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Incentivizing Top-Musicians

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INCENTIVIZING TOP-MUSICIANS

Guy A. Rub†

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INTRODUCTION

IN *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY*,¹ Glynn Lunney tackles a question that is at the heart of copyright law. Copyright law is often perceived as a system that creates property rights in information goods in an attempt to reach a delicate balance between the benefits and the costs of that system.² The core of copyright law’s theory is well established. Copyright transfers income to creative industries. Society benefits from the production of additional and better works. It pays with, *inter alia*, reduced access to those works. The stronger the copyright protection, the standard story goes, the larger those benefits and the more significant are those costs.

Lunney’s book undermines that theory, at least as much as the benefits are concerned. This important work shows that when it comes to the recording industry, over the last fifty years, there is little correlation between the total revenues of the industry and its productivity, especially that of top musicians. If additional income does not improve productivity then, even putting aside copyright’s significant social costs, it is unclear what its benefits are. What does society get in

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1. GLYNN LUNNEY, *COPYRIGHT’S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY* (2018).

2. *See, e.g.*, *Kirtsaeng v. John Wiley & Sons*, 136 S. Ct. 1979, 1986 (2016) (explaining that the Copyright Act “strik[es] a balance between two subsidiary aims: encouraging and rewarding authors’ creations while also enabling others to build on that work.”).

return for the limitation that copyright imposes on access to information goods?

These surprising results require us to continue and improve our understanding of the forces that drive creativity and incentivize artists, and especially successful artists, to create. This Essay contributes to these efforts. It proceeds as follows: Part I explores the challenge that COPYRIGHT'S EXCESS tackles. It explains the core of copyright's incentive theory, why it is difficult to test it empirically, and how COPYRIGHT'S EXCESS rises to that challenge, especially by exploring the lack of correlation between sales and productivity, and, in particular, superstars' productivity in the music industry.

Parts II-IV of this Essay consider several explanations for the lack of correlation. Part II addresses the sometimes-neglected role of the recording companies. Those intermediaries profoundly affect the artists' compensation and their creative decisions. Therefore, any analysis of the connection between sales, artistic income, and artistic output (i.e., productivity), needs to consider their role. Part III addresses one of Lunney's theories for explaining the discrepancy between sales and productivity. Labor economists have long held that while low-paid workers will wish to work more as their compensation increases, highly-paid workers will instead substitute work time for leisure time as their compensation increases and work less. Can this phenomenon explain why superstars became less productive when the music industry's sales peaked? In Part III, I explain why I find this explanation unlikely. Superstars, this Part suggests, are probably too wealthy to be affected by this phenomenon.

Part IV focuses on the superstars' incentives to continue to create even after their previous successes have made them very wealthy. It suggests that the main driving forces of top musicians are likely their internal joy from creating, and possibly more importantly, the social-psychological reward that is attached to their success. Ultra-wealthy businessmen present a similar phenomenon: They continue to work even when they already accumulate enough wealth to meet all their material needs because, as studies suggest, they enjoy their work, and they love to be considered successful by their reference group. It is reasonable to expect wealthy musicians to act similarly for corresponding motivations.

Part V briefly considers some of the possible implications. If top-artists are not primarily motivated by money, putting aside the status that is attached thereto, then society should be hesitant to devise a copyright system that makes those wealthy individuals even richer. It might get very little in return. In that respect, this Essay ends close to where COPYRIGHT'S EXCESS does: with the call for copyright law to focus on incentivizing marginal artists and not the super-rich.

I. THE CHALLENGE THAT COPYRIGHT'S EXCESS TACKLES: THE MAJOR UNKNOWN AT THE HEART OF COPYRIGHT LAW THEORY

IN COPYRIGHT'S EXCESS: MONEY AND MUSIC IN THE US RECORDING INDUSTRY, Professor Glynn Lunney takes a big swing. He confronts questions that are both at the core of copyright law theory and that are, for the most part, previously unanswered.³ The core theoretical justification for copyright law is well-known and almost a cliché. Creating information goods—e.g., composing a song, writing a book, or producing a movie—entails significant upfront fixed costs.⁴ After the work is published the marginal costs of creating additional copies, including by unauthorized copiers, are typically relatively low.⁵ Therefore, the average costs of producing copies of the work (e.g., an MP3 file of a song) is higher than the marginal costs.⁶ As a result, in a world without copyright, the risk is that copiers will drive prices toward their marginal costs and below average costs. Prices will then be too low and will not allow the authors to recover the fixed costs of creation.⁷ Knowing that, many potential authors will choose to refrain from creation altogether.⁸ Copyright protection, which restricts unauthorized copying, is therefore perceived as needed to incentivize creativity.⁹ Copyright law, of course, has significant costs, mainly in terms of raising prices and thus restricting access to information goods and in

3. That is not to say that empirical studies of copyright law are new. For example, in 1970, more than two decades before he was appointed to the Supreme Court, Professor Stephen Breyer published a partly-empirical study of copyright in books. Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970). In recent years this method of studying copyright law gained momentum, with commentators exploring various areas, such as the social norms surrounding creativity, the psychology of creativity, the effect of certain legal reforms on the productivity and availability of works, and more. See, e.g., CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (Kate Darling & Aaron Perzanowski eds., 2017) (exploring industries in which creativity is primarily supported by social norms); Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain?: Empirical Tests of Copyright Term Extension*, 28 BERKELEY TECH. L.J. 1 (2013) (exploring if the extension of copyright affected the availability of older works); Jeanne C. Fromer, *A Psychology of Intellectual Property*, 104 NW. U. L. REV. 1441, 1459–66 (2010) (introducing multiple studies concerning the psychology of creativity). Yet, many of the empirical work that was conducted in recent years, partly for reasons discussed in this Part, do not tackle the heart of copyright's incentive-access balance.

4. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

5. *Id.*

6. Guy A. Rub, *Amazon and the New World of Publishing*, 14 I/S: J.L. & POL'Y FOR INFO. SOC'Y 367, 383 (2018); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 228 (2004).

7. Landes & Posner, *supra* note 4, at 326.

8. *Id.*; Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 763–64 (2015).

