THE UPSTREAM EFFECTS OF THE STREAMING REVOLUTION: A LOOK INTO THE LAW AND ECONOMICS OF A SPOTIFY-DOMINATED MUSIC INDUSTRY

MOLLY HOGAN*

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INTRODUCTION

"Music for everyone," or, "the last desperate fart of a dying corpse?"[1] The former is a prominently displayed tagline on Spotify's U.S. homepage, while the latter is a snippet of a charged statement against the service made by Radiohead's Thom Yorke. Spotify and similar on-demand streaming services, like Apple Music, have displaced iTunes and CDs as the primary way that listeners access music.

* J.D. Candidate, 2016, University of Colorado Law School. Thank you to my family, friends, and the entire Colorado Technology Law Journal team for your support during the note-writing process.

1. SPOTIFY, https://www.spotify.com/us (last visited Nov. 14, 2015); Alex Young, *Thom Yorke: Spotify Is "the last desperate fart of a dying corpse"*, CONSEQUENCE OF SOUND (Oct. 3, 2013, 3:59 PM), http://consequenceofsound.net/2013/10/thom-yorke-spotify-is-the-last-desperate-fart-of-a-dying-corpse/.

However, for many within the music industry, the rise of Spotify is an indicator of transformative change that will further stifle the already-difficult task of making money through a career in music. As many music fans and artists themselves could argue, authoring and performing music is a form of art, not a surefire way to make a living, and most artists and songwriters did not go into the craft for the money alone. However, it is in our nature to expect the market system to reward hard, creative work, and many who are creating this musical product and benefitting consumers are not receiving the profits they believe they are owed.

In theory, the technological shift away from a direct-purchase market is beneficial to artists and the songwriters behind the final product. Spotify allows for a curious listener to stream playlists curated by friends or music aficionados without committing to the purchase of an MP3 or a full album.[2] An artist with his library of work on Spotify may, therefore, have his music heard by consumers that otherwise would not have been reached. This could then lead to better attendance at concerts and an overall larger fan base. Through Spotify, artists can actually cultivate some royalties from these listeners and from other listeners who may have once opted for piracy as a means of collecting music.[3] For an artist that simply wants his or her music to be heard, regardless of royalties, the Internet streaming model can be an appealing vehicle. Artists who are new to the business or who have not traditionally expected to make sustainable revenues often appreciate the impact that Spotify has on cultivating a fan base and may not complain about the minimal royalties they see from their streams.[4]

Many career musicians and songwriters, however, have been hesitant to embrace the music industry's latest disruptive shift. Some have outspokenly expressed their views against streaming services (like Thom Yorke so eloquently did).[5] Others have taken a more quiet role by either refusing to make their music available through the services indefinitely or by delaying an album's streaming release until it has had a chance to make a profit through MP3 or physical sales.[6] Pop stars and

2. SPOTIFY, https://www.spotify.com/us/free (last visited Nov. 14, 2015). *See* Karl Hodge, *20 Best Spotify Apps*, TECHRADAR (May 8, 2012), http://www.techradar.com/us/news/software/applications/20-best-spotify-apps-1079035.

3. *See Spotify Explained*, SPOTIFY ARTISTS, http://www.spotifyartists.com/spotify-explained/ (last visited Nov. 14, 2015).

4. Jason Cherkis & Timothy Stenovec, *Indie Record Labels Would Support Spotify Boycotts By Their Artists*, HUFFINGTON POST (July 26, 2013, 5:12 PM), http://www.huffingtonpost.com/2013/07/26/spotify-indie-labels_n_3659833.html.

5. *See* Young, *supra* note 1.

6. *See* Paul Resnikoff, *16 Artists That Are Now Speaking Out Against Streaming . . .*, DIGITAL MUSIC NEWS (Dec. 2, 2013), http://www.digitalmusicnews.com/permalink/2013/12/02/artistspiracy; Adam K. Raymond, *Five Artists Who Still Say No to Streaming*, SPIN

rock stars, traditionally expecting to live off royalties, seem to be the most invested in the fight against streaming. These parties adhere to the idea that music comes at a cost that should be passed onto the consumer.[7] Those who write songs for others to perform have felt hardship as the industry has shifted as well. These hardships cannot solely be attributed to the business decisions of record labels or companies like Spotify; rather, the overall method for calculating one's royalties is a combined result of business decisions and existing federal copyright law, which was not written with today's digital music landscape in mind.

The overall consensus among musicians and songwriters, despite differences between the goals of music powerhouses, career songwriters, and niche artists regarding royalty incomes, is that the music industry has undergone changes that make it nearly impossible for artists to expect the royalties they could expect in the 1990s. While Napster, the Internet's first widespread foray into free music, was taken down in 2001, the effects of the service continue to reverberate through the industry in 2015.[8] Beginning with the Napster revolution, and continuing into the era of iTunes, consumers became accustomed to being able to obtain individual songs at low prices (or for free). The decline of the full-length CD and the emergence of single songs as the norm for consumers ultimately led to the on-demand streaming model presented by Spotify. Each of these changes in the music industry has increased the fear that musicians will no longer produce the caliber of creative content that has traditionally been prevalent in the industry. David Byrne, vocalist and songwriter for The Talking Heads, made a prediction that "the Internet will suck the creative content out of the whole world" if the streaming model becomes the only way in which music is consumed.[9] Byrne is not alone in subscribing to this line of reasoning, and his dark prediction may be proven true absent a combination of changes within federal copyright law and practices within the music marketplace.[10] Data released by the

(June 20, 2013), http://www.spin.com/articles/spotify-pink-floyd-tool-led-zeppelin-five-artists-who-still-say-no-to-streaming/; Stuart Dredge, *Spotify Tells Fans Why It Doesn't Have Coldplay's Ghost Stories to Stream*, THE GUARDIAN (May 20, 2014, 3:55 PM), http://gu.com/p/3pbky/stw.

