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Behind the Music: Music Producers & Their Struggles for Authorship Rights

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Behind the Music: Music Producers & Their Struggles for Authorship Rights

BEHIND THE MUSIC:
MUSIC PRODUCERS & THEIR STRUGGLE FOR AUTHORSHIP RIGHTS

Dima S. Budron^{*}

INTRODUCTION	121
<i>I. The Authorial Role of Producers</i>	123
A. The Song-Making Process	124
B. The Producer Business Model	128
C. The Digital Era	132
<i>II. The Producer's Struggle for Authorship Rights</i>	137
A. Producers' legal-based leverage	138
B. Failure to recognize producer rights	143
<i>III. The Recommendations</i>	146
A. Redraft industry-related statutes with producers	147
B. Revise parts of the Copyright Act	148
C. Request a Copyright Office study	148
CONCLUSION	149

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INTRODUCTION

One of Justin Bieber's latest hit records, "Where Are Ü Now," was nominated for "Best Song Of The Summer" at the MTV Video Music Awards, reached number 8 on the Billboard Hot 100, and was streamed about 495 million times on Spotify as of March 31, 2016.² Interestingly, however, even though he has millions of fans,³ this song was not always a hit; it took the creative efforts of music producers⁴ Skrillex and Diplo to convert the original piano ballad into an international dance track that skyrocketed to the top of the charts.⁵

Despite evidence of producers' contributions, the cultural misconception that recording

² Christina Garibaldo, *How Skrillex and Diplo Turned Justin Bieber's Ballad into a Hit*, MTV NEWS, (Aug. 25, 2015), <http://www.mtv.com/news/2250577/justin-bieber-skrillex-diplo-where-are-u-now/>; see also *The 20 Biggest Tracks on Spotify Have been Streamed 10BN Times*, MUSICALLY, (Mar. 31, 2016), <http://musically.com/2016/03/31/20-biggest-tracks-spotify-10bn-times/>.

³ See *Justin Bieber*, TWITTER, (Apr. 25, 2017, 2:00 PM), https://twitter.com/justinbieber?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (93.3 million followers); *Justin Bieber*, FACEBOOK, (Apr. 25, 2017, 2:00 PM), <https://www.facebook.com/JustinBieber/> (78.3 million likes); *Justin Bieber*, INSTAGRAM, (Apr. 25, 2017, 2:00 PM), <https://instagram.com/justinbieber/> (85.3 million followers); see also *Searchable Database*, RIAA, (Nov. 6, 2015, 10:17PM), http://www.riaa.com/goldandplatinumdata.php?table=SEARCH_RESULTS&artist=Justin%20Bieber&format=SINGLE&go=Search&perPage=50 (reflecting numerous gold, platinum and multi-platinum records).

⁴ Hereinafter, music producers may also be referred to as producers.

⁵ Christina Garibaldo, *How Skrillex and Diplo Turned Justin Bieber's Ballad into a Hit*, MTV NEWS, (Aug. 25, 2015). Although Diplo and Skrillex have made a big enough name for themselves to release this song on their own album, collecting revenue as co-artists, the work they did to catapult this song into a megahit is what music producers regularly do to songs.

artists are more worthy of authorship rights than producers persists.⁶ While this may be true in some situations,⁷ the producer is generally an equal, if not greater, creative contributor than those currently receiving statutory royalties, such as recording artists or labels.⁸ Yet, legal scholars have never specifically dealt with the producer struggle; analyses of royalty disparities or issues in the industry usually focus on artists and labels.⁹

⁶ Steve Albini, *The Problem with Music*, THE BAFFLER, (Nov. 1993), <http://thebaffler.com/salvos/the-problem-with-music> (mocking music producers and stating that “all that’s required to be a full-fledged ‘producer’ is the gall it takes to claim to be one”).

⁷ Some music genres, including rock, rely less on the music producers and more on the band members playing and arranging the song.

⁸ See *infra* note 19–25 and accompanying text.

⁹ Daniel J. Gervais, *Transmissions of Music on the Internet: An Analysis of the Copyright Laws of Canada, France, Germany, Japan, the United Kingdom, and the United States*, 34 VAND. J. TRANSNAT’L L. 1363, 1363 (2001) (comparing the copyright laws of six countries and discussing how cross border transmissions are covered under various national laws); Peter Jaszi, *Toward A Theory of Copyright: The Metamorphoses of “Authorship,”* 1991 DUKE L.J. 455, 456 (1991) (analyzing how the theory of authorship became a part of the legal discourse and how that concept works within the law of copyright); Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 263 (2002) (questioning whether digital works are even eligible for copyright protection); Mary LaFrance, *Authorship and Termination Rights in Sound Recordings*, 75 S. CAL. L. REV. 375, 416 (2002) (asserting that legislators never intended sound recordings to be works made for hire and looking at how joint authorship affects copyright owner’s termination rights in sound recordings); Lydia Pallas Loren, *The Dual Narratives in the Landscape of Music Copyright*, 52 HOUS. L. REV. 537, 537–38 (2014) (exploring the intricacies of music licensing, how it affects fair payment for copyright owners, and how the system protects the existing business models from technological changes in the market); Rick Marshall, *The Quest for “Parity”: An Examination of the Internet Radio Fairness Act*, 60 J. COPYRIGHT SOC’Y U.S.A. 445, 446 (2013) (suggesting that business models that rely on transmitting sound recordings should be required to compensate the owners of the sound recording at a fair market rate and introducing the Internet Radio Fairness Act as a solution); Peter S. Menell, *This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age*, 61 J. COPYRIGHT SOC’Y U.S.A. 235, 371 (2014) (expressing that the internet drastically changed consumers’ ability to access and share copyrighted material).

Music is more than entertainment; it is part of cultural behavior and human evolution, crucial to the vibrancy of society.¹⁰ Unfortunately, the adverse economic conditions in this new technological era threaten the vitality of music creation not only for recording artists, but also for the producers that help bring songs to fruition.¹¹ Since streaming became the primary way to experience music, the industry has been challenged with rethinking business models to sustain profitability.¹²

This comment will examine relevant U.S. legislative history and analyze the joint authorship doctrine to support producer's rights, but also highlight the law's failure to grant them those rights.

It will also recommend three solutions: 1.) redrafting music-related legislation with producers represented, 2.) revising small parts of the Copyright Act, mainly §101 and §114, or 3.) requesting the Copyright Office to publish a study on the current copyright law's effect on producers.¹³

I. THE AUTHORIAL ROLE OF PRODUCERS

¹⁰ NILS LENNART WALLIN, ET. AL., *THE ORIGINS OF MUSIC* 132 (2000) (“Even the most cursory glance at life in traditional cultures is sufficient to demonstrate that music and dance are essential components of most social behaviors, everything from hunting and herding to story-telling and playing; from washing and eating to praying and mediating; and from courting and marrying to healing and burying.”).

¹¹ See *infra* note 48–54 and accompanying text.

¹² See *infra* note 65.

¹³ Unfortunately, a customary practice in the music industry is for up-and-coming music producers to sacrifice recognition and rights when working with big names in the industry to advance their career. Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief). Such trade-offs make it difficult for music producers to assert their rights against the people who hire them. Thus, music producers' actions, or rather inactions, likely led to the passing of legislation that disregards their authorial contributions.