9. Landes & Posner, *supra* note 4, at 326; LUNNEY, *supra* note 1, at 11–13.

terms of shrinking the public domain and thus raising the costs of future creation.¹⁰

While this account is generally (although not uniformly) accepted in the abstract, it leaves many questions open, as Judge Frank Easterbrook noted:

“... copyright law . . . create[s] or employ[s] property rights in information so that the producer of intellectual property can charge more than marginal cost, and thus cover the total cost of producing and disseminating the works . . . Just how much above marginal cost should the price be? No one knows . . . A copyright lasts the life of the author plus an additional period that Congress keeps increasing in response to producers’ lobbying. What is the right length of a copyright? No one knows . . . How much use, and by whom, should be permitted without compensation under the fair use doctrine? No one knows.”¹¹

Consider, for example, Congress’ decision to extend the term of copyright by twenty years by passing the Copyright Term Extension Act (CTEA) of 1996. Most scholars argue that such an extension is inefficient.¹² When CTEA’s constitutionality was challenged, a group of seventeen prominent economists, including five Nobel laureates, authored an amicus brief explaining how unlikely, rare, and insignificant the added incentives are from the extension of copyright.¹³ Justice Breyer, in his dissent, partly relied on that brief when he suggested that “The extension will not act as an economic spur encouraging authors to create new works . . . No potential author can reasonably believe that he has more than a tiny chance of writing a classic that will survive commercially long enough for the copyright extension to matter.”¹⁴

But can we be certain that CTEA is inefficient? Justice Ginsburg, writing for the majority, argued that “The CTEA may also provide greater incentive for American and other authors to create and disseminate their work in the United States.”¹⁵ She noted that “Congress heard testimony from a number of prominent artists; each expressed

10. Landes & Posner, *supra* note 4, at 328; Rub, *supra* note 8, at 764; Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 355 (1999).

11. Frank H. Easterbrook, *Contract and Copyright*, 42 Hous. L. REV. 953, 962 (2005).

12. Arti K. Rai, *Engaging Facts and Policy: A Multi-Institutional Approach to Patent System Reform*, 103 COLUM. L. REV. 1035, 1131 (2003) (“[T]he overwhelming majority of commentators have noted that extending a copyright term for works that have already been created is very difficult to justify on economic grounds.”). See also Lawrence Lessig, *Copyright’s First Amendment*, 48 UCLA L. REV. 1057, 1065–66 (2001); Benkler, *supra* note 10, at 387.

13. Brief for George A. Akerlof et al. as Amici Curiae Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

14. *Eldred v. Ashcroft*, 537 U.S. 186, 254 (2003) (Breyer, J., dissenting).

15. *Id.* at 206.

the belief that the copyright system's assurance of fair compensation for themselves and their heirs was an incentive to create."¹⁶

While I find Justice Breyer's position, supported by the economists' brief, significantly more convincing than Justice Ginsburg's position, supported by the testimony of a few rich artists—and I will say more about this type of evidence below¹⁷—it is difficult to prove that Ginsburg was wrong.¹⁸ As Judge Easterbrook noted, “What is the right length of a copyright? No one knows.”¹⁹ What makes this question—as well as similar questions concerning the actual costs and benefits of our copyright system—challenging is that it is quite difficult to quantify the benefits and costs of those legal norms. Quantifying the quality of creativity (as a function of copyright protection) is especially challenging.²⁰

This is the challenge that COPYRIGHT'S EXCESS tackles. And it does it in a compelling way, especially by showing the lack of correlation between sales and productivity in the music industry. Lunney notes that the music industry's income from record sales rose from the early 1960s to the late 1970s, decreased in the first half of the 1980s, and from then rose to their ultimate peak in the late 1990s.²¹ Since then, income from record sales has been in sharp decline.²²

16. *Id.* at 207.

17. *See infra* text accompanying note 85.

18. Recent empirical work is getting close proving that Breyer had the better argument, although I do not believe that Ginsburg's position was decisively disproven, partly because those studies did not include data quantifying the costs for extending copyright. *See, e.g.*, Buccafusco & Heald, *supra* note 3 (showing that the distribution of certain audio books increase when they fall to the public domain); Kristelia A. Garcia & Justin McCrary, *A Reconsideration of Copyright's Term*, 71 ALA. L. REV. 351 (2019) (showing that the typical sound recording loses most of its commercial value shortly after being released); Michela Giorcelli & Petra Moser, *Copyright and Creativity: Evidence from Italian Opera in the Napoleonic Age* (May 16, 2019), <https://www.ssrn.com/abstract=2505776> (showing that the introduction of copyright protection in Northern Italy in the nineteenth century likely increased productivity, but the extension of copyright had more ambiguous results).

19. Easterbrook, *supra* note 11, at 962.

20. In addition, Lunney correctly notes that in many copyright industries revenues and the quantity of information goods produced rise over the years. Therefore, it is quite challenging to show any causation between one and the other. LUNNEY, *supra* note 1, at 3.

21. *Id.* at 67–69.

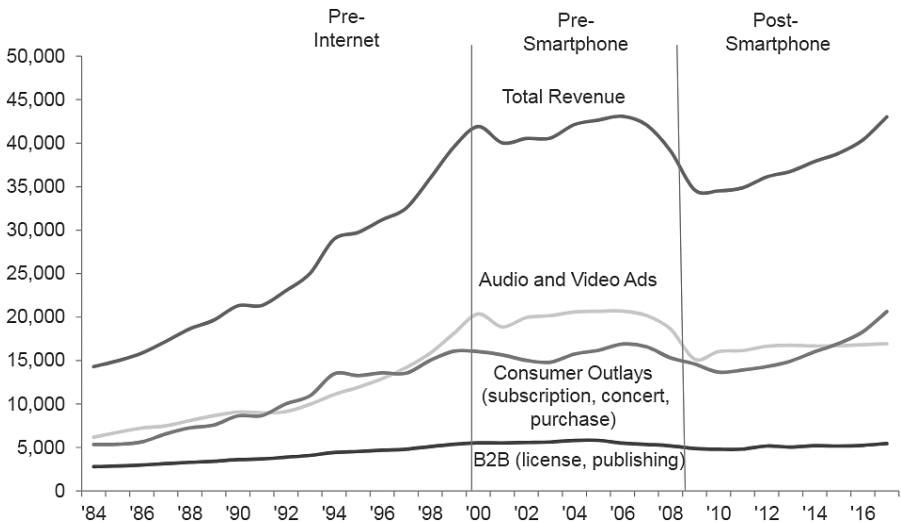
22. *Id.*, at 70–74. Another recent study, focusing on the total revenues of the music industry, shows similar (although not identical) trends: a massive increase in revenues from 1984 till 2000, a decline (in absolute terms!) until 2009, and a significant increase since then, attributed primarily to a significant rise in revenues from concerts and subscription services. *Putting the Band Back Together: Remastering the World of Music*, CITI GPS (Aug. 2018), <http://citi.us/2Y4DSse> [<https://perma.cc/G843-9M6E>] [hereinafter “Citi's Study”]. It is important to note that the Citi's Study, unlike COPYRIGHT'S EXCESS, uses absolute non-inflation-adjusted data. This graph summarizes some of the funding of the Citi's Study:



Relying on this data, Lunney’s core argument proceeds as follows: First, empirically, the quality and quantity of music production does not seem to correlate with record sales. Second, if copyright’s classic incentive theory is correct, that correlation can be expected. Third, copyright’s incentive theory needs to be modified, mainly by considering the backward-bending labor supply curve theory. The core of the argument is that as the income of musicians, and especially top musicians, rises, they choose to work less. Fourth, copyright law needs to account for this phenomenon and should, inter alia, try to limit the excessive income to some musicians, and, first and foremost, the industry superstars.