7. *See, e.g.*, Resnikoff, *supra* note 6, Chris Willman, *Exclusive: Taylor Swift on Being Pop's Instantly Platinum Wonder . . . And Why She's Paddling Against the Streams*, YAHOO MUSIC (Nov. 6, 2014), https://www.yahoo.com/music/bp/exclusive--taylor-swift-on-being-pop-s-instantly-platinum-wonder----and-why-she-s-paddling-against-the-streams-085041907.html.

8. Alex Suskind, *Fifteen Years After Napster: How the Music Service Changed the Industry*, THE DAILY BEAST (June 6, 2014, 5:45 AM), http://thebea.st/1pcnyLd.

9. David Byrne, *David Byrne: 'The internet will suck all creative content out of the world'*, THE GUARDIAN (Oct. 11, 2013, 2:53 PM), http://gu.com/p/3jdag/stw.

10. Paul Resnikoff, *Streaming Isn't Saving the Music Industry After All, Data Shows . . .*, DIGITAL MUSIC NEWS (June 26, 2014), http://www.digitalmusicnews.com/permalink/2014/06/26/streaming-isnt-saving-music-industry-new-data-shows.

Recording Industry Association of America ("RIAA") suggests that while streaming revenue skyrocketed in the first half of 2014, total industry-wide revenues for the same period dropped nearly 5% due to the corresponding decline in paid downloads and CD sales.[11] Should these trends continue, it does not seem unlikely that, in fact, streaming could become the sole way in which listeners consume musical content. And if the artists producing this material cannot make a living off streaming royalties, it will be less and less likely that consumers will continue to enjoy the wealth of creative content they do today.

The formulas used by Spotify and other on-demand streaming services to determine royalty payments are a highly popular area of contention for concerned musicians.[12] Spotify has published a simplified version of its payment calculations, and it has made clear that it does not have a pay-per-stream model; instead, the service uses a complicated formula that does not produce uniform payments.[13] While the service doles out 70% of its intake to rights-holders, the company itself has yet to make a profit.[14] Therefore, it is unlikely that forces from within the industry alone, absent a mass-exodus of music's biggest names from streaming services, will be able to force a change in Spotify's royalty payment scheme.

Outside of market-driven responses to Spotify's royalty payment structure, overarching changes to the underlying structure of copyright law are needed to mitigate the harms felt by musicians throughout the industry. The Copyright Act, which has not been amended since the Digital Millennium Copyright Act of 1998, did not anticipate the movement toward on-demand streaming as a primary source of music consumption.[15]

Songwriters and legislators have advocated for reforms to the Copyright Act in favor of promoting creativity and the continuance of the cherished tradition of American songwriting, but these proposals have not yet found their footing. In the summer of 2014, songwriters and industry representatives spoke in front of the House of Representatives Subcommittee on Courts, Intellectual Property, and the Internet in favor of a bill called the Songwriter Equity Act. This Act would alter two of the main roadblocks to songwriter royalties in the digital age.[16] The

11. *Id. See* Ed Christman, *U.S. Music Revenues Down Nearly 5%, Says RIAA*, BILLBOARD: BILLBOARDBIZ (Sept. 25, 2014, 4:59 PM), http://www.billboard.com/biz/articles/news/record-labels/6266341/us-music-revenues-down-nearly-5-says-riaa.

12. *See Spotify Explained*, *supra* note 3.

13. *Id.*

14. Ben Sisario, *Spotify's Revenue Is Growing, But So Are Its Losses*, N.Y. TIMES (May 8, 2015), http://www.nytimes.com/2015/05/09/business/media/as-spotify-expands-revenue-rises-and-losses-deepen.html?_r=0.

15. 17 U.S.C. § 110 (2013).

16. *See Music Licensing Under Title 17 Part Two: Hearing Before the Subcomm. on*

passage of this bill, or a similar piece of legislation, would serve as a first step toward greater revamping of outdated copyright law while allowing creativity to prosper as the industry continues to move toward streaming services.

While legislative changes as put forward in Congress would be one way to address these disparities, the Copyright Office itself has advocated for change. In February 2015, the Office published a report proposing a new approach that would compensate and regulate musical works and sound recordings in a more consistent manner, offering a "free market alternative" to musical work owners.[17] As the Copyright Office operates within the Library of Congress as an independent agency—a unique form of administrative power—the Office does not have a legislative grant to change the system itself. However, the Copyright Office holds specialized expertise that should guide Congress in shaping reforms to the Copyright Act.

This note analyzes the current state of the music industry and the copyright law that governs it, with a focus on the rights of the songwriters and artist-songwriters who craft their work as a source of income. While many of these individuals entered the music industry to fulfill their dreams, not to make money, even the most successful players in the game have spoken out and demanded fair payment for their artistic works.[18] Part I will examine the evolving marketplace for music as the industry shifts toward a streaming-dominated market. Part II will examine how royalties are calculated through existing copyright law for sales, performances, and interactive streams of copyrighted works, and how this legal framework did not anticipate services like Spotify that effectively blend two traditionally separate methods for consuming music. Part III will present and analyze proposed changes to copyright law that could better account for the discrepancy between creative output and royalties received by copyright holders in the face of this changing landscape, and the effect that these changes could have on Spotify and its peers as businesses. Part III and the Conclusion will provide recommendations for all players in this complicated puzzle—legislators, content providers, musicians, and songwriters—as the music industry continues to evolve.

Courts, Intellectual Property, & the Internet of the H. Comm. on the Judiciary, 113th Cong. 240–46 (2014) (statement of Roseanne Cash, on behalf of the Americana Music Ass'n) [hereinafter *Cash Testimony*]; *Music Licensing Under Title 17 Part One: Before the Subcomm. on Courts, Intellectual Property, & the Internet of the H. Comm. on the Judiciary*, 113th Cong, 42–60 (2014) (statement of Michael O'Neill, on behalf of Broadcast Music Inc. ("BMI")).

