotify and Pandora are labeled as commercial services, each program does allow users to access content for free. Where Pandora’s \$4.99/month premium service allows customers to access music ad-free (as does Spotify Premium at \$9.99/month) both payment structures are optional. Customers streaming for free will have to withstand some restrictions, as well as advertisements. However, for many modern consumers this is a small price to pay for free music services. *Spotify v. Pandora*, DIFFEN http://www.diffen.com/difference/Pandora_vs_Spotify (last visited Nov. 13, 2014).

¹⁹⁴ Both Netflix and Hulu Plus (the two most commonly accessed online television streaming services) offer free trials for new users. However, the longest any given trial lasts is thirty days, after which subscribers are forced to cancel access to programming or begin monthly payments. *Netflix vs. Hulu Plus: What’s the Best App to Stream TV Shows and Movies?*, HEAVY (July 2, 2014, 1:34 PM), <http://heavy.com/tech/2014/07/netflix-vs-hulu-plus-whats-the-best-app-to-stream-tv-shows-and-movies/>.

The online distribution services would also be wise to explore possibilities of transactional streaming.¹⁹⁵ Much like how the iTunes business model operates, there is no reason why every song ever released should be available at the same price point.¹⁹⁶ While we are already beginning to see this trend in other areas of popular music culture, it would be beneficial for artists to charge an advance for high-profile new releases that will attract listeners to a specific online distribution service.¹⁹⁷

An alternative pricing proposal to fix current issues in online music distribution would be the implementation of a variety of pricing tiers. Much like cable television and SiriusXM radio,¹⁹⁸ catalogs of music could be organized and marketed towards certain

¹⁹⁵ David Lowery, *How to Fix Streaming Music's Business Model*, HYPEBOT (Oct. 14, 2014) <http://hypebot.com/hypebot/2014/10/how-to-fix-streaming-musics-business-model.html> (noting that iTunes, a transactional music seller, has been highly successful and that a similar model may be worth pursuing with streaming).

¹⁹⁶ There are endless possibilities in staggering online music pricing. For example, new releases could be priced as transactional streams where the consumer can choose between low-cost limited access to a new release, or pay more for a transactional download. *Id.*

¹⁹⁷ For example, country-turned-pop-artist Taylor Swift has released deluxe editions of her past three albums exclusively to Target. While fans can still access the bulk of her music online or from other retailers, the incentive remains to purchase a physical CD from Target stores. Carolyn Menyes, *Taylor Swift New Album '1989' Deluxe Edition to Sell Exclusively at Target*, MUSIC TIMES (Aug. 19, 2014), <http://www.musictimes.com/articles/8984/20140819/taylor-swift-new-album-1989-deluxe-edition-target.htm>; see also *The Secret Genius of Taylor Swift*, NAT'L PUB. RADIO (Nov. 9, 2012, 3:17 AM), <http://www.npr.org/blogs/money/2012/11/09/164742426/the-secret-genius-of-taylor-swift> (“[T]he tools Swift didn't use are as important than [sic] the ones she did. By refusing to release her singles on Spotify, or any other streaming site, she pushed her fans to buy the album. Spotify pays the artist pennies on the dollar. Taylor Swift skipped it.”).

¹⁹⁸ SiriusXM Radio is commercial-free radio programming, available to consumers at varying subscription and price levels. *What is SiriusXM?*, SIRIUSXM SATELLITE RADIO, <http://www.siriusxm.com/whatissiriusxm> (last visited Nov. 13, 2014).

audiences.¹⁹⁹ Similarly, the online music industry would likely see positive change in a decision to implement a release windowing system.²⁰⁰ Much like the structure the film industry utilizes for its releases, music distribution services could weigh the cost of ownership rights of new albums in relation to the length the albums have been available for purchase on the market.

While forming a model similar to online television distribution may seem appealing,²⁰¹ consideration must be given to the

¹⁹⁹ “Creating bundled packages adds value to both the end user and the streaming service. Individual packages can be as little as \$4.99 a month, and complete access could [be] priced at \$49.99 a month.” Lowery, *supra* note 195.

²⁰⁰ Feature-length films are routinely released in “windows.” *Why Spotify is Not Netflix (But Maybe it Should Be)*, *supra* note 192. Most films follow a format similar to this:

1. Film Released in Theaters
2. Film Released later on Video on Demand (Rental)
3. Film Released later on Cable and/or Broadcast
- [4.] Film Released Later on Home Video (Rental and Purchase)
- [5.] Film Released Later on Netflix (Subscription).

Id. And while this model is not always followed, the general idea is that different levels of ownership of the movie are available at specific points in time and for a range of prices. This model also has potential for success in the music industry. *The Trichordist* suggests an online music distribution windowing system as follows:

1. Single Release Digital Transactional Download 99 cents
2. Single/Song Release Digital Transactional Streaming Rental 10 cents for 24 hours
3. Album Release Digital Transactional Download 9.99
4. Album Release Digital Transactional Streaming Rental \$1 for 24 hours
5. Select Songs Released to Subscription Streaming Services, not whole albums.
6. Album Release Subscription Streaming Services.

Id.

