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BARRIERS TO FINANCIAL COMPENSATION FOR ARTISTS IN THE RECORDING INDUSTRY IN THE DIGITAL AGE

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ABSTRACT

For decades, consumers, due to frequent technological advances, have utilized a variety of music-listening processes that have each become obsolete as more easily accessible technologies emerged. This change in music consumption methods is often detrimental to parties in the recording industry. The digitalization of the recording industry has allowed consumers to obtain music through means other than physical purchase, leading to well-documented financial insecurity for artists (Eiriz & Leite, 2017). In 2018, the Music Industry Research Association (MIRA) conducted a survey of 1,227 musicians and found that 61% of the group agreed that their music-related income is not enough to cover their living expenses (MIRA, 2018). For this reason, frequent attempts to deter widespread copyright infringement have been made. However, the aggressive litigation strategy of the recording industry and the development of streaming services as a viable music consumption method have instead decreased sales and negatively impacted artists' revenue from the recording industry (Fedock, 2005; Marshall, 2015).

INTRODUCTION

With the creation of the MP3 format and peer-to-peer file sharing during the 1990s, the growth of Internet music piracy accelerated significantly. Peer-to-peer file sharing allows consumers to download and share copyrighted works uploaded by other users on a peer-to-peer network. Napster, Inc., a popular peer-to-peer file sharing service, posed a great threat to the recording industry by enabling this unregulated exchange of music between consumers (David, 2010). By May of 1999, consumers could utilize Napster to

listen to music on the platform, but they could also register for an account that allowed them to freely download content not in their possession (Gopal, Sanders, Bhattacharjee, Agrawal, & Wagner, 2004). For this reason, the Recording Industry Association of America (RIAA), a trade group representing the recording industry, assisted several recording companies in suing Napster, alleging contributory and vicarious copyright infringement (Berschadsky, 2000). Filed on December 9, 1999, *A&M Records, Inc. v. Napster, Inc.* was the first major case to apply copyright laws to peer-to-peer file sharing and combat Internet music piracy in a newly-transformed market. The court found that peer-to-peer file sharing services were liable for copyright infringement, but subsequent lawsuits were less favorably received, for, instead of holding sharing services liable, they targeted individual file sharers. The focus of this literature review is to explore the significant challenges that have contributed to revenue decline for artists in the United States' recording industry.

Brief History of Copyright Law

Intellectual property may be described as “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce” (World Intellectual Property Organization, n.d.). In the United States, the law grants owners of intellectual property exclusive rights to their original works or ideas. Intellectual property protections offer artists a number of rights that help control the circulation of ideas throughout society, including copyrights and other protections of literary and artistic expression (Field, 2006).

Modern copyright law first arose in the early 1700s after legislation was passed to protect the works of intellectual property owners. In 1710, the Statute of Anne was written in England as a response to the rampant unauthorized publication of authors' works throughout the country (Kretschmer, 2000). For this reason, early English authors were often deprived of financial compensation for their intellectual property. The Statute of Anne prohibited printing guilds and other parties from duplicating and distributing authors' works without their consent (Statute of Anne, 1710). Further, the English approach to safeguarding intellectual property served as an early model for the United States' copyright legislation.

The U.S. Congress established the nation's very first copyright law in the late 1700s (Kretschmer, 2000). The U.S. Constitution sought "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries" (U.S. Const. art. I, § 8, cl. 8). This legislation paved the way for the Copyright Act of 1790, but this act had significant limitations, as it only secured "the copies of maps, chart, and book, to the authors and proprietors of such copies" in its encouragement of learning (Copyright Act of 1790). In the following decades, lawmakers made several revisions to this legislation to extend the terms of protection and to offer such protections to works that were not included in the nation's earliest federal copyright laws, such as both written and recorded musical works (Cummings, 2010).