The first of those claims—the correlation, or lack thereof, between sales and productivity—goes to the heart of copyright theory, but it did not receive significant empirical attention, possibly because of the difficulty in measuring productivity.²⁴ This challenge is especially

Figure 4. U.S. Music Value: Advertising and Consumer Outlays (\$ millions)



Id. at 9.

23. LUNNEY, *supra* note 1, at 81.

24. This does not mean that previous studies did not measure productivity as a function of copyright protection. *See, e.g.,* Giorcelli & Moser, *supra* note 18 (measur-

acute when one considers, as one should, not just the quantity of production but its quality.

Intuitively, few music fans will find that the music industry sales data correlates with their perception of the good and bad eras of popular music. Most will not perceive the 1960s as the worst decade in the last fifty years of popular music nor the 1990s, despite Nirvana, as the best. But Lunney does not rely on intuition, but instead successfully undertakes the difficult task of showing the misalignment between sales and productivity.²⁵ For example, and it is just one example of many, Lunney notes that *Rolling Stone's* list of best albums of all time indicates that the late 1960s and early 1970s was the most successful era in producing such great albums, while the 1990s were relatively weak.²⁶



Indeed, the evidence that Lunney brings is compelling, and by the time the full case is presented, it is hard not to accept his main claim: Over the past fifty years there seem to be little correlation between sales and productivity in the music industry. This, by itself, is a major

ing how the introduction of copyright protection in North Italy in 1810 increased the number and possibly the quality of operas produced in the region).

25. See LUNNEY, *supra* note 1, at 86–156.

26. COPYRIGHT'S EXCESS focuses on the lack of correlation between income from sales and productivity, but it is worthwhile to note that there seems to be relatively little correlation between changes in copyright law and the music industry's income from record sales. Some of the most important developments in copyright law over the last 50 years—all primarily broadening the scope of copyright protection—happened in the second half of the 1990s. See The Digital Performance Right in Sound Recordings Act of 1995 (granting owners of copyright in sound recording an exclusive right over the public performance of their works, now codified in 17 U.S.C. § 106(6) (2018)); The Digital Millennium Copyright Act (DMCA) (passed in 1998 and providing, inter alia, a cause of action against those who circumvent or help to circumvent certain encryption of copyrighted works, now codified in 17 U.S.C. § 1201); The Copyright Term Extension Act (CTEA) of 1998 (extending the term of copyright protection by 20 years, now codified in 17 U.S.C. §§ 301-03).

Copyright's incentive theory would expect the industry revenues to increase following those legal changes, which, of course, did not happen. Shortly after those reforms were passed, the sales revenues started to sharply decline. It seems that developments in technology and in the market, such as the emergence of MP3 compression and the rise of peer-to-peer file sharing, overwhelmed those legal developments. A possible takeaway—a full analysis thereof goes well beyond the scope of this Essay—is that maybe the law's overall effect of revenues and artistic productivity is lower than many legal scholars assume.

27. LUNNEY, *supra* note 1, at 81.

contribution to copyright literature. The rest of this Essay, however, focuses on the other components in Lunney's argument.

II. THE SALES-PRODUCTIVITY CORRELATION, INCENTIVES, AND THE INTERMEDIARIES

Does the lack of correlation between sales and productivity undermine copyright's incentive theory? I think that the answer is probably yes, but the story is quite complex.

The tension between Lunney's empirical findings and incentive theory is clear. Copyright law transfers resources from consumers and future creators to the creative industries,²⁸ and it causes significant inefficiencies along the way.²⁹ Those effects might be justified only if, in return, it leads to the production of more and better works. In the music world, that correlation does not seem to exist, which can suggest that it is quite likely that the mentioned transfer of resources and the associated inefficiencies are unjustified. Society gets nothing, or at least very little, in return for the high costs of the copyright system.³⁰

The story is, however, more complicated. Copyright's incentive theory assumes that potential authors will be incentivized to create because of the expectation of future income. The income it provides to yesterday's creators is just a tool to lure tomorrow's creators. This description already implies an indirect correlation between revenues and creativity.³¹ But the correlation is even weaker because the music industry, like many other creative industries, works through intermediaries.

Indeed, the music industry is characterized by the existence of multiple intermediaries, including, and most importantly, the record com-

28. See Rub, *supra* note 10 and accompanying text.

29. See, e.g., Guy A. Rub, *Stronger Than Kryptonite? Inalienable Profit-Sharing Schemes in Copyright Law*, 27 HARV. J. L. & TECH. 49, 101–02 (2013) (discussing the deadweight loss, as a form of economic waste, associated with copyright protection); Glynn S. Lunney, Jr., *Reexamining Copyright's Incentives-Access Paradigm*, 49 VAND. L. REV. 483, 487–89 (1996) (pointing to additional inefficiencies associated with copyright protection, such as the misallocation of social resources).

30. LUNNEY, *supra* note 1, at 5.

31. For example, this description can, at least in theory, explain why there might be a time delay between the incentives and productivity. It is theoretically possible that in 1999 the eleven-year-old Robyn Fenty, who later became known by her middle name, Rihanna, and the ten-year-old Taylor Swift decided to become musicians because they noticed how commercially successful the music industry was in the late 1990s. By the time they became superstars, around their 17th birthdays, the music industry record sales were much lower. While this story might or might not be factually true—I suspect that it is not—it demonstrates that even if copyright's incentive theory is correct, we should not expect a perfect correlation between record sales, and even revenues in general, and productivity. Nevertheless, the lack of correlation between sales and productivity cannot be fully explained by the possibility of delayed incentives. For example, one cannot explain the high productivity of the late 1960s and early 1970s with this theory, as the record sales throughout the 1960s were relatively weak.

panies or labels.³² Most recording artists are not paid directly by the buyers of their music but by their record companies.³³ That compensation is, of course, affected by sales, but the correlation is not perfect. While some of the record companies' revenues are used to pay recording artists,³⁴ others are used for other goals, including recruiting new talent.