A. The Song-Making Process

The song-making process determines authorial rights to a song, which in turn defines the revenue streams that authors will receive.¹⁴ An author is defined as “[t]he person or entity who creates a work. This can be the creator of the musical composition, the musical arrangement, the

¹⁴ DAVID STOPPS, *HOW TO MAKE A LIVING FROM MUSIC* 19 (2d ed. 2014) (listing the different avenues from which recording artists can generate income). Stopps came up with the following revenue streams for recording artists:

- (a) Income from public performances on radio, television, downloads and streaming online, live performances, concerts, bars, shops, hairdressing salons and any location where a work is played or heard in public;
- (b) Income from mechanical licenses when recordings are distributed on physical sound carriers such as CDs, cassettes, vinyl and DVDs and are sold to the public. Mechanical licenses are licenses issued by authors and publishers to phonogram producers, allowing them to legally exploit recordings and audio-visual productions containing a work;
- (c) Income from mechanical licenses when works are the subject of audio or audiovisual downloads, streaming via the Internet or as ring tones, ring-back tones or real tones;
- (d) Income from synchronization licenses when the work is synchronized to visual images, video or film;
- (e) Income from the sale of printed sheet music and scores or from online digital sheet music downloads;
- (f) Income from home copying levies;
- [and] (g) Income from public lending of sound carriers containing the work.

Id.; *see also id.* at 20. Performers are finding that recording income has become lower compared to other income streams. This directly affects mechanical income on the author’s side, which has therefore also been lowered. As stated above, mechanical income refers to license fees that phonogram producers are obliged to pay the publisher/author of the work in a recording for each record/download/stream sold or accessed. On the other hand, we are seeing growth in public performance income from CMOs for both authors and performers. *Id.*

lyrics, or a combination of any of them.”¹⁵ A song has two main parts: the lyrics (the words) and the musical composition (the harmony, melody, rhythm, and form).¹⁶ One person can create a song, but more often it’s a team.¹⁷ Although a song might be written and composed before a studio session, the song is transformed into a new artistic creation during the session, relying on the skills of the producers.¹⁸

A music producer—also referred to as a studio producer, record producer, or just producer—¹⁹ is responsible for “supervising the creation of a sound recording.”²⁰ This job has two parts: 1. contributing to the creation of the sound recording, and 2. taking care of the administrative needs to facilitate the process.²¹ Selecting a producer for a project is critical

¹⁵ *Id.* at 196.

¹⁶ PETER JASZI ET. AL., *COPYRIGHT LAW* 204 (9th ed. 2013).

¹⁷ United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* at 21, 22 (Feb. 2015) (“The creators of sound recordings typically include recording artists—that is, the singer or members of the band who are featured in the recording. The recording process is often managed by a producer, who supervises and contributes overall artistic vision to the project. Other “nonfeatured” musicians and vocalists may add their talents to the recording as well.”).

¹⁸ *Full Committee Hearing on Assessing the Impact of the Copyright Royalty Rates on Recording Artists and Webcasters*, 110TH CONG., 1ST SESS. at 80 (2007) (quoting American Federation of Musicians vice president Harold Ray Bradley, “I’ve known musicians to suggest changes to lyrics, and I certainly have known producers . . . to urge and obtain changes in lyrics, and then put their chords to the song during the recording session. But more importantly than any one word or note, the musicians in the recording session “style” the song with intros, fills, chord changes, solos, tempo and rhythms.”).

¹⁹ DAVID STOPPS, *HOW TO MAKE A LIVING FROM MUSIC* 104 (2d ed. 2014) (“In order to distinguish this role clearly from the phonogram producer we will use the term ‘studio producer.’”).

²⁰ *Id.* at 104, 208 (noting that the person whose job it is to supervise the studio recording is often referred to as a ‘producer’).

²¹ DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 120 (8th ed. 2013). An example of a traditional music producer is Quincy Jones. He sources particular

because the way a song is recorded, arranged, and edited can greatly affect its outcome since there are endless possibilities; thus, an artist usually selects a producer that will create a song that fits within the artist's vision.²² Some producers choose only to be a part of the creative process, opting to have the engineer handle the technical side of capturing the recording of the sounds.²³ The producer makes creative decisions by choosing what sounds are used in the music, arranging the beat and vocals, and directing the recording artist's performance.²⁴

Unfortunately, the versatility in the producer role, coupled with the history of the role, complicates the industry's perception of them.²⁵ In the 1950s, artists mostly arrived to the studio to provide vocals; then they would go "do lunch," leaving the producer to create the song.²⁶

musicians and uses particular recording/mixing techniques, to bring together a polished song that he may or may not have composed or written. While this is how producers historically contributed to the song-making process, there have been vast changes in their role that will be explored in more detail throughout this section of the Comment.

²² DAVID STOPPS, *HOW TO MAKE A LIVING FROM MUSIC* 104 (2d ed. 2014).

²³ *Id.*

²⁴ Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

²⁵ Steve Albini—a singer-songwriter, guitarist, music producer and engineer—authored an article in the '90s that was very critical of music producers. Steve Albini, *The Problem with Music*, THE BAFFLER (1993), <http://thebaffler.com/salvos/the-problem-with-music>. In it he proclaimed, "Producers who aren't also engineers . . . don't have the slightest fucking idea what they're doing in a studio, besides talking all the time." *Id.* He went on to explain how he saw the typical progression of a producer's career path: "Go to college, get an EE degree. Get a job as an assistant at a studio. Eventually become a second engineer. Learn the job and become an engineer. Do that for a few years, then you can try your hand at producing." *Id.* In his opinion, to be a producer today is as simple as labeling yourself one. *Id.* Albini claims that the term "producer" is "pejorative" term and that engineers not only tell jokes about producers, but also get offended when others call them producers. *Id.*

²⁶ PASSMAN, *supra* note 20, at 120 (recollecting Snuff Garrett's thoughts on how artists were not present in the studio for the whole creation of the song). At the start of the section on music producers, Passman asserts that his friend Snuff Garrett was "one of the most important producers in the fifties and sixties."

However, what might be skewing this thought progression is that early producers began as Artists and Repertoires (A&Rs).²⁸ A&Rs are record company executives.²⁹ Their job is “to find, sign, and guide talent, match songs to singers, and run recording sessions,” which is also one of the roles of producers.³⁰ The overlap in the role of A&Rs and producers further complicates the issue because A&Rs are typically label employees and producers generally are not, which results in different pay schemes.³¹

Advancements in technology also changed the producer industry. Today, an individual can achieve professional quality production without a million-dollar studio, which was typically owned or funded by labels, hence the need to reward them with royalties.³² This has caused a surge in independent producers.³³ The producer can also be the composer, the arranger, and even the lyrical songwriter.³⁴ This further adds to the complication of defining who producers are,

²⁸ PASSMAN, *supra* note 20, at 120.

²⁹ *Id.*

³⁰ *Id.*; Not only do A&Rs still exist, but they are of the most important people in the music industry. *Id.* at 119, 120. The better A&Rs come close to producing songs, but that is not the typical role these days. *Id.* at 120. Generally, A&Rs still have significant control in the project, but mainly to the extent of finding talent and matching the producers with the artists. *Id.*

³¹ A&R COORDINATOR, CAREERSINMUSIC.COM, <https://www.careersinmusic.com/a-r-coordinator/>.