17. U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE: A REPORT OF THE REGISTER OF COPYRIGHTS 2 (Feb. 2015), http://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf.

18. Taylor Swift, *For Taylor Swift, the Future of Music is a Love Story*, WALL ST. J. (July 7, 2014, 6:39 PM), http://on.wsj.com/1r3R6yq.

I. FROM REPRODUCTION TO PERFORMANCE (AND EVERYTHING IN BETWEEN)

While an individual could create a musical work entirely alone, in reality there is often a cast of players involved in the production of each song that comprises an album. Each work often requires input from multiple songwriters, recording artists, music publishers, performing artists (the primary musician or band plus additional accompaniment), record labels, and performance rights organizations ("PROs"). Typically, any number/combination of these players will collaborate on each song that goes into the final product (an album), and the royalties created by the sale of such albums will be divided amongst these players based on contracted terms and some statutory frameworks.

Since the turn of the century, new technologies have made it increasingly possible for consumers to take an *à la carte* approach to music selection, opting for playlists and devices comprised of individual song selections in lieu of full-length albums. While the first ten years of the twenty-first century saw a shift from physical music sales into an iTunes-dominated music industry, the industry continues to change with the advent of Internet streaming services. iTunes and on-demand streaming services have collectively allowed consumers to selectively curate their own music collections at the individual song level, resulting in a relative loss to those who create the full-length albums that once lined the aisles of record stores.[19]

The medium by which consumers obtain music has been in a constant state of change for decades. Today's mainstay of individually curated music libraries, now including Spotify playlists, can be attributed to the rise of MP3s as the dominant medium in the early 2000s. Many consumers eliminated music from their budgets after the rise of Napster, the controversial service that for a short time allowed file sharing of MP3s for free among Internet users.[20] Following Napster's demise, iTunes became the primary legal way for consumers, especially younger consumers, to obtain music easily and relatively cheaply over the Internet. Since the iTunes Store's introduction in 2003, the music industry's revenues have dropped by more than half, yet individuals are obtaining more music than ever.[21] Prior to iTunes, consumers typically needed to purchase an entire album to obtain their favorite tracks, as record stores did not tend to offer "singles" for most of those coveted

19. *See generally* Mark Rogowsky, *The Cruel Math Behind Why Streaming Will Never Save The Music Industry*, FORBES (Mar. 20, 2014, 10:24 AM), http://onforb.es/1dfJjdQ.

20. Tom Lamont, *Napster: The Day the Music Was Set Free*, THE GUARDIAN (Feb. 23, 2013, 7:05 PM), http://gu.com/p/3dqp3/stw.

21. *See* Adrian Covert, *A Decade of iTunes Singles Killed the Music Industry*, CNN MONEY (Apr. 25, 2013, 6:09 PM), http://cnnmon.ie/ZMjjNP.

songs.[22] By allowing consumers to obtain individual songs *à la carte*, Napster and iTunes set the stage for the streaming revolution, which continues to depart from tradition in allowing personalized music selection while leaving full albums behind.

The streaming market for music today can be generally broken up into two camps: (1) the Internet radio sector, including Pandora and iTunes Radio, and (2) the on-demand sector, including Spotify, Rdio and Apple Music.[23] While this note focuses specifically on on-demand streaming as it relates to royalties within the music industry, it is important to delineate the relationship between the two styles of streaming. Internet radio serves as a supplement, or even as a complement, to the traditional practice of purchasing music, while on-demand services have the potential of replacing listeners' iTunes libraries, which have already largely replaced once-vast physical collections of full-length albums.

A. Internet Radio Providers

Internet radio providers have gained an important place within the music industry since the arrival of streaming music, but their functional similarity to terrestrial radio allows them to exist within the music industry without posing a severe threat to music sales. Pandora, which functions solely as an Internet radio provider in the United States, Australia, and New Zealand, reported a total of 76,400,000 active users at the end of 2013, making the service the most widely-recognized and widely-used internet streaming service in the U.S. market.[24] Pandora has plenty of competition for this market—Apple, for example, offers a similar service known simply as Radio (part of its Apple Music subscription service) that incorporates songs from listeners' MP3 libraries.[25] Internet radio providers are set apart from on-demand streaming services due to their radio-like functionality. While a user is able to skip one or two songs per hour, services like Pandora largely function as a predetermined playlist and are analogous, legally and

22. *Id.*

23. Nathan Ingraham, *Pandora-style Internet Radio Services Are Growing Faster Than 'On-demand' Options Like Spotify, Study Shows*, THE VERGE (Nov. 8, 2012, 1:06 PM), http://www.theverge.com/2012/11/8/3618348/internet-radio-on-demand-music-growth-npd-survey.

24. PANDORA, 2014 PANDORA ANNUAL REPORT (2014), http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjMwMjU4fENoaWxkSUQ9LTF8VHlwZT0z&t=1 (last visited Nov. 14, 2015); Ben Taylor, *By the Numbers: The Streaming Music War (and Who's Winning)*, TIME (Aug. 14, 2014), http://ti.me/1ovNQ04.

25. Ben Sisario, *Apple Music Makes Debut With DJ Carrying the Flag*, N.Y. TIMES (Jun. 30, 2015), http://nyti.ms/1Ir4qHF; *see generally* Matt Peckham, *13 Streaming Music Services Compared by Price, Quality, Catalog Size and More*, TIME (Mar. 19, 2014), http://ti.me/1lOewoe.

practically, to streaming one's favorite local radio station over an Internet connection.