Presumably, the existence of record companies should still leave a correlation between their revenues and the artists' productivity. If the labels' income is rising, as presumably happened in the late 1990s, they can increase the artists' compensation, thus generating higher incentives to create. Moreover, that additional income should allow record companies to spend more on recruiting new artists. The problem is that the correlation is not as direct. For example, many recording artists who are signed by a label are only paid a lump-sum amount for each album they record.³⁵ In other words, their revenues do not directly correlate with their sales.³⁶ Indirectly, of course, the two are

32. Other creative industries have their own intermediaries. The book industry has publishers, the movie industry has the studios, and so on. *See Rub, supra* note 29, at 68–70 (examining the core compensation structure in artistic industries and the role that intermediaries play in those schemes). The role of record companies might be especially important in the music industry because it is highly concentrated, at least in the United States, and dominated by just three companies. *Id.* at 129. There are of course many other intermediaries, including along other parts of the distribution chain, that might not make creative decisions *per se* but that can affect the artists' compensation and thus creativity quite dramatically. Those include the companies that run music platforms (e.g., SiriusXM, Spotify, YouTube), music publishers, managers, concert agents and promoters, and more. *See Citi's Study, supra* note 22, at 61–62 (explaining the distribution of revenues among the intermediaries and noting that “because the music industry has so many intermediaries — and because the consumption of music is so fragmented across various platforms — the artist captures very little of the aggregate revenues.”). *See Rub, supra* note 6, at 384 (claiming that Amazon's central role in the book industry might make it over time more important than copyright law itself, in determining the authors' incentive structure).

33. DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 68–72 (8th ed. 2012). One important exception is touring income that in some cases is paid to the performing artists themselves and not through the recording companies.

34. A recent study suggests that musicians currently capture 12% of the music industry's total revenues, an increase—attributed to touring income—from the 7% they captured in 2000. *Citi's Study, supra* note 22, at 61–63.

35. The common practice in the recording industry (in its simplified version) is to pay artists a lump-sum advancement early in the production process. Future royalties are then accounted against the advancement and the production costs of the album (which together are called the fund). Therefore, until those royalties are equal to the fund, the artist receives no payment beyond the lump-sum advancement. If the total royalties fail to cover the fund, which is common, the rest is unrecoupable and is left with the artist. The practical effect of this scheme is that many artists only receive advancements from the record company. PASSMAN, *supra* note 33, at 83–85.

36. It is important to note, however, that top-selling artists, which are the focus of this Essay (and in some respects of Lunney's work), earn royalties that exceed their advancements, and therefore their compensation more closely tracks record sales. Many superstar musicians even have their own label to manage their newer (post-stardom) albums.

connected: At the minimum, the more sales a recording artist has, the better terms, including higher lump-sum payment, she will be paid on her future albums.³⁷ The industry's total sales are also expected to have an indirect effect on artists' income. Over time, assuming there is even a modest level of competitiveness in the industry, an increase in total revenues should lead to an increase in the artists' compensation, including those lump-sum advancements.

However, the intermediaries can slow down those processes and weaken the correlation. It is quite reasonable for an intermediary to bear the risk of fluctuation in the market, at least in the short run.³⁸ A rational label might, therefore, decide not to spend all its income in the good years, so it will be able to survive the bad years. As a result, a few good or bad years might not immediately and significantly affect the artists' income.

One study that addressed the recording artists' compensation more directly (although not specifically that of top-musicians) also indicates that there is a correlation, yet an imperfect one, between the industry revenues and the artists' compensation. That study suggested that compensation significantly rose (in absolute terms) between 1984 and 2000, very moderately rose (in absolute terms) between 2000 and 2010, and dramatically rose thereafter.³⁹ Until 2008, the share of the artists' compensation was 8%-10% of the industry's revenues, but it has since then risen to 12%, primarily due to the increased importance of concerts.⁴⁰

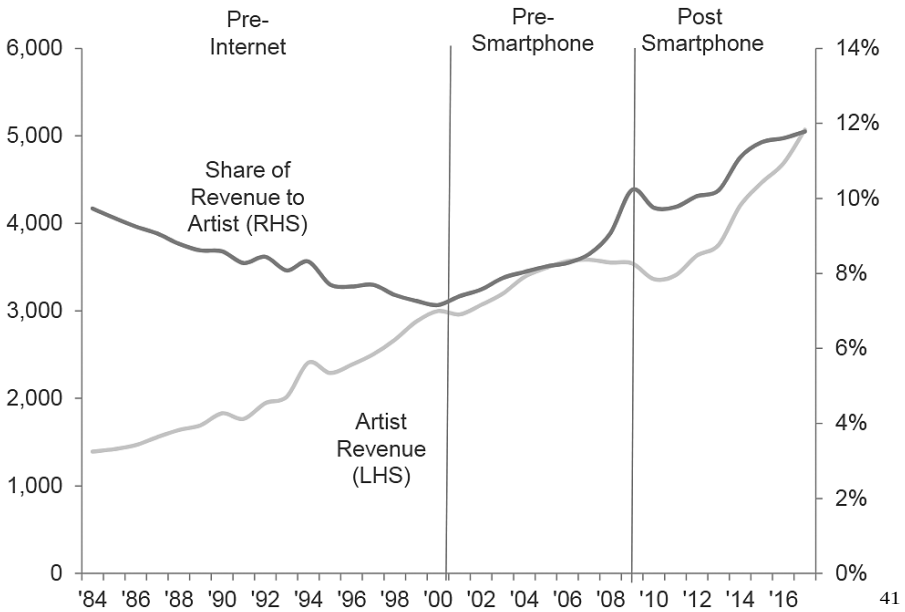
37. Some multi-album record deals include formulas that account for automatic increases in advancements depending on the sales of previous albums. See *PASSMAN*, *supra* note 33, at 95-97.

38. On an individual musician's level, the record companies do bear much of the risk of a failure, as the advancement is usually unrecoupable when sales are weak. See *supra* note 35.

39. Citi's Study, *supra* note 22, at 63.

40. *Id.*

FIGURE 75. ARTIST REVENUES AND ARTISTS' SHARE OF REVENUE
(\$ MILLIONS; PERCENT)



Record companies can also affect the productivity of their signed artists more directly, including along the vectors that Lunney measures. For example, a record company can force or at least incentivize artists to release albums more quickly or more slowly than the artists intended.⁴² It can do so for various reasons relating to the artists' best interests, or the company's best interests,⁴³ taking into account its entire portfolio of artists.

41. *Id.*

42. See PASSMAN, *supra* note 33, at 103–10 (discussing how record deals are structured to account for a reasonable time between one album and another, and how the record company contractually secures its power in those arrangements). Record companies can exercise this form of artistic power in multiple additional ways, such as by deciding to release “best hit” records at will or by rejecting or delaying albums for various technical reasons. *Id.* at 110–12. Intermediaries affecting creative choices are not unique to the music industry. See, e.g., JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 87 (2014) (describing how a gallery encouraged a visual artist to create larger pictures).

43. It has become more common in recent years to require some recording artists to sign what the industry calls a “360 deal.” Under such a deal, the record company gets a share of all the artists' activities that relate to their records, including touring. PASSMAN, *supra* note 33, at 97–101. Those deals encourage companies to take a bigger role in the artists' money generating activities and, for example, encourage them to tour more (or less) and record less (or more). Measuring the artist's productivity, in term of recording, might therefore tell us something about the record company and its preferences and not just about those of the artist.