³² DAVID STOPPS, HOW TO MAKE A LIVING FROM MUSIC 105 (2d ed. 2014) (“There have been examples of phenomenal recordings being produced in artists’ bedrooms using fairly inexpensive recording equipment and computer software.”); Studio and recording equipment is becoming less and less expensive with the advancement of technology, which not only makes it easier to become an independent producer, but also allows artists to buy equipment, set up their own studio, and circumvent the need to hire a producer. Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

³³ Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

³⁴ *Id.*

what they do, whom they work for, and how they are paid. Producers are devalued in the music industry because of the various misconceptions that arise from their undefined role.³⁵

B. The Producer Business Model

Copyright law recognizes the following two exclusive rights in music: the copyright in musical work (songwriting, composition, musical arrangement, lyrics) and the copyright in the sound recording (phonograms).³⁶ The Copyright Office believes the licensing system in §114 is “working reasonably well” considering the contentions surrounding interactive streaming.³⁷

³⁵ *Producers Push Self-Preservation*, MUSICWEEK.COM, News (Feb. 2, 2009, 10:25 AM) <http://www.musicweek.com/news/read/producers-push-self-preservation/039252> (telling how at a recent summit, 60 UK and US producer managers gathered to discuss what many believe is the systematic erosion and devaluation of the producers' role).

³⁶ 17 U.S.C. § 102(a) (2012); DAVID STOPPS, *HOW TO MAKE A LIVING FROM MUSIC* 29 (2d ed. 2014) (explaining how copyright owners can then license the work and receive different types of royalties).

³⁷ United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* at 6-7 (Feb. 2015); see also *id.* at 48 (“The statute provides that an interactive service is one that enables a member of the public to receive either ‘a transmission of a program specially created for the recipient,’ or ‘on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient”). Non-interactive streaming refers to services such as Pandora that do not allow users to pick exactly what song they want to hear. On the other hand, interactive streaming services, like Spotify, do allow instant access to any song in their catalogs. Interactive streaming services need to negotiate a license directly with a record company in order to use the label’s sound recordings. *Id.* at 52. Since direct licenses are agreed upon in the free market, the license terms are usually very different from those that arise under the statutory regime. *Id.* Unfortunately, this can lead to under-the-table deals. Many times, music services, like Spotify, may pay a significant advance against future royalties directly to the label, cutting out the creators of the sound recording completely. *Id.* This is one of the main reasons that increased transparency is imperative in the new digital landscape, but this is an issue to save for another paper.

Unfortunately, §114, and the law in general, does not provide producers with a “statutory share of performance royalties.”³⁸

Producers historically worked for labels, and the labels paid them a salary.³⁹ At some point, producers started to get royalties, which became a point of contention in the industry.⁴⁰ Producers are typically compensated in the following two ways: flat-rate payments and/or royalties.⁴¹ A producer commonly negotiates between a 2-4% album sales royalty.⁴² Depending

³⁸ Casey Rae, *New Bill Would Authorize Royalties for Audioworkers*, (March 30, 2015, 12:36 PM) <https://www.futureofmusic.org/blog/2015/03/30/new-bill-would-authorize-royalties-audioworkers>.

³⁹ See *supra* notes 30-31 and accompanying text.

⁴⁰ PASSMAN, *supra* note 20, at 119-20. Music producer Snuff Garret worked for Liberty Records and made them millions of dollars through the records he produced; yet, he was only paid a small salary in comparison. *Id.* He bravely asked the label’s president for a one-cent royalty per record. *Id.* While one cent sounds rather insignificant, it was an outrageous request at the time—one that almost got him fired. *Id.* Yet, the label granted his request because of his undeniable value. *Id.* This was the start of producer royalties. *Id.* Calculating, tracking, and paying out producer royalties can be a very difficult task because the music industry struggles with global transparency and data collecting. Often time music producers must file suit against labels for unpaid producer royalties. See Bill Werde, *Bad Boy Makes Good In Royalty Dispute—Maybe*, BILLBOARD, (Feb. 2006) (detailing a suit brought by music producer Easy Mo Bee against Bad Boy to recoup royalties for his contributions Biggie Smalls' "Ready to Die" album). As the lawyer was building his case, he came across many other music producers who claimed they had also not been paid. *Id.* About \$200,000 to \$300,000 in royalties was paid to the respective plaintiffs. *Id.* The attorney was quoted saying, “We're thrilled these producers are being paid They are ready to produce hits for Bad Boy again.” *Id.*

⁴¹ Rae, *supra* note 37; United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* at 22 (Feb. 2015).

⁴² Dan Daley, *Producers Adapt to a New Economic Landscape in the Music Industry*, GRAMMY.COM (September 01, 2010, 2:42 PM) <http://www.grammy.com/news/points-of-survival>.

on the producer's prestige, he might receive an advance from the label.⁴³ Labels strategically transitioned the hiring of producers to artists.⁴⁴ But contracting directly with artists forces producers to wait for labels to recoup artist advances before receiving royalties.⁴⁵ This business model worked when labels were still hiring producers for full albums, but digital access to music changed this practice and the way producers make money.⁴⁶

Producers are “in the trenches with the artist creating that main product”⁴⁷ So, producers should be afforded the same revenue streams.⁴⁸ The producer business model is constantly evolving to maintain profitability, but the current digital revolution is particularly

⁴³ STOPPS, *supra* note 31, at 104. (“Advances paid out to the studio producer, and any subsequent studio producer royalties paid out by the phonogram producer, will be regarded as recording costs, which will normally be recoupable against the artist’s royalties.”); *see also* PASSMAN, *supra* note 20, at 124-25. (highlighting that, depending on the genre of music and the stature of the music producer, the advance can range anywhere from \$7,500 to \$150,000). Usually, the label recoups the advance before the producer gets paid royalties.

⁴⁴ PASSMAN, *supra* note 20, at 125 (explaining that once labels started to hire a group of music producer to work on one album, causing their in-house lawyers to spend a lot of time dealing with contracts, they creatively decided to put the burden of hiring music producers on the artist). Labels stopped wanting to pay their lawyers to draft the numerous contract deals and made it the artist’s responsibility to hire and pay the music producers. *Id.*

⁴⁵ *Id.* at 125 (noting that not only did the hassle of dealing with the paperwork shift to the artist, but so did the financial burden of paying the music producers); some deals might require the artist to pay the producer before the label has started to pay the artist. *Id.* at 126. Producers with bargaining power can get deals like that with artists, or even better, can convince the label to pay the producer royalties directly. *Id.* at 129.

⁴⁶ Daley, *supra* note 41 (“In the face of declining CD sales and increasing single-song downloads, the point model for producers has gotten a lot hazier.”).

⁴⁷ *Id.*

⁴⁸ *Id.* (“I’m finding that artists and labels are opening up to sharing the revenue in order to secure a producer who can really make a difference for them.”).

challenging.⁴⁹ Revenue streams have shifted from physical or digital sales to live performances.⁵⁰ This cuts moneymaking options for producers, unless they are hired to produce a live album or DJ shows for artists.⁵¹ To ensure more consistent revenue, some producers participate in writing the song, allowing collection of publishing royalties.⁵² Producers do not have statutory rights,⁵³ and producers without bargaining power are expected to work for free to garner recognition and power.⁵⁴ Producer royalties will never quite be as they were, and

⁴⁹ *See id.*

⁵⁰ *Id.*

⁵¹ *Id.*; Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015). (On file with Author) (“I started to promote my ability to DJ the shows for my artist NIKO IS and be his hype man throughout a set. This led to the opportunity to DJ shows for Talib Kweli.”).

⁵² Daley, *supra* note 41 (Producers “garner more royalty participation through co-writing songs with the artist Producer royalties are limited to unit sales and some uses of the master recording such as DVD sales. Publishing royalties, on the other hand, can come from unit sales, airplay, synchronization use in films and television, commercial adaptations, and other sources.”). But because the producer role leads to more connections, many composers try to get into production to build their network. *Id.* (“ . . . some composers have become producers themselves in order to gain better access to artists.”).