The Copyright Act of 1909 was enacted to offer protection to the authors of musical works. This act conferred upon copyright owners the exclusive right to reproduce as well as perform their works in public (Copyright Act of 1909). According to the United States Copyright Office (USCO), a phonorecord is defined as "a material object in which sounds are fixed...and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (USCO, 2018). The reproduction right gives copyright owners the specific right to solely reproduce their original composition (written music) and sound recordings (recorded performance of music) in phonorecords (Hanus, 2018). Correspondingly, the reproduction right prohibits anyone other than the copyright owner from producing phonorecords (i.e., records, cassette tapes, and CDs) of both compositions and sound recordings. In addition to extending protection to all original works of authorship, the Copyright Act of 1909 also devised a compulsory licensing system, which aided artists in obtaining financial compensation for reproductions, such as cover recordings of their original composition recordings (Copyright Act of 1909).

Despite these developments, the Copyright Act of 1909 failed to address initially unreleased sound recordings, and, as a result, these did not receive copyright protection for decades (Cummings, 2010). Consumers could copy and share sound recordings, such as those on records, without infringing on their copyright. American copyright law was limited until the 1970s, when drastic reform addressed artists' lack of protections for sound recordings.

Widespread illegal copying of musical works occurred in the U.S. after the 1960s. As tape cassettes and cartridges became a mass consumer good in America, illegal recording and distribution of concert performances followed (Cummings, 2010). The Copyright Act of 1976 was written to combat the rampant piracy observed throughout the United States by increasing the scope of works that were protected, extending their protection term length, and addressing copyright infringement, registration, and fair use of original works (Copyright Act of 1976). Despite this drastic revision of copyright law, artists were still denied adequate protection of their sound recordings until later in the twentieth century.

A limited public performance right for the digital streaming of copyrighted sound was granted by the Digital Performance Right in the Sound Recordings Act of 1995 (LaFrance, 2002). Shortly afterward, this right was refined and expanded in the U.S. by the Digital Millennium Copyright Act (USCO, 1998). Following the Digital Performance Right in Sound Recordings Act, further reform was needed to address the increasing availability of new digitalized music formats that complicated the future of the recording industry yet again.

Approved in 1992 by the Moving Picture Experts Group, the digital music format MP3 is an international standard for encoding and compressing audio (Garofalo, 1999). In past decades, consumers were limited to solely sharing physical forms of music (i.e., records, cassette tapes, and CDs) and burdened by constraints such as time, money, and other inconvenient aspects of creating and sharing pirated products (Koh, Murthi, & Raghunathan, 2014). The use of MP3 digital technology enabled consumers to duplicate music with more efficiency (Marshall, 2005), paving the way for rampant illegal sharing of copyrighted works and threatening the profits of artists of the recording industry.

Music piracy, or the illegal distribution of copyrighted music, poses a significant threat to creative industries (Chiou, Huang, & Lee, 2005). Music piracy has posed a challenge to artists since the late nineteenth century, when competitors discovered how to copy recordings using Thomas Edison's phonograph technology (Cummings, 2010). Despite the prevalence of piracy throughout history, the rise of MP3, paired with the growth of the

Internet, allowed consumers to share music illegally on a much larger scale than before. For this reason, the recording industry has been aggressive in finding effective ways to combat piracy.

LITERATURE REVIEW

The Litigation of Music Piracy

Aggressive litigation. The availability of MP3-formatted music and peer-to-peer file sharing services enabled consumers to engage in music piracy more easily. Within a few short months after Napster's release, the service rose to popularity and accumulated five million registered users, many of whom used the file sharing system to download copyrighted music for free (Musgrove & Thomason, 2000). *A&M Records, Inc. v. Napster, Inc.* was an attempt to control this unregulated exchange of music on peer-to-peer file sharing services (*A&M Records, Inc. v. Napster, Inc.*, 2001). In May 2000, the court found Napster violated the Digital Millennium Copyright Act of 1998 (DMCA) and called for the complete removal of copyrighted works, thus beginning the demise of the service (Gopal et al., 2004).

Litigation damages sales and public opinion of the recording industry. Soon after the RIAA sued Napster, Inc. for facilitating Internet music piracy, the RIAA sought further action against copyright infringement. In January of 2003, the RIAA filed suit against Verizon, a leading Internet Service Provider (ISP) and won (Electronic Privacy Information Center, n.d.). Using the DMCA, the RIAA forced Verizon to release the identities, via IP (Internet Protocol) address, of Internet service subscribers suspected of digital music theft (Fedock, 2005). Verizon appealed, arguing that the subpoenas sent to ISPs did not fall under the extraordinary subpoena authority of the DMCA (Bhattacharjee, Gopal, Lertwachara, & Marsden, 2006). The courts rejected this argument, and Verizon lost the appeal. Soon afterward, the RIAA began to serve the subpoenas with power granted by section 512(h) (Goel, Miesing, & Chandra, 2010).