Pandora and other Internet radio services serve as a complement to music sales, and likely even as a complement to on-demand streaming services like Spotify. As Pandora relies more heavily on advertising revenue from its free service than paid subscriptions and offers Internet radio as opposed to on-demand service, it is not a direct competitor with Spotify, the leader in on-demand streaming.[26] Pandora's mission as an Internet radio service is to "create[] a listening experience full of current and soon-to-be favorite songs" for the listener, not to allow on-demand access to specific songs, thus exposing those listeners to material that they must later seek out elsewhere.[27] If a listener hears a song via Pandora that he would like to repeatedly access, that user must go outside the application into another music service (likely iTunes, Spotify, or even YouTube) to hear that song on demand. Therefore, while Pandora is certainly relevant to the discussion of streaming technology and the resulting royalties to artists, the service in its current form does not threaten to replace iTunes or Spotify.

Internet radio services have faced their own copyright law challenges in recent years that are separate from the issues facing on-demand streaming services. This movement is only tangentially related to the issues related to on-demand streaming and royalties, as it only concerns the public performance component of copyright law. Copyright holders, particularly songwriters, have protested Internet radio for allowing mass consumption of their work for seemingly little profit. However, because radio services have never functioned as copyright holders' largest areas of income, the fact that songwriters are receiving minimal royalties from such services does not dictate the overall discussion about declining songwriter royalties. In a notable example, songwriter Linda Perry announced that her song "Beautiful" (as performed by Christina Aguilera) was played on Pandora over 12.7 million times over a three-month period, yet those plays only produced royalties totaling $349.16.[28]

Songwriters have used statistics like Linda Perry's to advocate for higher statutory performance royalty rates for radio plays (these rate-setting practices will be further discussed in Part II).[29] Critics of these

26. Rocco Pendola, *Pandora, Spotify Are Not Competitors*, THE STREET (Jan. 23, 2014, 9:18 AM), http://www.thestreet.com/story/12258843/1/pandora-spotify-are-not-competitors.hml.

27. *About Pandora*, PANDORA, http://www.pandora.com/about (last visited Nov. 14, 2015).

28. Greg Sandoval, *Pandora's Web Radio Bill Is Doomed—Well, For Now*, CNET (Nov. 29, 2012, 10:24 AM), http://cnet.co/1uo4tKH.

29. *See* Ed Christman, '*Fair Play, Fair Pay Act' Introduced, Seeks Cash from Radio*

songwriters' qualms with Internet radio cite its similarity to terrestrial radio as the precise reason why those royalties have little to do with the larger shift that is occurring in the music industry from purchases toward on-demand streaming. Terrestrial radio providers have always paid low royalties, and as Pandora successfully argued in a recent case against songwriters and publishers, Internet radio serves a very similar function in exposing listeners to songs that they might access later through other means.[30] While copyright holders arguably have a reason to be unhappy with the revenues they see from services like Pandora, the harms felt by these individuals due to the larger movement from CDs and downloads to on-demand streaming present a different and distinct challenge with a more dominant impact as the industry shifts away from album sales.

B. On-demand Streaming Services

While Pandora and its Internet radio provider peers do not have the potential to overthrow iTunes and the more old-fashioned method of purchasing music, on-demand streaming services like Spotify do pose such a threat, and that threat is imminent. Spotify's introduction into the U.S. market in late 2011 immediately caused a rift in the music listening economy. By the platform's first anniversary in the States, American Spotify users had listened to over 13 billion tracks.[31] Spotify sets itself apart from Pandora and similar Internet radio services by offering on-demand streaming of customizable playlists or *à la carte* selections.[32] Spotify's free option allows for on-demand selection of songs on computers, while limiting users' autonomy only slightly on mobile devices by restricting the playback of playlists or artists to shuffle mode.[33] By upgrading to Spotify's paid "Premium" service, a user obtains unrestricted, ad-free access to play any music in Spotify's library on any device.[34]

While Apple's iTunes was recently considered the future of music

Stations, BILLBOARD (Apr. 13, 2015, 4:44 PM), http://www.billboard.com/articles/business/6531693/fair-play-fair-pay-act-performance-royalty-radio; Glenn Peoples, *Pandora Stops Internet Radio Fairness Act Legislation Efforts, to Focus on CRB*, BILLBOARD: BILLBOARDBIZ (Nov. 25, 2013, 4:59 PM), http://www.billboard.com/biz/articles/news/digital-and-mobile/5800772/pandora-stops-internet-radio-fairness-act-legislation.

30. India Thompson, *Collecting from Pandora: A Brief*, MUSIC BUS. J. (May 2014), http://www.thembj.org/2014/05/collecting-from-pandora-a-brief/.

31. Evan Rodgers, *Spotify Celebrates Its First Year in the US With Milestones and Statistics*, THE VERGE (July 23, 2012, 2:13 AM), http://www.theverge.com/2012/7/23/3175737/spotify-first-year-us-anniversary-statistics.

32. SPOTIFY, *supra* note 1.

33. *Id.*

34. As of this publication, Spotify's current premium rate is $9.99/month, with a student membership rate of $4.99/month. Should a user choose to use Spotify's free model, he or she will hear an advertisement every second or third streamed song. *Id.*; *Spotify Student Discount Offer*, SPOTIFY, https://www.spotify.com/us/student/ (last visited Nov. 14, 2015).

consumption, in 2015, Spotify is taking the place of iTunes. Just as iTunes once came into the music market as a disruptive technology, displacing mall-mainstay record stores as the primary outlet for music purchases by offering digital, single-song MP3s at reasonable prices, Spotify is now lined up to displace iTunes in the lives, or hard drives, of American music consumers.[35] With Spotify's offering of on-demand choices, an easy-to-use platform, and reasonably priced (or free) subscriptions, many predict the service is keenly positioned to replace iTunes as the market leader in the near future.[36] The RIAA's data on industry-wide revenues for 2014 has led industry experts to take notice of this shift, with analysts predicting that the 5% decline in total industry revenues is a sign of further changes to come as more and more consumers look toward on-demand streaming as a primary method of accessing music.[37]

C. Other Shifts in the Industry

While MP3 providers and physical album distributors are still relevant in 2015, they must adapt to consumer demands or risk becoming obsolete. Amazon, which once served primarily as a marketplace for physical goods including CDs, now offers its own on-demand streaming music service as a part of its Amazon Prime subscription program.[38] Other technology giants like Sony, Microsoft, and Google have introduced their own similar offerings.[39] Although most of these services are offered as add-ons to existing services, the abundance and persistence of such services in the marketplace signifies a growing consumer preference toward streaming—at least as a part of their overall music consumption.