⁵³ 17 U.S.C. § 114 (2012). They might be able to negotiate a “letter of direction” with artists to authorize SoundExchange to pay a percentage of royalties from the artist’s cut to the producer. United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* at 7, 47 (Feb. 2015); Daley, *supra* note 41 (defining SoundExchange as a “nonprofit performance rights organization that collects statutory royalties from satellite and Internet radio, cable TV music channels and other digital platforms”).

⁵⁴ *Producers Push Self-Preservation*, *supra* note 34. (asserting that the music producer’s predicament of having to work for free because very few projects generate producer royalties is an unfeasible business model that must change if consumers want quality recordings). The goal for music producer representatives should be to look into how “deals and budgets can be

adaptability is the key to survival.⁵⁵

C. The Digital Era

The profound shift in music consumption, see figure below,⁵⁶ has reshaped revenue streams for copyright owners,⁵⁷ but laws remain greatly unchanged.⁵⁸

restructured to allow the recording process to continue to employ producers in a viable manner.”

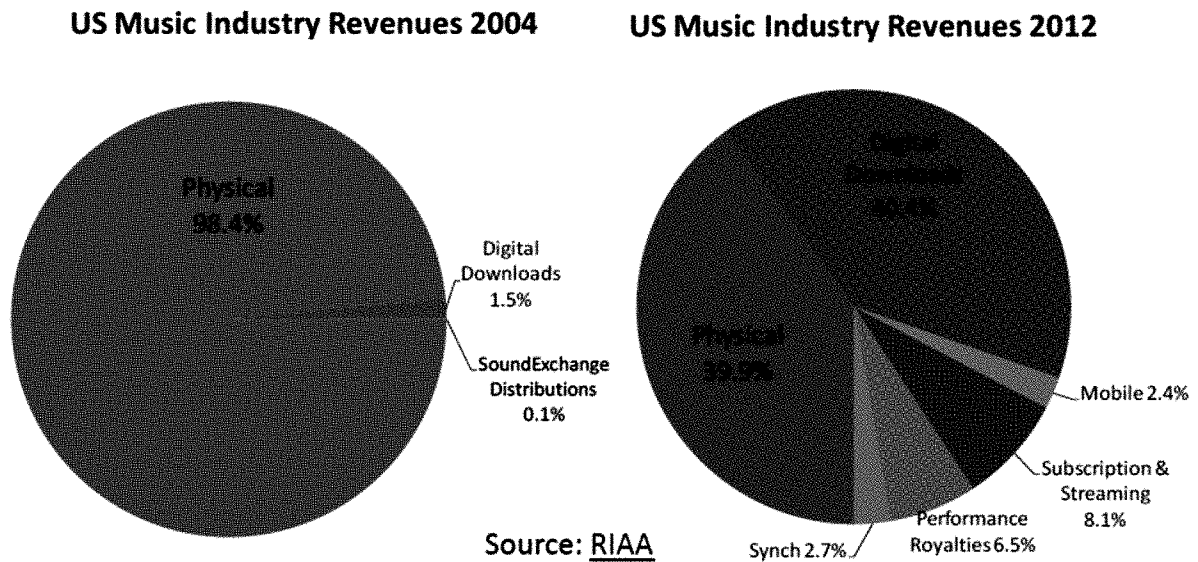
Id.

⁵⁵ Daley, *supra* note 41 (“As CD sales keep declining, the producers who are willing to be flexible in how their deals are structured are the ones who are surviving,” says Aaron Wilhelm, a manager at Nettwerk Producer Management and colleague of Fahlborg. “If you can't roll with how things are changing you're going to get left behind.”).

⁵⁶ *A Fruitful Anniversary for iTunes*, RIAA (April 2013) <https://www.riaa.com/a-fruitful-anniversary-for-itunes/>

⁵⁷ United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights at 70* (Feb. 2015) (highlighting that the shift from purchasing physical albums, to downloading digital singles, to accessing songs on-demand via digital streaming services has increased reliance on performance royalties as opposed to reproduction and distribution royalties).

⁵⁸ John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or its Foe?*, THE NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/revenue-streams> (arguing that while access to music has changed, the laws regulating how music creators are paid has not). The industry has taken the existing royalty model and attempting to just impart that system onto the streaming model, which does translate appropriately because the money generated from streaming is not equivalent to the CD market; *But see* Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, THE NEW YORK TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html?_r=0 (quoting top music attorney and author Donald Passman contending that “Artists didn't make big money from CDs when they were introduced, either . . . and [CDs] had a lower royalty rate. Then, as it became mainstream, the royalties went up. And that's what will happen here”).



RIAA Chart: music industry revenues in 2004 – the year after iTunes launched – vs. industry revenues in 2012, courtesy of RIAA shipment database.

Artists like Taylor Swift and Jay-Z have been vocal about their dissatisfaction with the streaming model and the lack of artist revenue generated.^{59 60} While producers may be able to come to a

⁵⁹ See Jon Fingas, *Taylor Swift Slams Apple for Skimping on Music Royalties During Trials*, (Jun. 21, 2015), <http://www.engadget.com/2015/06/21/taylor-swift-explains-apple-music-stance/> (summarizing that Taylor Swift told Apple she will not allow them to play her album “1989” because Apple initially planned to not pay artists or producers during the service’s 3-month trial period). Swift made it a point to state that her concern is not for herself, but rather for the “young songwriter” that relies on his music to make a living. *Id.*; see also Jack Linshi, *Watch Jay Z Bash Spotify, Apple and YouTube in Freestyle Rap*, TIME (May 18, 2015), <http://time.com/3883331/jay-z-tidal-spotify-apple-google/> (discussing Jay-Z’s streaming platform TIDAL and his dislike of other streaming services).

⁶⁰ Transparency will not be explored in detail in this Comment, but is certainly an issue that is worthy of a lengthy discussion. See Maya Kosoff, *Pharell Made Only \$2,700 In Songwriter Royalties From 43 Million Plays of ‘Happy’ On Pandora*, BUSINESS INSIDER (Dec. 23, 2014), <http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43->

royalty allocation agreement with artists, the amount of money artists generate is so low that a percentage of that amount results in an unviable payout to the producer.⁶¹ To demonstrate, Grammy-nominated recording artist, Armen Chakmakian, released a screenshot of his quarterly royalty statement, see below.⁶² The Copyright Office published a Music Licensing Study addressing this very issue, but has not determined a solution.⁶³

million-plays-of-happy-on-pandora-2014-12 (delivering a statement from Pandora's Director of Public Affairs which emphasized that the real issue lies in the dispute between labels and publishing companies regarding how to cut up royalties, not whether Pandora generates enough royalty income); see also John Seabrook, *Revenue Streams: Is Spotify the Music Industry's Friend or its Foe?*, THE NEW YORKER (Nov. 24, 2014)

<http://www.newyorker.com/magazine/2014/11/24/revenue-streams> (unveiling the harsh reality that the terms of licensing deals between Spotify and labels remain unknown because the parties signed nondisclosure agreements). To better depict the situation, a music-industry executive explained, "It's like you go to your bank, and the bank says, 'Here's your salary,' and you say, 'But what is my employer paying me? I work for them, not you!' And the bank says, 'We are not going to tell you, but this is what we think you should get paid.'" *Id.*

⁶¹ See Ben Sisario, *As Music Streaming Grows, Royalties Slow to a Trickle*, THE NEW YORK TIMES (Jan. 28, 2013), http://www.nytimes.com/2013/01/29/business/media/streaming-shakes-up-music-industrys-model-for-royalties.html?_r=0 (snickering that while the industry used to joke that royalties from iTunes downloads were like a "river of nickels," the new streaming economy changed this river of nickels into a "torrent of micropennies"); see also Maya Kosoff, *Pharrell Made Only \$2,700 In Songwriter Royalties From 43 Million Plays of 'Happy' On Pandora*, BUSINESS INSIDER (Dec. 23, 2014), <http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12> (explaining that Pharrell William's song "Happy" only yielded \$2,700 in publisher and songwriter royalties from 43 million streams on Pandora in the first quarter of 2014).