The DMCA was intended to combat online copyright infringement. One method of the DMCA, the criminalization of the "circumvention of technological measures used by copyright owners to protect their works," places restrictions on the intellectual

properties that made illegal file sharing more difficult for infringers (USCO, 1998, p. 2). In addition to anti-circumvention provisions, lawmakers added section 512, a clause addressing online copyright infringement, to the DMCA. Service providers were made liable for infringement conducted on their servers, unless the service provider qualified for limitations of liability, under the DMCA, to deter illegal file sharing. Section 512(h) grants copyright owners, or those acting on their behalf, the right to litigate against individual users by serving service providers with subpoenas that call for the identification of the alleged infringers (Zilkha, 2009). Although lawmakers attempted to return power to the owners of digital works by creating the DMCA and section 512(h), the legislation was ultimately abused by the recording industry through the use of subpoenas and litigation against individual end-users (Bhattacharjee et al., 2006).

In September of 2003, the RIAA filed over 200 lawsuits using subpoenas issued by section 512(h); Electronic Frontier Foundation (EFF, 2008). As a result of a lack of judicial oversight throughout the subpoena process, the RIAA pursued maximum statutory damages against alleged file sharers, hoping to promote public observance of copyright law (Sag, 2016). Individuals accused of sharing music illegally were forced to settle suits for thousands of dollars because fighting the accusations in court would have been more expensive than paying the fines (EFF, 2008). The RIAA subpoenaed children, grandparents, and deceased people accused of file sharing, often seeking as much as \$150,000 in damages (Fogarty, 2008). The RIAA sought to collect significant sums of money as well as public apologies from the defendants, regardless of the defendant's financial limitations or the context of the initial file sharing (EFF, 2008; Sag, 2016). The RIAA sued individual infringers in an attempt to dissuade and eventually end Internet music piracy; they incurred significant legal fees from the lawsuits, while Internet music piracy continued to escalate (EFF, 2008; Fogarty, 2008).

The RIAA acknowledged that filing lawsuits against individual file sharers was both impractical and ineffective in preventing Internet music piracy. Further, the relentless targeting of file sharers conducted by the RIAA significantly damaged the public's opinion of the recording industry. Consumers were dissuaded from purchasing music, fearing the legal actions of the RIAA, which targeted individual file sharers including children, teenagers, and

grandparents (Choi & Perez, 2007). To illustrate, David Draiman, a popular rock vocalist from the band Disturbed, argued that “Instead of spending all this money litigating against kids who are the people they’re trying to sell things to in the first place, they have to learn how to effectively use the Internet” (Selvin & Chonin, 2003, para. 4). Wang and McClung (2011) noted that, although threatening file sharers with lawsuits and fines can be effective, legal actions such as these can also inspire defensive reactions that may lead to a boomerang effect, a strong opposing response caused by attempts to restrict a person’s freedom or change their attitudes. Mitchell, Scott, and Brown (2018) found that, instead of benefiting the recording industry, “the RIAA’s model of litigation actually backfired and led to decreased legitimate album sales” (p. 59). Mitchell et al. (2018) used Nielsen’s SoundScan, a database of weekly song and album sales, to track monthly album sales from January of 1994 to December of 2014. Their findings support the notion that the legal actions of the RIAA were responsible for a decline in annual per capita album sales.

In addition to a loss of sales, the lawsuits did little to help the artists that the RIAA claimed to be defending. Following the copyright settlements, artists’ managers sought to collect money on behalf of their clients, but literature highlights how money collected by the RIAA from peer-to-peer settlements was paid to compensate artists (EFF, 2008). Bhattacharjee et al. (2006) found that the increased cost of the lawsuit campaigns took a significant toll on RIAA. Correspondingly, labels struggled with the depletion of settlement money after their legal expenses were recouped. Further, Rainie and Madden (2004) conducted a web survey exploring copyright and music sharing with 2,755 musician and songwriter participants. They found that 60% of the sample of artists agreed that the RIAA lawsuits against individual file sharers would not benefit musicians and songwriters. At the same time, Rainie and Madden (2004) noted that almost two-thirds of the survey group felt that the companies who owned and operated peer-to-peer networks should be held responsible for individual file sharers. Although the RIAA originally believed mass lawsuits would discourage piracy and keep their business model afloat, the targeting of anonymous file sharers resulted in a decline in music sales and severe public criticism of their litigation strategy.