In perhaps the single largest signal of an industry-wide shift toward the on-demand streaming model, Apple purchased Beats by Dre for $3 billion in 2014.[40] Beats by Dre included Beats Electronics, a line of headphones and speakers, and, more significantly, Beats Music, an on-

35. Maxwell Wessel, *Why Spotify Will Kill iTunes*, HARV. BUS. REV. (July 22, 2011), https://hbr.org/2011/07/why-spotify-will-kill-itunes.

36. *Id.*; Will Oremus, *Look Out, Pandora: Spotify Just Got Way Better*, SLATE: FUTURE TENSE (Dec. 11, 2013, 6:16 PM), http://www.slate.com/blogs/future_tense/2013/12/11/spotify_shuffle_free_mobile_streaming_is_bad_news_for_pandora_good_news.html.

37. *See* Resnikoff, *supra* note 10; Christman, *supra* note 11.

38. *Amazon Prime*, AMAZON, https://www.amazon.com/prime (last visited Nov. 14, 2015).

39. *See* Peckham, *supra* note 25.

40. Steve Knopper & Jason Newman, *Apple Confirms Beats Purchase for $3 Billion*, ROLLING STONE (May 28, 2014), http://www.rollingstone.com/music/news/apple-confirms-beats-purchase-for-3-billion-20140528; *Welcome to the Family*, APPLE, https://www.apple.com/welcome-beats/ (last visited Nov. 14, 2015).

demand streaming service.[41] After a period of revamping, Apple introduced its "Apple Music" offering on June 30, 2015.[42] The new service integrates a user's MP3 library with curated playlists, radio stations, recommendations based on individualized preferences, and new releases—all available as part of the subscription fee.[43]

Services like Apple Music and other on-demand streaming options offered by traditional industry leaders have the ability to force Spotify to decrease its total subscription rates overall, a fact that is bad news for rights-holders. Spotify operates as a venture solely devoted to on-demand streaming, and therefore, its highest costs (in licensing the music it offers) do not afford for economies of scale—the more streams the service gets, the more licensing costs it will incur.[44] If Apple Music successfully pulls from Spotify's subscriber base, Spotify may be forced to recoup those losses in the form of higher subscription rates or additional advertising revenues to pay for its licensing costs.

D. Spotify's Business Model

So long as Spotify remains the leader in the on-demand streaming business, its business model is the most relevant to examine in assessing whether artists and songwriters should fear an imminent end to the music sales they once enjoyed. In response to criticisms and artist backlash, Spotify published its method for calculating and distributing royalties to rights-holders in late 2013.[45] The "rights-holders" to a single song typically include the label, publisher, and distributor of the album, who in turn distribute to the recording artists and songwriters.[46] Spotify pays

41. *Id.*

42. *See, e.g.*, Chris Velazco, *A Closer Look at Apple Music: Feature-packed, But a Bit Disjointed*, ENGADGET (June 30, 2015, 3:15 PM), http://engt.co/1IKSvjA.

43. *See id. See also Membership*, APPLE, http://www.apple.com/music/membership/ (last visited Nov. 14, 2015) (as of publication, Apple Music's subscription fee is $9.99 per month for a single membership and $14.99 for a family membership). Apple Music offered a 3-month free trial for all users and, as of September 30, 2015, Apple had yet to collect any subscription fees from its members. *See* Jamie Rigg, *Judgment day for Apple Music: Will You Be Subscribing Once the Trial Ends?*, ENGADGET (Sept. 30, 2015, 10:00 AM), http://www.engadget.com/2015/09/30/judgement-day-for-apple-music/.

44. *See* John McDuling, *An Epic Battle in Streaming Music is About to Begin, And Only a Few Will Survive*, QUARTZ (July 23, 2014), http://qz.com/232834.

45. Victor Luckerson, *Here's How Much Top Musicians Are Making on Spotify*, TIME (Dec. 3, 2014), http://ti.me/18Yw11e.

46. While this is the case for most signed recording artists, independent artists typically forego the middlemen of labels, publishers, and distributers in favor of operating as sole rights-holders. These artists must pay a small aggregation fee to a service like CDBaby in order to deal with Spotify. *See Spotify Explained*, *supra* note 3. *See also Get Your Music on Spotify*, SPOTIFY ARTISTS (last visited Nov. 14, 2015), http://www.spotifyartists.com/guides/#list-of-aggregators (describing how artists can utilize third parties—aggregators—to get their music on Spotify).

out "nearly 70%" of its total revenue to rights-holders.[47] By retaining only approximately 30% of its total revenue since its 2011 inception, Spotify has yet to see a profit; in fact, the service has allegedly *lost* $200 million since its founding, a statistic that Spotify declined to discuss publicly.[48]

In some respects, the growth of Spotify can be seen as a positive for the music industry in Napster's aftermath. In Sweden, the introduction of Spotify by Swede Daniel Ek has completely turned around a music economy once ruled by piracy, and the service claims to be making a similar mark stateside.[49] Spotify's own calculations state that while an average U.S. music consumer would only spend $25 per month on music purchases, through paid subscriptions and advertisement-supported subscriptions, the service brings in $41 per month per user.[50] Critics of Spotify and the streaming model as a whole, however, cannot reconcile Spotify's relative success with the decline of music sales overall. The harshest critics of the service—successful artists like David Byrne—have criticized Spotify's royalty payment practices as being incapable of sustaining creativity and musicians' ability to make a living.[51] Spotify's opponents call for higher royalty payouts from the service overall, likely cultivated by charging higher monthly subscription rates and advertising premiums, in order to keep musicians on such services.[52]