⁶² Armen Chakmakian, *A Grammy Nominated Artist Shares His Royalty Statements....*, Digital Music News (Apr. 3, 2014) <http://www.digitalmusicnews.com/2014/04/03/streamingstatements/>.

⁶³ United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 73-78 (Feb. 2015)

U.S. Performances - Internet Audio

Source - Other Information								
Title	Work Number	Performance			Bonus Level	Your %	WH	Royalty Amt
		Use	Count	Period				
HEARTS OF SPACE								
ABOVE THE SKY	005248321	FF	1	20133		50.00%		\$0.17
CEREMONIES	004339898	FF	1	20133		100.00%		\$0.26
DISTANT LANDS	004339897	FF	1	20133		100.00%		\$0.28
HEARTS OF SPACE Total								\$0.69
INTERNET								
DISTANT LANDS	004339897	FF	20	20133		100.00%		\$0.03
INTERNET Total								\$0.03
LIVE 365 1Q2013								
CARAVANS	007038583	FF	24	20131		100.00%		\$0.02
CEREMONIES	004339898	FF	97	20131		100.00%		\$0.10
ECHOES OF A PRAYER	004339904	FF	103	20131		100.00%		\$0.10
GYPSY RAIN	004339877	FF	109	20131		100.00%		\$0.11
LAST DANCE	007038582	FF	104	20131		100.00%		\$0.10
LIVE 365 1Q2013 Total								\$0.43
LIVE 365 2Q2013								
CARAVANS	007038583	FF	28	20132		100.00%		\$0.03
CEREMONIES	004339898	FF	102	20132		100.00%		\$0.11
ECHOES OF A PRAYER	004339904	FF	99	20132		100.00%		\$0.11
GYPSY RAIN	004339877	FF	95	20132		100.00%		\$0.11
LAST DANCE	007038582	FF	91	20132		100.00%		\$0.10
LIVE 365 2Q2013 Total								\$0.46
LIVE 365 3Q2013								
CARAVANS	007038583	FF	20	20133		100.00%		\$0.02
CEREMONIES	004339898	FF	122	20133		100.00%		\$0.13
ECHOES OF A PRAYER	004339904	FF	126	20133		100.00%		\$0.14
GYPSY RAIN	004339877	FF	121	20133		100.00%		\$0.13
LAST DANCE	007038582	FF	110	20133		100.00%		\$0.13
SEPTEMBER	007038586	FF	31	20133		50.00%		\$0.02
LIVE 365 3Q2013 Total								\$0.57
PANDORA								
DISTANT LANDS	004339897	FF	464	20133		100.00%		\$0.03
ECHOES OF A PRAYER	004339904	FF	284	20133		100.00%		\$0.02
EL MIRAGE	007038584	FF	576	20133		100.00%		\$0.03
FIRE DANCE	007038581	FF	544	20133		100.00%		\$0.03
GYPSY RAIN	004339877	FF	454	20133		100.00%		\$0.02
HOPE RISING	007038588	FF	1,040	20133		100.00%		\$0.06
IMAGININGS	004339872	FF	542	20133		100.00%		\$0.03
KISS AND A SIGH	004339900	FF	362	20133		100.00%		\$0.02
LAST DANCE	007038582	FF	459	20133		100.00%		\$0.03
SPIRITS RIDE	007038582	FF	1,051	20133		100.00%		\$0.06
PANDORA Total								\$0.33
RHAPSODY INTER								
ABOVE THE SKY	005248321	FF	27	20133		50.00%		\$0.01
BIRDSONG	007038580	FF	11	20133		100.00%		\$0.01
CARAVANS	007038583	FF	13	20133		100.00%		\$0.01
CEREMONIES	004339898	FF	25	20133		100.00%		\$0.01
DISTANT LANDS	004339897	FF	31	20133		100.00%		\$0.01
ECHOES OF A PRAYER	004339904	FF	60	20133		100.00%		\$0.04
EL MIRAGE	007038584	FF	11	20133		100.00%		\$0.01
ENCHANTRESS	004339878	FF	35	20133		100.00%		\$0.02
FIRE DANCE	007038581	FF	21	20133		100.00%		\$0.01
GYPSY RAIN	004339877	FF	42	20133		100.00%		\$0.02
HOPE RISING	007038588	FF	12	20133		100.00%		\$0.01
IMAGININGS	004339872	FF	26	20133		100.00%		\$0.01
JOURNEY HOME	007038589	FF	11	20133		100.00%		\$0.01
JOURNEY S END	007038591	FF	11	20133		100.00%		\$0.01
KISS AND A SIGH	004339900	FF	33	20133		100.00%		\$0.02
LAST DANCE	007038582	FF	15	20133		100.00%		\$0.01
LONG WAY DOWN	004015921	FF	13	20133		100.00%		\$0.01
MOONLIGHT IN YOUR EYES	004339881	FF	19	20133		100.00%		\$0.01
RAIN RAIN GO AWAY	004339870	FF	56	20133		100.00%		\$0.03
SEPTEMBER	007038586	FF	33	20133		50.00%		\$0.01
SPIRITS RIDE	007038582	FF	14	20133		100.00%		\$0.01
TIME TO HEAL	004339902	FF	20	20133		100.00%		\$0.01
RHAPSODY INTER Total								\$0.30
RHAPSODY RADIO								
ABOVE THE SKY	005248321	FF	634	20133		50.00%		\$0.01
CEREMONIES	004339898	FF	618	20133		100.00%		\$0.01
ECHOES OF A PRAYER	004339904	FF	508	20133		100.00%		\$0.01
RAIN RAIN GO AWAY	004339870	FF	552	20133		100.00%		\$0.01
TIME TO HEAL	004339902	FF	611	20133		100.00%		\$0.01
RHAPSODY RADIO Total								\$0.05
SPOTIFY								
BAKER S DOZEN	001840777	FF	150	20133		50.00%		\$0.02
EBONY WIND	001840779	FF	178	20133		50.00%		\$0.03
GYPSY RAIN	004339877	FF	2,088	20133		100.00%		\$0.60
HEY YOUR HAT S ON BACKWARDS	001840781	FF	193	20133		25.00%		\$0.01
HOW MUCH DOES ZIMBABWE	001840782	FF	147	20133		25.00%		\$0.01
IMAGINARY ISLANDS	001840780	FF	283	20133		50.00%		\$0.04
NIGHT PASSAGE	001840776	FF	167	20133		50.00%		\$0.02
SECRET GATHERING	001840778	FF	196	20133		50.00%		\$0.03
SPOTIFY Total								\$0.76
WB								
WB ONLINE PERFORMANCES	000000000	FF	1	20133		100.00%		\$0.52
WB Total								\$0.52
YAHOO.COM								
BAKER S DOZEN	001840777	FF	59	20133		50.00%		\$0.02
DISTANT LANDS	004339897	FF	44	20133		100.00%		\$0.03
NIGHT PASSAGE	001840776	FF	49	20133		50.00%		\$0.01
YAHOO.COM Total								\$0.06
U.S. Performance - Internet Audio Totals								\$4.20