As a result, even if the incentive theory is correct, we might not observe a strong correlation between revenues or sales and productivity. Indeed, without access to the decision-making-level information within the record companies, which is, of course, confidential, we might not be able to fully understand why a certain level of industry revenues correlates to a certain level of productivity.

Still, I find it unlikely that the lack of correlation between sales and productivity can be fully explained by the actions of record companies. The mismatch is too significant and too long-term to be explained in that way. For example, while in theory it is possible that the revenue spike in the late 1990s allowed the record companies to put aside funds that were used to launch the music careers that made the 2000s a more productive decade, I find it unlikely, at least on a large scale. The changes in sales from the 1990s to the following decades were significant and long-lasting. I am not familiar with any evidence and find it unlikely that the record company executives of the 1990s foresaw and prepared for those massive changes by saving millions, or maybe billions, of dollars for a rainy day.

III. CAN THE BACKWARD-BENDING SUPPLY-CURVE EXPLAIN THE SALES-PRODUCTIVITY DISCREPANCY?

If the actions of the intermediaries cannot fully explain the lack of correlation between sales and productivity, then another explanation is needed. In other words, even in an industry that is dominated by record-label executives, this lack of correlation should be quite concerning from a copyright policy perspective. Indeed, COPYRIGHT'S EXCESS' truly convincing story about the mismatch between sales and productivity in the music industry over the past fifty years undermines the standard narrative of copyright theory. That is, in itself, an incredibly valuable contribution to copyright scholarship.

This leaves open a troubling and important question: If record sales cannot explain the shifts in productivity over the last fifty years, what can? Some partial explanations were already mentioned in this Essay, and others can easily come to mind. One can try to explore the role of intermediaries (although, as already noted, it is a partial explanation at best), the increase in digital piracy⁴⁴ (which can, at best, only explain the changes in the industry over the past 20 years), the increase in touring (which is also a recent phenomenon),⁴⁵ and so on. None of those explanations can account for and fully explain the mismatch between sales and productivity. A full account, which I am not offering in this Essay, will also need to consider the level of competition in the

44. See Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 SCH. L. REV. 63, 100 (2003); LUNNEY, *supra* note 1, at 70.

45. LUNNEY, *supra* note 1, at 173 (“[I]n the pre-file-sharing era, tours were loss leaders, a form of advertising expenditure.”).

music industry and how it allows industry participants, especially the record companies and their shareholders, to extract money out of the industry.

Glynn Lunney offers his own explanation. It is an explanation that I am hesitant to adopt, but one that can lead to future studies that will shed light on the incentives of leading artists. Lunney's explanation is based on a well-established theory within labor economics: the backward-bending supply-curve of labor. This theory suggests that when the salary of a worker rises, the promise of a higher income, and the associated improved quality of life, will cause the worker to wish to work more. However, if the salary continues to rise, at some point the value of the additional income will not be enough to encourage the worker to work more. The worker will not be able to use those funds to gain enough utility and acquiring leisure will seem more desirable. Therefore, beyond that point, an increase in salary or other forms of compensation will cause the worker to want to work less.⁴⁶

Lunney applies this theory to the supply of music. When the industry's revenues were relatively low, the argument goes, individuals in the industry—i.e., musicians—were incentivized to work harder. Like most lower-earning individuals, the increase in their compensation motivated them to work longer hours to improve their quality of life. However, as the industry's total revenues increased, and especially when they reached their peak in the late 1990s, the industry saw the same shift that the backward-bending supply-curve theory expects. Like typical high earners, top-musicians were substituting work for leisure. They became less productive. Only in the 2000s, when revenues decreased, were individual artists encouraged to work more, as was reflected in the increase in the industry's productivity.

For several reasons, I find this argument questionable. The first issue, and the minor one, was already alluded to above.⁴⁷ It is not obvious that when the industry as a whole was doing better, top artists were paid proportionally more. The compensation of top artists can be affected by multiple factors, only one of which is the industry's total sales. For example, it is possible that the top artists' increase in touring income more than compensated them for the potential decrease in royalties from record sales.⁴⁸ Indeed, even if record companies were getting richer in the late 1990s and poorer in the 2000s, this might not have fully trickled down to the top tier musicians.

A more significant issue has to do with the application of the backward-bending supply-curve theory to very rich individuals. Lunney focuses on the apparent decrease in productivity of top-selling musicians

46. See, e.g., GEORGE J. BORJAS, *LABOR ECONOMICS* 42–45 (8th ed. 2019).

47. See *supra* Part II.

48. The industry as a whole eventually increased both its total revenues and the artists' compensation, primarily due to increase in the income from touring and subscription services. See Citi's Study, *supra* note 22.

during the late 1990s, which was arguably lower than the period before and after the 1990s. In the second half of the 1990s, top-selling musicians produced fewer hits and fewer records, and the hits they produced were likely of lower quality, at least based on several factors that Lunney considers.⁴⁹ But what is shared among top-selling artists in the late 1980s—such as Guns N’ Roses, Journey, and Bruce Springsteen—those of the late 1990s—such as Garth Brooks, Shania Twain, or Santana—and those of the late 2000s—like Lady Gaga, The Black Eyed Peas, and Taylor Swift—is that they are all extremely rich.⁵⁰

When it comes to those top artists, the backward-bending supply-curve theory seems less applicable. It is unlikely that Shania Twain was paid so much for her commercial success of the late 1990s that it pushed her over the bend of her supply curve to the point of (rational) laziness, but Lady Gaga’s commercial success of the late 2000s and Bruce Springsteen’s of the late 1980s were modest enough to make them eager to work hard to increase their earnings and improve their quality of life. Even if the backward-bending supply-curve theory is generally true, it is almost certain that the top-selling musicians have long passed the point where typical individuals substitute work with leisure.⁵¹ If Twain’s, Gaga’s, or Springsteen’s supply-curve is bending, it should have bent a long time ago and quite early in their careers.

IV. INCENTIVIZING TOP ARTISTS

One of the takeaways from COPYRIGHT’S EXCESS is that copyright’s incentive theory might lack nuances and that it erroneously fails to take into account the full complexity that incentivizing creativity entails. Stating that more money means more creativity is incomplete and inaccurate.⁵²

49. *E.g.*, LUNNEY, *supra* note 1, at 157–73.

50. The most commercially successful albums in the U.S. in the late 1990s (1996–1999) were Garth Brooks’s *Double Live*, Shania Twain’s *Come on Over*, and Santana’s *Supernatural*. During the late 1980s (1986–1989) the best-selling albums in the U.S. were Guns N’ Roses’ *Appetite for Destruction*, Journey’s *Greatest Hits*, and Bruce Springsteen’s *Live/1975–1985*. In the late 2000s (2006–2009) the best-selling albums in the U.S. were Lady Gaga’s *Bad Romance* and *Poker Face*, The Black Eyed Peas’ *I Gotta Feeling*, and Taylor Swift’s *Fearless*. See RIAA, *Gold & Platinum*, https://www.riaa.com/gold-platinum/?tab_active=top_tallies&ttt=T1A [<https://perma.cc/N9YR-RXYB>] (last visited June 8, 2020).