The RIAA subsequently switched to sending threatening letters to those accused of illegally sharing music (EFF, 2008). These

letters offered file sharers an opportunity to settle disputes, and, as a result, the RIAA was able to collect amounts averaging \$3,000 (EFF, 2008). This litigation strategy pushed the Court of Appeals for the District of Columbia to overturn the decision in *Verizon v. RIAA* and moved to prevent the RIAA from using its federal subpoena power (Bhattacharjee et al., 2006). On January 21, 2004, the RIAA began filing a series of lawsuits against unidentified “John Doe” defendants by employing investigators to find individuals uploading copyrighted music to peer-to-peer networks via an IP address. The investigators later revealed the identities of the anonymous defendants (Goel et al., 2010; Grodzinsky & Tavani, 2005). By 2008, the RIAA was able to target and prosecute over 35,000 individuals accused of illegal file sharing (Mitchell et al., 2018). However, due to significant public backlash from the RIAA litigation war, the recording industry organization announced later in the year that they would be putting an end to the lawsuits (EFF, 2008). As a result, instead of targeting developers of file sharing services or individual file sharers, the RIAA announced that they would focus their efforts on the most egregious copyright infringers—those who possessed and uploaded large numbers of pirated files to the Internet (Goel et al., 2010; Rainie, Mudd, Madden, & Hess, 2004). Despite their effort to identify and sue the worst pirates, the rising popularity of the BitTorrent protocol forced the recording industry to usher in an additional phase of mass John Doe litigation (Sag, 2016).

Litigation decentralizes the file sharing process. *A&M Records, Inc. v. Napster, Inc.* resulted in the decentralization of the file sharing process and the rise of file sharing utilities. First implemented in 2001, the BitTorrent protocol was a method developed to share files via direct peer-to-peer connections with outside hosts (Kash, Lai, Zhang, & Zohar, 2012). Although BitTorrent was originally designed to distribute legal downloads, such as open source software and commercial video games, the technology granted its users the ability to exchange pirated content (McKinney & Renaud, 2011). Under BitTorrent, the “seeders,” often referred to as individuals who share complete files stored on their computers, utilize torrent websites to upload files that are then divided into a large number of small information packets (Chan, 2017). As a user’s download progresses, a portion of these file packets is downloaded from the original seeder to the user’s hard drive. The user also acquires additional information

packets from other users downloading the same file. Users receive packets while sharing their data with others attempting to download the same file, thus expediting the original file transfer process. BitTorrent users were capable of uploading and downloading information packets simultaneously (Giblin, 2011). The increased efficiency of file sharing caused BitTorrent to rise in popularity; “within a year of starting the company, files shared on Bit-Torrent made up more than a third of all traffic on the internet” (Pierce, 2018, para. 1). Sun (2018) noted that the availability of free music on peer-to-peer networks such as BitTorrent remains the main push towards peer-to-peer file sharing. Presently, BitTorrent is accessed by 170 million users each month (BitTorrent, 2018).

The efficiency of BitTorrent, paired with its ability to acquire music for free, enticed many music downloaders to illegally share copyrighted music (Karunaratne, 2012), but BitTorrent software providers were not sued for copyright infringement (Bridy, 2009). Bridy (2009) argued that filing lawsuits against companies such as BitTorrent has no impact on illegal file sharing. BitTorrent does not rely on a single server; each user’s computer is connected indirectly to every other user’s computer via the Internet (Karunaratne, 2012). Not storing data on a central server protected BitTorrent from anti-piracy efforts because it did not host actual copyrighted content; the content moved continuously between multiple computers. Peña-Porrás (2018) noted that previous attempts made by the recording industry to terminate piracy-supporting websites only resulted in the sprouting of newer websites that replaced those that were shut down. The legal measures originally intended to benefit the recording industry ultimately resulted in the decentralization of the file sharing process, and, as a result, the recording industry was defeated by its own attempts to prevent music piracy (Sun, 2018). The decentralized BitTorrent system rendered the recording industry incapable of maintaining dominance over file-sharing technology (Fuller, 2018). The recording industry subsequently invested in developing viable music methods to properly compensate artists for their work, in the hope of effectively combating piracy (Gopal et al., 2004).