Artists are not the only group fighting for reform. The Music Licensing Study touched upon the lack of producer rights.⁶⁴ Immediately following the report, Congressman Joseph Crowley and Thomas Rooney introduced the Allocation for Producers (AMP) Act,⁶⁵ intended “[t]o amend title 17 . . . to provide for direct payment of statutory sound recording performance

⁶⁴ United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 7, 180 (Feb. 2015) (agreeing that music producers are integral to the song-making process and recognizing that they are currently not statutorily entitled to payment). Specifically, music producers are not mentioned in § 114(g) and do not receive direct payments from SoundExchange. *Id.* They do receive payment through the “Letter of Direction” and the Copyright Office is considering that this practice become a part of U.S. copyright law. *Id.* Those in favor argue that this would be an easy amendment because the music producer’s share will still come from the royalties allocated to featured artist’s, so the overall royalty allocation would not need to change. *Id.* at 180. This does, however raise concerns that the label, which gets 50% of the digital non-interactive streaming royalties, is double-dipping by having music producers and featured artists getting paid from the same pool of money. Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

⁶⁵ Crowley, Rooney Introduce AMP Act to Allow Music Producers to Receive Fair Pay, *Media Center*, Media Center, CONGRESSMAN JOSEPH CROWLEY WEBSITE (Mar. 19, 2015) <http://crowley.house.gov/press-release/crowley-rooney-introduce-amp-act-allow-music-producers-receive-fair-pay> (campaigning that the AMP Act “will ensure that every music professional receives what he or she has earned”). Congressman Rooney was quoted saying that, “Without producers and engineers, the music we enjoy every day couldn’t make it from the recording studio to our radios and phones.” *Id.* He further stated that the AMP Act would ensure studio professionals receive royalty payments in a “fair and streamlined manner.” *Id.* Congressman Crowley’s experience in song recording allows him to better understand the creative direction that music producers impart on the recording process, which is why he believes they are integral contributors that should be rightfully compensated. *Id.*

royalties to record producers.”⁶⁶ With this momentum,⁶⁷ the issue for producer rights is ripe and is justified not solely as a matter of fairness, but based on other legal doctrines.

II. THE PRODUCER’S STRUGGLE FOR AUTHORSHIP RIGHTS

A. Producers’ legal-based leverage

⁶⁶ Allocation for Music Producers Act (“AMP Act”), H.R. 1457, 114TH CONG. (2015-2016). The AMP Act proposes to make the process of allocating royalties to music producers via SoundExchange’s “Letter of Direction” a part of the copyright law. *Id.* (“(5) LETTER OF DIRECTION. — A collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions in accordance with subsection (f) shall adopt and reasonably implement a policy that provides . . . for acceptance of instructions from a payee . . . to distribute a portion of the payments to which the payee otherwise would be entitled from the licensing of transmissions of a particular sound recording to a producer, mixer, or sound engineer who was part of the creative process that created the sound recording (in this section, referred to as a ‘letter of direction’).”). It also provides music producers with statutory support to collect royalties on sound recordings fixed before November 1, 1995. *Id.* (proposing “a deduction of 2 percent of the receipts from the licensing of transmissions of a sound recording fixed before November 1, 1995, from receipts otherwise payable to the recording artist or artists featured on such sound recording (or the persons conveying rights in the artists’ performance in the sound recordings”).

⁶⁷ The language of the AMP Act has also made its way into another bill called the Fair Play Fair Pay Act of 2015. While the Act does reiterate the proposed amendments of the AMP Act, it is mainly focused on performance royalties and attempting to align the U.S. with the laws of other countries around the world. Fair Play Fair Pay Act of 2015, H.R. 1733, 114TH CONG. (2015–16) (proposing the same amendment as the AMP act under Section 9, “Allocation of Payments to Music Producers”). The bill’s main purpose is “to provide fair treatment of radio stations and artists for the use of sound recordings.” *Id.*

a. Legislative History

The Sound Recording Amendment of 1971 (SRA) marked a drastic shift in U.S. copyright law.⁶⁸ The Committee believed Constitutional protections should be extended to sound recordings because they fit into the “scope of ‘writings of an author.’”⁶⁹ Legislators drafted the amendment to grant copyright in sound recordings,⁷⁰ but failed to grant rights to all necessary parties.⁷¹

Although the SRA did not allocate royalties or assign authorship rights, it laid the foundation for legislation to come.⁷² The House Report stated that sound recordings:

[U]sually . . . involve “authorship” both on the part of the performers . . . and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.⁷³

⁶⁸ H.R. REP. NO. 92-487, at 5 (1971) (“The enactment of S. 646 will mark the first recognition in American copyright law of sound recordings as copyrightable works.”) The House Report specified that the copyright only extends to the “aggregate of sounds and not the tangible medium of fixation.” *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 2 (explaining that the bill creates a limited copyright in sound recordings “fixed, published, and copyrighted on or after the effective date of the legislation and before January 1, 1975,” which makes unauthorized reproduction and sale of copyrighted sound recordings unlawful).

⁷¹ *Id.* at 2 (intending for the bill to protect the income of legitimate record manufacturers, as well as, performing artists and musicians, but failing to mention music producers).

⁷² *Id.* at 5 (“[T]he bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.”) This may be the biggest flaw in the legislation because it left too much up to contracts.

⁷³ *Id.*

The House Report went on to state that:

There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases . . . where only the record producer's contribution is copyrightable.⁷⁴

These excerpts can be interpreted as Congress recognizing producers and determining they are worthy of authorship rights.⁷⁵ Yet, later legislation uses the term record producers to mean labels, which excludes music producers and goes against other intentions in the report.⁷⁶ However, it is undeniable that the term “record producer” in this report refers to a *person*.⁷⁷

⁷⁴ *Id.*

⁷⁵ PETER JASZI ET. AL., COPYRIGHT LAW 205 (9th ed. 2013).

⁷⁶ This may be due to the report not assigning authorship, but rather leaving it to the contracting parties to decide. H.R. REP. NO. 92-487, at 5 (1971).

⁷⁷ *Id.* (referring to the record producer as the one who sets up the record session and captures, records, and arranges the music. It makes most sense to interpret this to mean a producer as opposed to a label).

The Copyright Act of 1976 massively reformed U.S. copyright law, but contained many gaps. Even after enactment, legislators continued to have hearings for reform, with the focus on whether performers and producers should be paid for public performances.⁷⁸ These reports highlighted the negative effects of not paying creators for public performances⁷⁹ and emphasized that performance rights would encourage creativity.⁸⁰ The Register of Copyrights said, “[t]o leave the creators of sound recordings without any protection or compensation for their widespread commercial use can no longer be justified,”⁸¹

⁷⁸ *Copyright Issues: Cable Television and Performance Rights: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 96TH CONG., 1 246, 247 (1979) (reiterating that this lack of paying public performance royalties denies U.S. citizens protection of the Rome Convention). Legislators replaced a provision that would have made it illegal not to pay performers and producers of sound recordings for public performance of their work with a call for the Register of Copyrights to conduct a study on this matter. *Id.* at 246. Congress received the results of the report in January 1978. *Id.* The Report also noted that since the United States’ “recording industry is the largest in the world and its performers are popular throughout the world,” it is in the country’s “national economic interest” to approve a bill for performance rights reform. *Id.* at 248.