51. See also Alex Williams, *Why Don’t Rich People Just Stop Working?*, N.Y. TIMES (Oct. 17, 2019), <https://nyti.ms/2UpH3d3> [<https://perma.cc/3487-7AFF>] (noting that the super-rich do not have “a retirement number” and quoting a prominent tech executive stating, “[t]here’s never some omega point . . . [p]eople who get to that point don’t stop once they get there.”).

52. Copyright literature, especially in recent years, pays more attention to the actual forces that drive creativity. Much of that work is driven by empirical research. See, *e.g.*, SILBEY, *supra* note 42; Fromer, *supra* note 3; Christopher Jon Sprigman, Christopher Buccafusco & Zachary Burns, *What’s a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B.U. L. REV. 1389 (2013).

This Essay does not aim to provide a comprehensive theory of incentives for creation. It, instead, provides a few initial thoughts on the issue, and especially on the ways in which leading artists are incentivized to continue to create.

It is unlikely that copyright's simplistic incentive theory can explain why superstars continue to work.⁵³ Those artists do not usually worry about covering their fixed costs of creation. In fact, many of them have already earned enough to cover all their (and their children's) future expenses, including their cost of living. Still, many, possibly most, successful and rich individuals, including many successful and rich musicians, continue to work. In other words, the formula "money equals incentives," which is quite crude with respect to almost every individual, might be just erroneous when it comes to those who are already very wealthy.

What makes the wealthy work? Yochai Benkler famously offered the following formula to assess the reward that individuals derive from their labor: $R = M + H + SP(M, jalt)$.⁵⁴

In this formula, R stands for the individual's total reward. It is assumed that individuals try to maximize their R. M stands for the utility from the monetary reward. This is the pleasure that individuals receive from the monetary reward itself.⁵⁵ M is therefore tied to the individual's actual ability to increase her consumption or enjoyment from the additional income. It is thus likely marginally decreasing.⁵⁶ When it comes to musicians, they, for example, can use their advancements to purchase goods and services, which will increase their utility and thus M.

H stands for the hedonistic (internal) pleasure or utility that one receives from her labor. For example, many artists, including musicians, openly discuss the joy that they receive from the creative process itself and its output.⁵⁷

SP stands for the utility from the social-psychological reward that individuals get from their labor. This is a broad category that includes

53. It is important to note that the discussion in the following paragraph focuses on the top musicians. Their productivity plays a significant role in COPYRIGHT'S EXCESS and in this Essay. Less successful artists are subject to different constraints.

54. Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369, 429 (2002). Benkler's original formula was slightly differently worded: $R = M_s + H + SP_{p, jalt}$. In Benkler's formula "s" denotes the decrease in marginal utility of wealth, a factor that is, of course, taken into consideration in my analysis as well. "p" stands for the relations between M and SP. I, of course, consider that factor as well.

55. As further explored below, a monetary award can have a social impact as well. That impact will be considered part of SP and not M.

56. Benkler, *supra* note 54, at 426.

57. See, e.g., Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745, 1765–67 (2012) (explaining the personal nature of creation, including by quoting the famous author Margaret Atwood's notion that she creates to express herself and that "I had to keep writing or else I would die.").

praises, fame, awards, shame, and much more. Benkler importantly noted that this reward is a function of, among others, the monetary reward and the rewards (monetary or otherwise) of others. In other words, Alice's social-psychological reward might partly depend on whether and how much money she receives for her actions⁵⁸ and how much reward, including money and fame, others are getting.⁵⁹

COPYRIGHT'S EXCESS, to some degree, focuses on the connection between R and M—exploring how more or less monetary reward motivates musicians. It is, however, somewhat less likely that M plays a significant role when it comes to superstars. The Shania Twains and Taylor Swifts of the world are so rich—each has accumulated more than \$400 million⁶⁰—that any additional monetary compensation cannot significantly affect their purchasing power. Even if they stop working altogether they will likely be able to buy anything they might want for the rest of their lives.⁶¹ The decrease in the marginal utility of wealth makes M almost irrelevant for the super-rich. So why do they continue to work? I suspect that, as Benkler suggested, the answer has to do mostly with H⁶² and, even more so, with SP.⁶³

Such a result would be consistent with the findings of comparable studies in a different context—the labor of very successful and very rich businessmen. Many such multi-millionaires continue to work. Survey data, for example, indicates that America's highest earners plan to retire at a very old age, if at all. One survey from 2013 found that nearly one-third of those with annual earnings of \$750,000 or

58. The colorful examples that Benkler uses here are prostitutes and professional athletes. Benkler, *supra* note 54, at 427–28. The former are typically subject to negative SP because they receive monetary rewards for their actions, while the latter receive a positive SP if they are high-earners.

59. This notion is marked with *jalt* in the formula, which stands for jealousy and altruism. Indeed, in many cases Alice's SP will decrease knowing that Bob, her colleague, is more highly valued than her, which for simplicity we can call jealousy. But her SP can also increase knowing that Charlie, her son, is well rewarded. This is altruism.

60. See, e.g., Dan Western, *The Top 20 Richest Singers in the World 2019*, WEALTHYGORILLA, <https://wealthygorilla.com/richest-singers-world> [<https://perma.cc/LX3M-GWKU>] (last visited June 3, 2020).

61. Interestingly, Twain did go on a long hiatus from recording music and she did not release any albums from 2002 to 2017. While she toured infrequently during that timeframe and appeared on a few television shows, she seems to have reduced her artistic productivity quite dramatically during an extended period of time. In contrast, since her debut album in 2006, when she was 17, Swift releases a studio album every 2-3 years. While this is a good example of the differences in productivity between the superstars of the 1990s (Twain) and those of the 2000s (Swift), considering that both are similarly very rich, in their case, wealth by itself likely cannot explain their different paths.

62. See Fromer, *supra* note 57, at 1765–70 (pointing to authors' inner desire to create and their personhood, as expressed in their work).