Music streaming services. Literature indicates that the development of fee-based download services can be used to combat music piracy. In contrast to illegal file sharing, on-demand streaming services allow consumers to listen to a comprehensive library

without purchasing individual music products (Wlömert & Papies, 2015). Streaming services generate revenue either by charging users a subscription fee to access their comprehensive libraries (i.e., paid streaming service) or by subsidizing free streaming services by selling advertising to yield a profit (i.e., free streaming service). In 2018, the International Federation of the Phonographic Industry (IFPI) estimated that 86% of consumers accessed music through on-demand streaming services. Despite the growing popularity of music streaming, services such as these remain problematic to artists in the recording industry.

Music streaming services hurt physical sales. Both the recording industry and the research community have analyzed the impacts of on-demand streaming services on recording artists' revenues. Although streaming services were originally intended to deter piracy, Marshall (2015) showed that recording artists believe on-demand streaming services pose a great threat to both digital and physical music sales. Research indicates that both fee-based and free streaming services can appeal to artists' pre-existing customers, who prefer streaming to physical purchases of music (Wlömert & Papies, 2015). Wlömert and Papies (2015) also noted that consumers of paid subscription services are even less likely to make physical purchases of music, preferring to have access to the plentiful catalog of music their streaming service offers. This is particularly detrimental to artists who generate less revenue from streaming services than from physical sales of their music. Artists have been forced to accept that consumers are less willing to purchase their creative works when cheaper music-listening methods, such as streaming services, are available to them as an alternative.

Music streaming services increase the likelihood of music piracy. Research suggests that music-streaming services negatively impact artists' revenues and encourage music piracy. Aguiar and Waldfogel (2018) used a regression analysis of 2013 top track sales and found that the streaming service Spotify supported music piracy. Borja, Dieringer, and Daw (2014) noted that frequent users of music streaming have the technical proficiency to illegally download music and are comfortable with using the technology to engage in music piracy. They found that utilizing music streaming services increases the likelihood of engaging in music piracy by about 20%. Borja and Dieringer (2016) stated that streaming services provide users with the

technology to discover and listen to new music releases, which in turn compels them to seek access to new tracks illegally. Though music streaming is a less expensive alternative to purchasing music works, illegal file sharing is still rampant within the recording industry. MUSO (2017), a global piracy data monitor, found that “access to piracy websites for music dramatically surged in 2017, increasing to 73.9 billion visits: a 14.7 percent increase from 2016” (para. 8). In addition to the revenue losses sustained from decreasing music sales, artists also experience great difficulties in earning money from streaming services.

Music streaming services insufficiently distribute royalties to artists. Under the recording industry’s previous business model, artists were compensated with a percentage of each sale of their musical works (Hanus, 2018). Digital music streaming changed how artists and songwriters earn revenue for their work today. Interactive digital streaming services, such as Spotify, currently distribute royalty payments to artists using a per-stream model, otherwise known as service-centric licensing (Dimont, 2018). Service-centric licensing pays royalties to artists “per-stream,” but streaming-service users pay a flat subscription rate, thus resulting in a cross-subsidization between high-streaming users and low-streaming users. Under this model, money is distributed by dividing the total revenue by the number of times a musical work is streamed on the platform. Revenue is dependent on the streaming platform’s number of subscribers, regardless of the number of times a musical work is played (Marshall, 2015). Some artists receive minimal compensation, even when their music is very popular.

In 2018, a data visualization organization, Information is Beautiful, found that the average per-stream royalty to music rights holders was \$0.0007 to \$0.0190 (Information is Beautiful, 2018). The low average payout per stream is not only paid to artists, but all rights holders of the work (Dimont, 2018). As a result, artists receive an even smaller fraction of the stream payout after the record label, producers, and songwriters have all taken their cut. In previous decades, parties within the recording industry used a business model in which artists were compensated with a percentage of each album or individual song they sold (Hanus, 2018). Streaming services have resulted in a significant royalty loss for artists.