²⁰¹ Despite charges to consumers wishing to use services like Hulu and Netflix, online television distribution websites appear to be continuing to make financial gains. According to a report by *Equities.com*, an online financial resource platform that combines interactive social networking capabilities for investors and public companies, despite Netflix’s recent one dollar per month increase in subscription price, the company is still benefitting from production of original programming content, and subscriber rates are on the rise. Remy

likelihood that consumers will conform to a new system. From a distance it seems unlikely that consumers would pay even a reasonable fee for music access when, competing, albeit illegal, networks are still offering music for free.²⁰² Overcoming the piracy obstacle appears especially daunting, considering that illegal downloading has become an international habit among the majority of consumers.²⁰³ For an effective change in the music industry to occur, record companies will need to incentivize behavioral changes among consumers. In moving forward to better the online distribution market, audience education will be undoubtedly necessary.²⁰⁴ If consumers realized services such as Pandora and Spotify are not beneficial to the artists they support, they would be less likely to use these services.

Merritt, *How Netflix is Cashing in on Orange is the New Black*, EQUITIES.COM (June 5, 2014, 10:03 PM) <http://www.equities.com/editors-desk/stocks/technology/orange-is-the-new-black-buys-netflix-subscribers-respect>.

²⁰² While the RIAA recognizes that piracy will likely forever be an ongoing struggle in the music industry, should artists continue to see such drastically diminished profits, the RIAA asserts it would not be able to maintain itself. “Q: Don’t you think some people are always going to download music illegally, even with a graduated response program in place? . . . [A:] As an industry, we have lived with street piracy for years. Similarly, there will always be a degree of piracy on the Internet. It’s not realistic to wipe it out entirely but instead to bring it to a level of manageable control so a legitimate marketplace can really flourish.” *For Students Doing Reports*, RECORDING INDUSTRY ASS’N AM., <http://www.riaa.com/faq.php> (last visited Nov. 13, 2014).

²⁰³ While music piracy is a substantial—and unfortunately growing—issue in the United States, international markets are seeing an even larger financial hit due to the illegal file sharing. According to a report by *The New York Times*, many critics believe music companies “have been too slow to embrace new online business models that are attractive enough to lure music fans away from pirate sites.” Pfanner, *supra* note 153.

²⁰⁴ “Because of the social norm of accepting digital music file-sharing, the recording industry has attempted to change the norm by educating the public on copyright law, which included the legal strategy of suing individual file-sharers and labeling the act of digital file-sharing as theft and piracy.” Schwender, *supra* note 3, at 261.

By placing new songs in online music networks where consumers can safely access high-quality music while still supporting both artists and the industry, a change most likely to benefit songwriters may occur.²⁰⁵ It will also be crucially important, in following successful television models, for online music distributors to invest resources to improve the music community at large.²⁰⁶ In return, online distribution services would hopefully begin to recognize the value of providing financial and business support for emerging artists.²⁰⁷ It will undoubtedly be a long journey for the music industry to develop a social norm favoring legitimate avenues of music consumption; however, this is a change necessary to its survival.²⁰⁸

VII. CONCLUSION

²⁰⁵ Spotify is the first music streaming system to see much use from consumers. While the program (which launched in Sweden) is fairly new to the American market, it is gaining in popularity amongst its *paying* users. According to Spotify's co-founder and chief executive, Daniel Ek, the company has high hopes that customers will begin to see the benefit of supporting artists as valid incentive to pay the \$10-per-month subscription fee. *See* The Spotify Team, *\$2 Billion and Counting*, SPOTIFY (Nov. 11, 2014), <https://news.spotify.com/uk/2014/11/11/2-billion-and-counting/> ("We're trying to build a new music economy that works for artists in a way the music industry never has before.").

²⁰⁶ "Netflix in responding to their needs in the marketplace is actually investing capital directly into content creation in a meaningful way." *Why Spotify is Not Netflix (But Maybe it Should Be)*, *supra* note 192.

²⁰⁷ *Id.*

²⁰⁸ The music industry is not alone on the receiving end of financial hits due to piracy. Similar anti-theft precautions are currently being employed by the film industry as well. For example, in the spring of 2014, Warner Bros. Pictures U.K. launched an exclusive trailer for *The LEGO Movie* as part of an anti-piracy campaign targeting its young audiences. According to Liz Bales, the director general at Industry Trust for IP Awareness, it is "crucial that the film industry is connecting them with legal services, making it easy to choose to pay for official content and less likely that they would inadvertently or intentionally access pirate websites." Stuart Kemp, *U.K. Anti-Piracy Campaign Brings 'The LEGO Movie' Trailer to Life*, HOLLYWOOD REP. (Nov. 29, 2013, 8:33 AM), <http://www.hollywoodreporter.com/news/uk-anti-piracy-campaign-brings-660726>.

While SEA is a valid attempt at reforming the long-standing difficulties presented in section 114 and section 115 of the Copyright Act, it is unlikely a statutory change will most effectively create change at the speed it needs to occur. An increase in mechanical royalties may appear beneficial to songwriters, but the increased production costs will likely burden music dissemination to a crippling degree. By instead modernizing how consumers view the accessibility of music and placing it in a context comfortable to most purchasers, there is a possibility for songwriters to more quickly benefit from the copyright laws already in place. Modifications can, and *should*, be made to online music distribution outlets to more ethically and financially support every party involved in each music transaction.