63. See Greg Lastowka, *Digital Attribution: Copyright and the Right to Credit*, 87 B.U. L. REV. 41, 58 (2007) (“[S]elf-interested authors often create not merely in pursuit of money, but also in pursuit of attention and recognition.”).

more noted that they do not plan to retire before they turn 70, if at all.⁶⁴ This is a much higher percentage than that of lower earners.⁶⁵ Another 2010 survey found that “60 percent of those with a net worth of \$15 million or more plan to stay involved with work regardless of their age.”⁶⁶

This phenomenon—mega-rich businessmen who continue to work—intrigues researchers. Interestingly, to a large degree, the common explanations to this phenomenon fall under the two categories already explored: internal pleasure and/or social-psychological reward, especially in the form of outperforming those they consider their competition. Professor Jeffrey Winters, for example, explained that rich individuals are thrilled when they increase their wealth.⁶⁷

Several studies point to the importance of status to the super-rich. Professor Brooke Harrington noted that they evaluate their wealth not in terms of purchasing power, but instead, by asking themselves “Do I have as much or more than these people I’m comparing myself with?” because “feeling wealthy is about comparison with others in your reference group.”⁶⁸ They continue to work partly because of the shame associated with not working: “Imagine the embarrassment of being so highly-accomplished . . . and then, as time passes, you can’t answer the question of ‘What do you do?’ so easily.”⁶⁹ The author Gary Shteyngart, who interviewed more than a dozen highly wealthy hedge funders noted how competitive they were: “They’d compete against one another on their Bloomberg terminals all day and then at the end of the day they would play competitive poker with each other.”⁷⁰ The psychologist Brad Klontz, who often works with billionaires, suggests that status plays a big part in their decision to keep working: “They want to win. That’s part of the motivation. We’re all competitive in our own way. It’s part of our tribal DNA.”⁷¹

64. Robert Frank, *Why the rich never retire*, CNBC (Aug. 2, 2013), <https://www.cnbc.com/id/100935310> [<https://perma.cc/CC5E-L4KK>].

65. *Id.*

66. *Id.*; see also, Williams, *supra* note 51 (noting that “[s]tudies over the years have indicated that the rich, unlike the leisured gentry of old, tend to work longer hours and spend less time socializing.”).

67. Joe Pinsker, *The Reason Many Ultrarich People Aren’t Satisfied With Their Wealth*, THE ATLANTIC (Dec. 4, 2018), <https://www.theatlantic.com/family/archive/2018/12/rich-people-happy-money/577231> [<https://perma.cc/K72V-HM28>].

68. *Id.* This behavior might be supported by the *relative income hypothesis*, which suggests that individuals measure satisfaction from wealth in comparison to others and not in absolute terms. The theory is associated with the work of the economist James Duesenberry. See JAMES S. DUSENBERRY, *INCOME, SAVING AND THE THEORY OF CONSUMER BEHAVIOR* (1949).

69. Alina Dizik, *If you get rich, you won’t quit working for long*, BBC (Dec. 8, 2016), <https://bbc.in/3eS6Ty4> [<https://perma.cc/3ZXC-XXQT>].

70. Pinsker, *supra* note 67.

71. Eilene Zimmerman, *Inside the Minds of the Ultrawealthy*, N.Y. TIMES (Feb. 19, 2017), <https://nyti.ms/2Y6Fu4V> [<https://perma.cc/35NV-57BB>].

While those studies and this data did not focus on very rich musicians,⁷² it is quite likely that their motivations to continue to create are rooted in their internal drive as well as, or maybe more, in the social-psychological reward that comes from leading the industry.⁷³ Top musicians, for example, seem to place tremendous weight on winning awards.⁷⁴ The social-psychological reward is, of course, a broader concept and includes things like fame and the reception of one's work among critics and fans. Record sales (and even income) might still be very important, but, as is the case with very rich businessmen, it might be mainly a tool for receiving social-psychological rewards. Record sales are a good proxy for the reception of the record among fans and of the artist's fame. For example, it is quite likely that superstars care deeply whether their albums received a platinum status from the RIAA, and while that status is determined by sales (and nowadays by downloads and streaming as well), for a superstar artist the status itself might be more valuable than the sales. Importantly, as Benkler alluded to and as the data from the super-rich businessmen suggests, it is quite likely that this status is significantly affected by the performance of one's peers and one's "reference group."⁷⁵

72. *But see* PASSMAN, *supra* note 33, at 108 ("I'm convinced (but can't prove) that one of the reasons for delay [in releasing music albums] is that artists, particularly following a major success, are a bit frightened to put out their next record."); *see also supra* note 63.

73. I am not aware of reliable empirical data on the motivations of top musicians. It might not be trivial to obtain that information. For example, the social norms among creative communities likely affect the ways in which musicians describe their motivations. The following paragraphs are, therefore, based on my assessment, by analogy to other ultra-rich together with anecdotal evidence.

74. Musicians, for example, seem to place significant weight on even being nominated, let alone winning a Grammy. *See, e.g., Martina McBride: My GRAMMY Moment*, BILLBOARD (Jan. 25, 2014), <https://www.billboard.com/articles/events/grammys-2014/1538569/martina-mcbride-my-grammy-moment> [<https://perma.cc/W9CZ-9T47>] (quoting Martina McBride "It's a thrill to win one of music's highest honors . . . I'd love to win a solo Grammy one day. That's still on my bucket list"). The Grammys ceremony itself is attended by most top musicians. In fact, it is hard to find a top-selling musician from recent decades that did not perform at the ceremony. A Grammy is of course just one of dozens of awards that musicians might win. Lady Gaga, for example, who sold more than 11 million albums and is estimated to have a net worth of \$300 million, stated time and again how important her 2019 Oscar nomination was to her and her family. *See* Kyle Buchanan, *Lady Gaga Slept Through Oscar Nominations, Then 'I Just Burst Into Tears'*, N.Y. TIMES (Jan. 22, 2019), <https://nyti.ms/30eKoPT> [<https://perma.cc/R2UY-SC39>] ("These are not Oscar nominations for me, these are Oscar nominations for the Germanottas [Gaga's family] . . . this feels like a very big win for them."); Amy Kaufman, *Lady Gaga on her two Oscar nods, a possible 'Shallow' performance and Bradley Cooper's snub*, L.A. TIMES (Jan. 22, 2019), <https://lat.ms/2zYnB0d> [<https://perma.cc/ZMG8-F8CT>] ("I'm so overwhelmed and happy. I apologize in advance if I cry" . . . "There's really no award that is more esteemed than the Oscar in acting, and for music, it is also extremely special. Since I was a little girl, I always admired all of the artists that put in so much hard work and passion into filmmaking. Watching the award shows, I used to cry with them.").

75. *See, e.g.,* Brian "Z" Zisook, *Don't Talk to Snoop Dogg About How Many GRAMMYS He Hasn't Won*, DJBOOTH (Mar. 14, 2018), <https://djbooth.net/features/>

If this analysis is correct, then the relations between the compensation of top-selling artists and their incentives to create is complex and murky. It is not obvious that during a period in which the industry's sales are down, superstars' incentives will decrease as well. Superstars' ability to assess their status might be only slightly affected by a decrease or increase in the industry's sales. The number of Grammy awards might be at least as important. Moreover, focusing on social-psychological rewards raises a host of other factors that might need to be considered. For example, social-psychological rewards typically correlate to visibility. Is it, for example, possible that touring, which became more important to the music industry in recent decades, makes top-musicians' success more salient? Maybe social media does? Those are complex questions, but tackling them might provide important insights concerning the productivity of leading musicians throughout the decades.