Inadequate compensation for artists. After the MP3 file format was created, consumers were able to easily distribute copyrighted works. Widespread piracy ensued, and the recording industry responded by creating music-streaming services. Although streaming services offer royalties to rights holders, they distribute inadequate compensation to artists. Spotify and other interactive streaming services use service-centric licensing, a flawed system that pays rights-holders each time their work is streamed (Dimont, 2018). Kretschmer (2000) analyzed streaming service income distribution and noted, “Very few artists can expect to have a sizeable income from royalties” (p. 217). Today, artists are not satisfied with their organizational reward. Marshall (2015) wrote:

Artists are thus being told that they are wrong to treat streams like sales that they should adopt a patient, long run view. Yet, while large labels with cash reserves to potentially ride out the storm, artists who need money to live on now argue that streaming is undermining their current income by cutting into their digital sales. (p. 183)

Presently, the Orrin G. Hatch-Bob Goodlatte Music Modernization Act (MMA) is legislation that describes royalty distribution on streaming services. The MMA created a council of publishers that issue blanket licenses to digital music services and later collect and distribute those royalties to artists (LaFrance, 2018). This licensing collective also provides increased protections for pre-1972 recordings as well as to music publishers and engineers. The MMA allows rate court judges to consider sound recording royalties when adjusting public performance royalties for music streaming. As the royalties for sound recordings are typically greater than those for public performance, rate court judges have the power to set the amount of royalties paid for live performances closer to those paid for sound recordings, which benefits the artist. Despite these benefits, this new legislation is limited in scope because it only addresses licensed uses of artists’ works.

Today, there is no system that adequately rewards an artist for each instance a consumer streams one of their music tracks. YouTube is considered the most popular streaming service worldwide, with 1.5 billion monthly users (McIntrye, 2018). YouTube generates revenue in the form of advertisements by monetizing content, such as music and sound recordings, providing artists with very little or no financial

compensation. YouTube is able to earn large sums of money from advertisements on unlicensed recordings, music that the rights holders have not granted the use of, while paying little or no money to the artist involved (LaFrance, 2018).

In 2017, the IFPI found that 85% of its monthly users accessed YouTube for music streaming. Despite its popularity, YouTube is a streaming service that offers the lowest reward to rights holders, with an average artist revenue of \$0.0007 per play (Information is Beautiful, 2018). Artists must have a substantial number of streams to be adequately compensated for their work; Peter Frampton, the artist behind the best-selling album of 1976, *Frampton Comes Alive*, has explained that “For 55 million streams of “Baby I Love Your Way,” I got \$1,700” (Frampton, 2018; RIAA, n.d.). An artist seeking to earn the monthly minimum wage of \$1472 would need their music streamed 2.1 million times on YouTube (Information is Beautiful, 2018).

CONCLUSION

Previous attempts made to deter widespread music piracy have failed. Early responses to copyright infringement, such as aggressive litigation and the development of music streaming services, have created new challenges for artists. Legal action taken as a response to piracy resulted in a decentralization of the file sharing process and loss of sales as well as damage to public opinion. Although originally intended to offset the loss of revenue from copyright infringement, streaming services instead have negatively impacted sales and proven ineffective against music piracy. Streaming services distribute low royalty payments based on advertisements and subscriptions, which are often drastically divided before creators are paid for their works. Although music streaming is a convenient option for consumers, it can often lead to inadequate compensation for artists.

Copyright law is the legal platform designed to protect intellectual property, yet rapid technological advancements have challenged the effectiveness of this legislation in the United States. At present, the MMA attempts to address these problems by modernizing copyright law to include streaming services. Although this legislation facilitates a better distribution of royalties on music streaming platforms, MMA also has limitations regarding unlicensed

uses of artists' works on hosting sites. LaFrance (2018) noted that a significant limitation of MMA is that it does not address hosting sites such as YouTube. Streaming services continue to negatively impact royalty distribution. For this reason, it is imperative that we address these issues through revision of copy-right law to develop a viable streaming model that adequately compensates artists of generations to come.

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Kai N. Le

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