⁷⁹ *Id.* at 246 (quoting the Register of Copyrights, who said, “The Copyright Office believes that the lack of copyright protection for performers since the commercial development of phonograph records has had a drastic and destructive effect on both the performing and the recording arts”).

⁸⁰ *Performers’ and Performance Rights in Sound Recordings: Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103D. CONG., 1 at 17 (1993).

⁸¹ *Copyright Issues: Cable Television and Performance Rights: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary*, 96TH CONG., 1 at 247.

and stressed the constitutionality of compensating producers for their creative efforts.⁸² These reports repeatedly refer to the *creative efforts* of record producers. Based on the description of the role of producers, it is unambiguous that they are to whom these legislators are referring.⁸³ Producers are the *creators* of the sound recording, not the label.⁸⁴

The legislative history of §114 reveals a shift in discourse regarding producer authorship rights. In both the Senate and House Reports, the purpose of the Digital Performance Right in Sound Recording Act of 1995 is to:

[E]nsure that performing artists, record companies and others whose livelihood depends upon effective copyright protection for sound recordings, will be protected as new technologies affect the ways in which their creative works are used⁸⁵

Interestingly, there is a change in language from record producers to record companies.⁸⁶ However, later in the document, the Honorable Bruce A. Lehman,⁸⁷ said it is time to “bring protection for performers and producers of sound recordings into line with the protection afforded to the creators of other works.”⁸⁸ Similarly, the Register of Copyrights, testified that:

[J]ustice requires that performers and producers of sound recordings be accorded a public performance right. As a world leader in the creation of sound recordings, the United States, should no longer delay in giving its creators of sound recordings the minimum rights many countries give their performers and producers.⁸⁹

⁸² *Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103D. CONG., 1 at 7.

⁸³ *See supra* notes 18–34 and accompanying text.

⁸⁴ *Id.*

⁸⁵ S. REP. NO. 104-128, at 10 (1995); H.R. REP. NO. 104-274, at 10 (1995).

⁸⁶ *Id.*

⁸⁷ *Id.* at 12; 15 (he is the Assistant Secretary of Commerce and Commissioner of Patents and Trademarks).

⁸⁸ S. REP. NO. 104-128, at 13 (1995).

⁸⁹ *Id.*

Both these excerpts reference producers of sound recordings, but the purpose of the Act does not.⁹⁰ Producers technically fall under “others,” but are not accounted for in the allocation of royalties in §114.⁹¹ These legislative reports should not be overlooked. They show that the current copyright system, which neglects producers, is not only unjust, but is also legally unsound.

Joint Authorship Doctrine

In addition to this legislative history, case holdings also support the claim that producers are joint authors. As the court said in *Aalmuhammad v. Lee*, the author is “the person to whom the work owes its origin and who superintended the whole work, the ‘master mind.’”⁹² Producers are the masterminds of the song.⁹³ The court did not define what one must do to be an author, yet it stated movie directors are joint authors because their substantial control over movie production.⁹⁴

⁹⁰ Other reports also state that the goal of compulsory licensing is to benefit “performers and . . . record producers as joint authors.” *Hearing Before the Subcomm. on Intellectual Prop. and Judicial Admin. of the H. Comm. on the Judiciary*, 103D. CONG., 1 at 8 (1993) (quoting 43 Fed. Reg. 12,763 (1978) at 12,766). It would appear that once again, the term ‘record producers’ is being used to refer to an individual, or producer, as opposed to a record company/label because the company as a whole cannot contribute creatively to the creation of a sound recording. *Id.* at 54 (“The basis for this recommendation was that the performers of sound recordings are as much a creator of the sound recording as the author or producer[,] and should be entitled just as much to the fruits of their labor.”).

⁹¹ *Id.*; see also 17 U.S.C. § 114(g)(2) (2012) (listing the only others to be background vocalists and background musicians).

⁹² *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000).

⁹³ See *supra* notes 18–34 and accompanying text; See also PASSMAN, *supra* note 20, at 124 (stating that producers come up with the ideas for a project, set the mood for the session, coach the artist, and musicians in the studio, control the recording session, supervise the entire process, and make critical creative decisions); Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015). (On file with Author)

⁹⁴ *Aalmuhammed*, 202 F.3d at 1233-35.

Thus, the same should be held for music producers – a claim some courts agree with.⁹⁵ Therefore, it is a mystery that producers are not given a statutory right to royalties from sound recordings.

B. Failure to recognize producer rights

a. The Contracting Industry

One important reason producers do not receive authorship rights might be the nature of the music business. Many think that producers are covered by royalty agreements and do not need legal rights. Superstar producers might have the bargaining power to secure high royalty

⁹⁵ See *Diplomatic Man, Inc. v. Nike, Inc.*, 2009 WL 935674, at *4 (S.D.N.Y. Apr. 7, 2009) (finding that “it is apparent that the song . . . is a work of joint authorship”). In that case, Santana wrote the lyrics and Just Blaze produced the song “The Second Coming.” *Id.* at *1. Although it can be confusing to determine whether Just Blaze should also be credited as composer because the case stated he created the music in addition to compiling and editing the recording, the music was actually a sample; thus, he did not in fact create the music in a way that would make him a composer. *The Second Coming*, WHOSAMPLED, [http://www.whosampled.com/sample/7483/Juelz-Santana-Just-Blaze-The-Second-Coming-Hector-Berlioz-Songe-D'une-Nuit-De-Sabbat-\(Dreams-of-a-Witches'-Sabbath\)/](http://www.whosampled.com/sample/7483/Juelz-Santana-Just-Blaze-The-Second-Coming-Hector-Berlioz-Songe-D'une-Nuit-De-Sabbat-(Dreams-of-a-Witches'-Sabbath)/). In another case, producer Ke’Noe sued rapper Lil’ Flip and Sony for unpaid royalties, and Sony did not even argue against Ke’Noe’s assertion that he is a joint author of the songs he produced. *Jordan v. Sony BMG Music Entm't, Inc.*, 637 F. Supp. 2d 442, 459 (S.D. Tex. 2008) *aff'd in part, remanded in part*, 354 F. App'x 942 (5th Cir. 2009) (stating that Sony actually agrees that the music producer, Jordan aka Ke’Noe, and rapper, Weston aka Lil’ Flip, are joint authors); *Ke’Noe, Credits*, ALL MUSIC <http://www.allmusic.com/artist/kenoe-mn0000310983/credits> (crediting Ke’Noe with production on the album).

percentages.⁹⁶ However, for anyone who is not a superstar, like the many rising independent producers, this power does not exist and they need the support of the law.⁹⁷ Even as the shift from physical to digital makes this distribution-based system obsolete, the pay structure remains,⁹⁸ and new revenue streams, like that in §114, do not include producers. In fact, no statutory mandate for direct royalties to producers exists, so they must rely only on their negotiated contracts.⁹⁹ The lack of recognition of producer rights in the law encourages the perception of producers as invisible authors.

b. The “Work Made for Hire” Doctrine

The doctrine of employer authorship may have a negative effect on the producer’s position because many still assume producers are employees of labels.¹⁰⁰

⁹⁶ PASSMAN, *supra* note 20, at 90, 124-25 (stating artists or producers with reasonable bargaining power usually try to have the label pay the producer and they might even ask that the label treat the producer payments as recoupables on the artist’s deal).

⁹⁷ “In fact, many independent producers are forced to work first and try to get paid later simply to maintain a consistent workflow.” Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

⁹⁸ PASSMAN, *supra* note 20, at 65-68 (describing how pure record stores are almost nonexistent and that big box stores like Wal-Mart, Target, and Best Buy are shrinking the square footage that they dedicate to CDs).