V. IMPLICATIONS

While this Essay's focus on the internal (hedonistic) and social-psychological rewards does not explain, in itself, why productivity in the music industry in the 1990s was lower than that of the 1980s and the 2000s, it suggests that, at least when it comes to top-selling artists, more money might not result in improved productivity. As far as top artists are concerned, other factors, such as visibility and perception, might be more important and impactful.

Interestingly, while I offer a partly different view of superstars' incentives, and while that view requires additional analysis and study, intuitively, it might lead to normative results that are quite close to those of Lunney's. The empirical data seems to suggest quite clearly that an increase in sales, which entails significant social costs,⁷⁶ does not generate more and better music, especially when it comes to the leaders of this industry. In other words, even if the backward-bending supply-curve theory is mostly inapplicable to top musicians, from an incentives perspective, there is relatively little value in increasing their monetary reward. The costs of providing them those additional funds, through the copyright system, likely outweigh, maybe substantially, the social benefits. Normatively, this is quite similar to the conclusions that COPYRIGHT'S EXCESS reached: top musicians likely make too much money from the copyright in their music, and we need to find

2018-03-13-snoop-dogg-grammy-nominations [<https://perma.cc/KW3U-NYME>] (quoting Snoop Dogg on his failure to win Grammys despite being nominated 17 times "when it got to 17, I was like, 'Huh? Hold on.' Then I started looking at the [musicians] I lost to and I was like, 'Hold on, cuz.' THEN I started trippin'. I'm athletic, too. So I'm like, 'I'm better than you . . . It's bullshit. [laughs].'").

76. See *supra* text accompanying note 10.

ways, including through copyright law, to incentivize the marginal artist and not the top ones.⁷⁷

One approach might be to let the record companies do just that. After all, promoting music productivity is, all else being equal, in their best interests. Moreover, collectively, they control much of the music industry, and therefore, one may hope that they will be able to limit the compensation to top musicians and channel some of it to marginal artists. It is, however, doubtful that they want to or are able to do that. For example, in a competitive environment (or in a market with relatively low barriers to entry), the ability of those record companies to squeeze top musicians is quite limited. Those artists can leave a label and work with a better-paying competitor or even start their own recording company.

Where the record companies will not or cannot help, the law might be able to step in. Lunney shows how certain legal reforms can assist in limiting the over-compensation of top musicians. Many more ideas can come to mind, either within copyright law—for example, maybe we should consider the artist's wealth in a fair use analysis⁷⁸—or by other laws—for example, by taxing top artists and using those funds to support emerging artists.⁷⁹

We can also start by restricting, eliminating or rejecting legal rules and suggested reforms that are benefiting mostly the top artists, such as the Copyright Term Extension Act,⁸⁰ the termination of copyright

77. While marginal artists should be preferred over superstars, marginal artists can also be over-incentivized. See Lunney, *supra* note 29. A full analysis of this concern is beyond the scope of this Essay.

78. The Copyright Act lists four factors that should be taken into account in evaluating whether a use is fair. 17 U.S.C. § 107 (2018). The wealth of the plaintiff is not one of them. While the Supreme Court made it clear that this is an open list of factors, courts rarely go beyond that list and they do not currently consider wealth in making fair use determination.

79. See LUNNEY, *supra* note 1, at 201 (considering the possibility of taxing top artists). See also Brian L. Frye, *Equitable Resale Royalties*, 24 J. INTELL. PROP. L. 237, 267–76 (2017) (suggesting that sellers of fine art pay a share of the sale price but, unlike typical resale royalty schemes, that those funds will not be transferred to the artists, who are typically rich, but instead redistributed through the tax system to less successful artists). It should be noted that some of the arguments expressed in this Essay can be applied more broadly and beyond the music industry. If the very rich are primarily motivated by the joy of work and the social-psychological rewards that accompany their success, then a corresponding argument could be made to significantly tax them. Such a tax should have minimal effect on those motivations and therefore create only minimal distortion in the supply of labor. A full analysis of this argument is, of course, well beyond the scope of this Essay.

80. Extending copyright for existing works, as Congress did when it enacted the Copyright Term Extension Act, benefits mainly top authors. For most authors, the extension from life plus 50 years to life plus 70 years was irrelevant because most works lose practically all their commercial value decades before their copyright expires, even under the regime that predated the Copyright Term Extension Act. Top authors, however, might create work that generates a long-lasting stream of revenue.

transfers,⁸¹ and resale royalties.⁸² Not surprisingly, superstar artists support all those measures.⁸³ However, the fact that top artists propose or support a legal reform does not necessarily mean that it is socially desirable, or, specifically, that it will incentive marginal artists. We should be hesitant to take their words at face value—as Justice Ginsburg might have done when evaluating CTEA⁸⁴—as a clear indication that certain legal reforms will promote creativity.

Of course, some of those ideas entail multiple difficulties. For example, it might not be easy to guarantee that the funds denied from top artists will be used efficiently to encourage marginal ones.⁸⁵ A full analysis of those and similar ideas is thus beyond the scope of this Essay. However, it is clear that the law, and especially copyright law, should consider the identity of its beneficiaries. Reining in the compensation of the very rich artists is not just justifiable from a distributive justice perspective. It is also efficient.

CONCLUSIONS

COPYRIGHT'S EXCESS teaches a valuable lesson. Incentivizing creativity is a complex matter. Channeling additional resources to an industry, especially through copyright law, is not only socially costly, but it might not even achieve its stated benefit: incentivizing creativity. The focus on the productivity, or lack thereof, of top musicians is especially important. While I'm not sure that those super-high income levels lead, by themselves, to laziness, I believe that incentives are a weak justification for the generous compensation they extract from their copyright. Future research will be able to shed more light on the incentives that drive superstars and will be able to explore in-depth the ways in which the law can better focus on the marginal artists and not those who are already rich.

81. 17 U.S.C. §§ 203, 304 (allowing authors, i.e., recording artists, to terminate any license or assignment of their work). *See*, Rub, *supra* note 29, at 100–01 (explaining how this mechanism benefits mostly the top artists).

82. Resale royalties require sellers of fine art to pay a share of the sale price to the artist. This is the law in more than 70 countries and, until recently, in California. In 2013 the Copyright Office recommended passing a similar bill in the United States. *But see* Guy A. Rub, *Experimenting with State-Enacted Resale-Royalties*, 107 KY. L. J. 651, 659–62 (2019) (summarizing data that suggests that this mechanism is regressive and that it almost exclusively benefits a tiny group of very rich artists or their estates).

83. *See, e.g., supra* text accompanying note 16.

84. *Id.*

85. *See* LUNNEY, *supra* note 1, at 202–04 (analyzing this difficulty).