The way that Spotify compensates the rights-holders for each song is more complicated than a pay-per-stream scenario that one would envision. To calculate an artist's payout from Spotify for a given month, multiply Spotify's monthly revenue by the artist's percentage of total Spotify streams for that month.[53] Then, that number is multiplied by ~70%, according to Spotify's simplified web page for artists, and the other ~30% is retained by Spotify.[54] The number calculated by this formula represents the total payout to all copyright owners for one work. Each right-holder's piece of this "Spotify pie" is determined by individual contractual agreements between artists and labels and by the statutory provisions outlined in Part II.[55]

47. *Spotify Explained*, *supra* note 3.

48. Joshua Brustein, *Spotify Hits 10 Million Paid Users. Now Can It Make Money?*, BLOOMBERG BUSINESS (May 21, 2014), http://www.bloomberg.com/bw/articles/2014-05-21/why-spotify-and-the-streaming-music-industry-cant-make-money.

49. Steven Bertoni, *Spotify's Daniel Ek: The Most Important Man In Music*, FORBES (Jan. 16, 2012, 9:37 AM), http://onforb.es/x4b83f.

50. *Spotify Explained*, *supra* note 3.

51. *See* Byrne, *supra* note 9; Christman, *supra* note 11.

52. Byrne, *supra* note 9.

53. *Spotify Explained*, *supra* note 3.

54. *Id.*

55. Independent artists that use an aggregator service receive the full ~70% calculation, minus the small payment to the aggregator. *See id.*

Although Spotify is not yet profiting from the distribution of rights-holders' materials, many rights-holders are nonetheless unhappy with the royalties they are receiving from the service and its peers.[56] Spotify's take from each stream is proportional to iTunes' take from each digital download.[57] Therefore, it is not the percentage that is controversial about Spotify's practices, but rather the low total income from each stream. Taylor Swift, who contributed to the songwriting, production, and performance of her 2014 album "1989," opted to withhold the album from Spotify entirely, blaming the service and its contemporaries for the decline in revenues that she and other artists have seen in recent years.[58] David Byrne's op-ed on Spotify used Daft Punk's "Get Lucky," a massive summer hit and Grammy Award winner, to show that even a hit song reaching "success" on Spotify will only result in about $13,000 for each member of the group.[59] Such a payout may seem fruitful in a world where Spotify serves as only one of many sources of the artists' revenue. However, when Spotify is the primary way in which consumers are accessing the song, the artist's paycheck falls short of adequately providing compensation for the time and resources put into the production while still offering a reward for international popularity.[60] While the examples of Taylor Swift, David Byrne, and Daft Punk exemplify the qualms of artists that also hold songwriting credits for their recordings, the trickle-down effect of Spotify's royalty system is proportionally felt by career songwriters that contribute to albums solely by providing their written words or compositions without contributing to the performance of the work.

To recap: Spotify as a business is not profiting from its streaming model, many of the industry's top performers are not happy with the model, and songwriters are not making money through the model. All of these realities are certainly partially attributable to consumer habits and market factors that have changed in the music industry over recent decades. But market forces are not the sole source of the problem. The copyright laws that dictate the payment of royalties for purchases and performances of songs is intertwined with the business aspect of Spotify's structure.

56. *See, e.g.*, Byrne, *supra* note 9.

57. *See* Stuart Dredge, *How Much Do Musicians Really Make From Spotify, iTunes and YouTube?*, THE GUARDIAN (Apr. 3, 2015, 5:02 AM), http://gu.com/p/478vx/stw (infographic showing iTunes profit of 30% compared to an artist's 70% per track downloaded).

58. Victor Luckerson, *This Is Why Taylor Swift's Album Isn't on Spotify*, TIME (Oct. 28, 2014), http://ti.me/1rxKRAa.

59. *See* Byrne, *supra* note 9.

60. *See id.*

II. THE LEGAL FRAMEWORK OF COPYRIGHTS AND ROYALTIES

Copyright law has protected the original works of songwriters longer than music recording has been possible, and since 1976, the Copyright Act has served as the source of this protection.[61] Section 106 gives the copyright owner the exclusive right to perform, reproduce, and distribute reproductions of such a work—a right that the copyright owner may authorize others to exercise on his or her behalf.[62] When many parties collaborate to create one work, each of those parties has an equal stake in that copyrighted end product.

Regardless of how many players (recording artists, songwriters, publishers, labels, PROs) are involved in the creation of a given recorded song, under the Copyright Act, two copyrights are always created—one copyright for the sound recording, and another copyright for the underlying musical composition.[63] Songwriters have a stake in both copyrights, and the Copyright Act determines the royalties that are owed to songwriters when recordings of their works are performed or reproduced.

Not to be confused with the two distinct copyrights embodied in a single song recording, copyright law also sets forth two methods for copyright owners to collect royalties—one through the reproduction of the recorded work, and another for the public performance of the work.[64] Streaming through "interactive" means, or on-demand streaming, triggers both of these methods, as such streaming is seen as a middle ground between a full purchase (which requires a reproduction of the work) and a performance (which does not).[65] This section will explain those two methods as traditionally separated, and then further explain how on-demand streaming royalties eventually reach copyright holders.

While distributors like Spotify could increase artists' payouts by revamping their business models, such a result could alternatively be reached via amendments to the Copyright Act. Spotify and other music distributors, including iTunes and record stores, are able to set prices and determine the proportion of revenues they pay out to rights-holders. In contrast, copyright law dictates how the paid-out portion is further distributed to those copyright holders that contributed to the product's creation. The Act has not been substantially amended since the Digital Millennium Copyright Act of 1998, years before iTunes or today's

61. 17 U.S.C. § 101 (2013).