There has not been a significant amendment to music royalties since streaming services like Spotify have altered the music marketplace.

⁹⁹ United States Copyright Office, *Copyright and the Music Marketplace: A Report of the Register of Copyrights* 118 (Feb. 2015).

¹⁰⁰ When this doctrine applies, the hiring party who paid to have the work created is the “author” and gets copyright ownership, as opposed to the person who actually created it. 17 U.S.C. § 201(b) (2012); *see also* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of “Authorship”*, 1991 DUKE L. J. 455, 485 (1991).

While some producers are still on label payroll as employees, this is no longer the norm.¹⁰¹ Therefore, absent the determination of an employer-employee relationship between a producer and label, a sound recording does not qualify as a “work made for hire” under the work of an independent contractor because sound recordings are not one of the nine enumerated categories detailed in the statute.¹⁰² Thus, producer contributions should not be considered “works made for hire.”

¹⁰¹ “With the advances in technology, there is a rise in independent music producers.” Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

¹⁰² See *Cnty. for Creative Non-Violence (CCNV) v. Reid*, 490 U.S. 730, 751-52 (1989) (listing the factors courts should consider to establish the hiring party’s level of control); 17 U.S.C. § 101 (2012) (requiring that “the parties must expressly agree in a written instrument signed by them that the work shall be considered a work made for hire” and that the work be one of the nine enumerated categories); Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. INTELL. PROP. L. 29, 46 (2014) (noting that the nine enumerated categories are work that is specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas); see also *CCNV*, 490 U.S. at 751-52 (explaining that the key factor in determining whether a hired party is considered an employee depends on the amount of control the hiring party has over the work product).

III. THE RECOMMENDATIONS

After analyzing the causes for the disappearance of producer authorship recognition, the next step is to make positive change. Upholding the Constitution, copyright only makes sense when the balance of interests—promoting public disclosure and conferring power of distribution onto the creator—is maintained for all creators, not just the ones with the strongest lobbyists.¹⁰³ Making music is a significant investment that requires just and adequate compensation.¹⁰⁴ Moreover, in an industry that operates on the law of contracts, it is imperative to ensure that all parties have equal bargaining power. Currently, artists, producers, and labels are not on the same level because the law does not give them equal positions to fall back on if free market negotiations fail.¹⁰⁵

¹⁰³ The Constitution states the basis of copyright should be “[t]o 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. *See also Towards a Theory of Copyright*, *supra* note 100, at 463.

¹⁰⁴ “The creation of a sound recording takes a huge investment of time, talent and energy, and, like other entrepreneurs, we are making financial investments And when we hire musicians to work on the album, we pay them well, the fundamental principle being that when people do the work, they should be paid for it. Like any other small business, we endure organizational and administrative tasks as well[.] And then, of course, there are the expenses of our instruments.” *Full Committee Hearing on Assessing the Impact of the Copyright Royalty Rates on Recording Artists and Webcasters*, 110TH CONG., 1ST SESS. at 11, 12 (2007) (statement of Cathy Fink, Artist, Washington, D.C.).

¹⁰⁵ 17 U.S.C. § 114(g)(2) (2012) (stating that artists and labels can leverage the royalty percentages mandated to them by law in an effort to negotiate in the free market, but music producers cannot).

Those opposed to producer authorship rights are likely concerned with adding another layer of copyright. Some courts resisted dividing rights to movies in fear of having too many individuals with copyright interests.¹⁰⁶ However, this issue does not arise in music because there are fewer people who could be considered authors.¹⁰⁷ Plus, with today's technology, it conceivably would not be difficult to track who worked on a given sound recording. Thus, I recommend three possible plans of action: redraft all industry-related statutes with producers at the table, revise small parts of the Copyright Act, or request that the Copyright Office publish a study on the issue.

A. Redraft industry-related statutes with producers

The music laws should be rewritten with producer representation at the table. Producers have not had a strong voice throughout the history of copyright reform.¹⁰⁸ With the momentum building for producer rights, music laws should be redrafted with the interests of producers in mind. Producers should have equal say just like recording artists, songwriters and composers.

¹⁰⁶ See *Aalmuhammed v. Lee*, 202 F.3d 1227, 1233 (9th Cir. 2000) (discussing how too many individuals would be an “author” if the question was whether they made a “substantial creative contribution,” making everyone from producers, directors and casting directors to costumers and hairstylist all worthy of copyright protection); *Garcia v. Google, Inc.*, 786 F.3d 733, 742 (9th Cir. 2015) (denying an actor’s claim to a copyright interest in her contribution to the movie because the court thought that the actor’s theory of copyright law would make “Swiss cheese of copyrights”); *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247, 258 (2nd. Cir. 2015) (deciding that since filmmaking is a collaborative process that usually involves creative contributions from many people, giving a copyright interest to each contributor would undermine the copyright of the film by each individual’s claims).

¹⁰⁷ Interview by Dima Budron with Thanks Joey, Music Producer, Colours of the Culture, in Washington D.C. (Oct. 21, 2015) (On file with IP Brief).

¹⁰⁸ *Id.*

B. Revise parts of the Copyright Act

If redrafting laws seems too daunting, simple amendments to §101 and §114 could help. Section 101 should define “artist” or “author” and include music producers in it. Or a separate definition for music producer should be created, and then the term should be added to every clause that gives recording artists and labels rights. Furthermore, the term “phonogram producer” should change to label so people do not assume it means music producers.

Section 114 excludes producers from the royalty distribution.¹⁰⁹ This division of royalties should be redrafted to include a direct share to producers to justly compensate all creators equally. The industry will continue to run on free market contracts; however, the fallback royalty distribution should protect producer interests.¹¹⁰

C. Request a Copyright Office study

If the U.S. Copyright Office and those with interests in the music industry are not yet convinced of this need to revise the laws to reflect the entitlement of producers to statutory payments structures, then the U.S. Copyright Office should at a minimum launch a deeper investigation into how the current regime affects producers. The U.S. Copyright office has successfully carried out necessary studies when the market called for it, and the resulting reports were very useful.¹¹¹

¹⁰⁹ 17 U.S.C. § 114(g)(2) (2012).

¹¹⁰ *See id.* (granting royalties to the owner of the sound recording, usually the label, the recording artists, the non-featured vocalists, and the non-featured musicians).

¹¹¹ *Policy Reports*, UNITED STATES COPYRIGHT OFFICE, <http://copyright.gov/policy/policy-reports.html> (listing the various policy studies the Copyright Office has published).

CONCLUSION

Producers are an integral contributor to the creation of a sound recording.¹¹² Streaming dramatically changed the producer business model.¹¹³ Copyright law is silent on producer rights; however, legislative history recognizes producers as joint authors,¹¹⁴ and joint authorship jurisprudence supports producers as joint authors.¹¹⁵ However, the law, and specifically §114, does not grant producers with statutory rights to royalties.¹¹⁶ Updating the copyright law to include producers will not only ensure proper incentives, but will align the law with the realities of the music industry and opinions of legislators from decades ago. It is time that the law clearly and justifiably defines the rights for those behind the music: **the music producers**.

¹¹² *See supra* notes 18–34 and accompanying text.

¹¹³ *See supra* notes 35–54 and accompanying text.

¹¹⁴ *See supra* notes 67–90 and accompanying text.

¹¹⁵ *See supra* notes 91–94 and accompanying text.

¹¹⁶ *See supra* notes 36–37 and accompanying text.