62. *See id.* § 106.

63. *See id.*

64. *See id.*

65. *See* William A. Pittenger, *The Legal Difference Between Downloading & Streaming Music*, DIGITAL MUSIC LAW BLOG (Sept. 15, 2014), http://www.digitalmusiclaw.org/the-legal-difference-between-downloading-and-streaming-music/.

streaming services emerged.[66] Thus, the Act did not account for the unique ability of on-demand streaming services to offer *à la carte* song selection to consumers in a new way.

A. Mechanical Royalties

"Reproduction royalties" are triggered when a "phonorecord" of an album is sold, either in a physical form (CD or vinyl) or as a digital download.[67] These royalties are referred to as "mechanical," as they are owed to the copyright holder whenever a reproduction not involving a human performance of the song is made.[68] Section 106(1) of the Act protects the right of copyright owners to reproduce and authorize the reproduction of phonorecords, while section 106(3) grants owners the exclusive rights to distribute copies to the public.[69]

Section 115 of the Act sets forth a statutory framework for determining a songwriting or composing mechanical license rate for reproductions.[70] The rate at which songwriters receive royalties for reproductions is currently set at 9.1¢ per song reproduction, with a slightly higher scale for songs that exceed five minutes in length.[71] Under this framework, when an MP3 is sold on iTunes, for example, and iTunes gives 70% of the song's retail price back to the rights-holders, 9.1¢ of that amount must be paid to the songwriter.[72] Quite often, this rate is further split between the songwriter and his or her publisher.[73] Songwriters or their publishers typically employ the Harry Fox Agency to collect these royalties, an agency that has done so since its 1927 establishment by the National Music Publishers' Association (NMPA).[74]

The statutory rate for mechanical licenses was last raised in 2007, and many copyright holders do not find this rate to be an adequate reflection of their work's worth.[75] When the process for mechanical licensing was enacted in 1909, the rate was set at 2¢ per song, leading songwriters to argue that a century of inflation alone should provide for a

66. *See* 17 U.S.C. §§ 101, 106 (2013).

67. *See id.* § 106.

68. Chris Robley, *Music Publishing Royalties Explained: What is a Mechanical Royalty?*, THE DIY MUSICIAN (May 8, 2013), http://diymusician.cdbaby.com/2013/05/what-is-a-mechanical-royalty/.

69. 17 U.S.C. § 106 (2013).

70. *See id.* § 115.

71. *Mechanical License Royalty Rates*, U.S. COPYRIGHT OFFICE, http://copyright.gov/licensing/m200a.pdf (last visited Nov. 14, 2015).

72. *Id.*

73. *See* Pittenger, *supra* note 65.

74. *What Does HFA Do?*, HARRY FOX AGENCY, https://www.harryfox.com/publishers/what_does_hfa_do.html (last visited Nov. 14, 2015).

75. *See* U.S. COPYRIGHT OFFICE, *supra* note 71.

current rate that is higher than 9.1¢.[76]

B. Performance Royalties

When a sound recording is replayed but not reproduced, royalties are still owed to the songwriter. The second scheme for triggering royalties under § 106(4) and § 106(6) grants the rights of public performance to publishers (on behalf of songwriters) and labels (on behalf of artists).[77] The Copyright Act defines a "public performance" of a work as a broad category including transmissions over the radio, television, Internet (streaming), and even rotations in public spaces like bars and airplanes.[78] Copyright holders delegate the processes of collecting, calculating, and distributing these performance royalties to one of the three PROs—the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), and the Society of European Stage Authors and Composers ("SESAC"). The two largest PROs, ASCAP and BMI, operate under longstanding consent decrees issued by the Department of Justice's Antitrust Division to restrict and monitor the royalty fees that these organizations are able to set for public performances.[79] Under these consent decrees, "rate courts" determine the rates at which most songs' performance royalties are set, with the PROs holding very limited powers of negotiation.[80]

While § 106(6) allows the copyright holders of sound recordings to perform the work publicly by means of a digital audio transmission, § 114(i) limits the calculation of royalties for the underlying work in such a transmission.[81] Section 114(i) requires that performance royalties under § 106(6) "shall not be taken into account in any administrative, judicial, or other governmental proceeding to set or adjust the royalties payable to copyright owners of musical works . . . ."[82] This provision goes on to state "[i]t is the intent of Congress that royalties payable to copyright owners of musical works for the public performance of their works shall not be diminished in any respect as a result of the rights

76. *See generally* Amanda Holpuch, *US Music Copyright: 'It's basically just a bunch of people fighting over money'*, THE GUARDIAN (June 24, 2014, 15:23 EDT), http://gu.com/p/3qd6d/stw.

77. 17 U.S.C. §§ 106(4), (6) (2013).

78. *Id.*; *See* Pittenger, *supra* note 65; *ASCAP Payment System*, ASCAP, http://www.ascap.com/members/payment/whocollect.aspx (last visited Nov. 14, 2015).

79. United States v. ASCAP, Civ. Action No. 41-1395, 2001 WL 1589999, at *3–8 (S.D.N.Y. June 11, 2001) (Second Amended Final Judgment); United States v. BMI, Civ. No. 64-Civ-3787, 1994 WL 901652, at *1 (S.D.N.Y. Nov. 18, 1994) (Amended Final Judgment).

80. Jesse Feister, *Copyrights, Licensing, and Royalties: A Fact Sheet*, AMERICAN SONGWRITER (June 27, 2014, 10:35 AM), http://www.americansongwriter.com/2014/06/songwriter-u-copyrights-licensing-royalties-fact-sheet/.

81. 17 U.S.C. §§ 106(6), 114(i) (2013).

82. *Id.* § 114(i).

granted by section 106(6)."[83] These provisions apply to proceedings that may occur in rate courts as set up in the ASCAP and BMI consent decrees, where the PROs are given limited negotiating status in setting rates at which their constituent songwriters and publishers are compensated.

As it stands, section 114(i) prohibits PROs from introducing evidence as to how other rights-holders, including the performers, are being compensated for the same recordings in setting rates for songwriters. This provision was originally meant to benefit performers, who are not owed royalties when their songs are played on terrestrial radio.[84] In the age of digital radio, however, this provision has an adverse effect on the songwriter, as performers *do* receive royalties when their songs are played through services like Pandora. The Digital Performance in Sound Recording Act ("DPRA") set forth this distinction between terrestrial radio and digital radio in 1995, but copyright law has not changed since digital radio has gained preeminence in recent decades.[85] Today, those consent decrees coupled with § 114 have the effect of limiting BMI and ASCAP in negotiating on behalf of songwriters, while there is no analogous limitation on the bargaining power of Soundexchange, which collects on behalf of labels from digital performance distributors.[86] Not only does this disparity affect a songwriter who had no part in the performance of a hit song, like Linda Perry in her songwriting of Christina Aguilera's "Beautiful," but it also affects the songwriting royalties, and in turn, the total royalties, of an artist like Taylor Swift who holds songwriting credits on her own recorded tracks.

C. Royalties from "Interactive Streaming"

While sale of music through iTunes triggers only a mechanical royalty, and streaming of music through Internet radio services like Pandora triggers only a performance royalty, streaming of music through "interactive" or "on-demand" methods, like Spotify, triggers both forms of royalties. Just as on-demand streaming acts somewhat as a hybrid between iTunes and Pandora—allowing users to create their playlists while streaming music somewhat like a radio service—the formulas for calculating interactive streaming royalties are also somewhat hybrid. Whenever a song is streamed over Spotify, the same performance

83. *Id.*

84. *Public Performance Right for Sound Recordings: Fact Sheet*, FUTURE OF MUSIC COALITION (Nov. 5, 2013), http://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings.

85. *Id.*

86. *See* Feister, *supra* note 80.

royalties are owed to the songwriter as are triggered when that song is streamed over Pandora, as the two actions are both considered digital performances under § 106(6).[87] However, the second set of royalties owed by interactive streaming providers to rights-holders is less straightforward.

Since a reproduction of a phonograph has not occurred when a song is streamed, a copyright holder is not owed the same level of mechanical royalties that would be owed had the song been downloaded. However, he or she is entitled to a streaming mechanical royalty (set at a lower rate).[88] In actual reproductions, the licensing scheme is compulsory—any rights-holder must accept the 9.1¢ rate in exchange for a reproduction.[89] In interactive streaming, pursuant to § 114(d), licensing is not compulsory, and the streaming provider must instead contract with the content owners.[90] In contracting with record labels, Spotify and its peers effectively gain the consent of most content owners through contractual agreements, and set the terms discussed in Part I for distributing royalties amongst the parties that contributed to each individual recording.[91]

The "All-In Royalty Rate," the result of the formulas set forth to calculate streaming royalties for publishers and songwriters, takes mechanical royalties and performance royalties into account. On behalf of songwriters, the Harry Fox Agency collects mechanical royalties for publishers (who, in turn, split them with songwriters) from services like Spotify. When the issue of mechanical royalty rates for interactive streams went to the Copyright Royalty Board ("CRB"), it created a specialized structure called the "All-In Royalty Rate" calculation chart that, in very simplified terms, creates three alternative methods for calculating the combined royalties that should be owed to a publisher/songwriter, and then requires the streaming service to pay out the greatest of the three resulting amounts.[92] To simplify this discussion

87. 17 U.S.C. § 106(6) (2013).

88. *See* Feister, *supra* note 80. Jamie Purpora, *How We're Getting Your Mechanicals From Streams*, TUNECORE BLOG (Nov. 8, 2012), http://www.tunecore.com/blog/2012/11/how-were-getting-your-mechanicals-from-streams.html.

89. 17 U.S.C. § 115 (2013); *see* U.S. COPYRIGHT OFFICE, *supra* note 71.

90. 17 U.S.C. § 114(d) (2013); *see* Feister, *supra* note 80.

91. *See* Feister, *supra* note 80.

92. The All-In Royalty Rate is the greater of:

(a) 10.5% of gross advertising revenue and subscription fees; or

(b) If the service provider pays the publisher directly, 21% to 22% of what is paid to the record label for the sound recordings alone (this is the rate Spotify is subject to), or if the service provider makes a single payout to the record label, the publisher receives 17.36% to 18% of what the label receives for the sound recordings and musical compositions combined; or

(c) $0.15 to $0.50 per subscriber per month.

Standalone Non-portable Subscriptions, Streaming Only, HARRY FOX AGENCY, https://www.harryfox.com/find_out/rate_charts.html (last visited Nov. 14, 2015).

even further, the pieces of current copyright law that plague songwriters in the realms of music sales (physical and MP3) and Internet radio all combine to further plague songwriters in the realm of on-demand streaming. Therefore, while proposed reforms may speak to provisions of the law that are seemingly related to one medium or another, their effects will surely be felt should the industry shift into an on-demand streaming dominated marketplace, or a world without music ownership.

III. APPROACHING REFORM FROM ALL ANGLES

Artists and songwriters have vocalized their displeasure with the way music distributors and legislation dictate their royalties in a number of ways. Many have taken to blogging or using social media in combination with partial or full boycotts of certain services, hoping to spur a market shift toward more equitable royalty payments. Others have advocated in favor of copyright law reform as a means to the same end, hoping to force higher rates through the political process.

A. Congressional Action

Songwriters and their advocates, including ASCAP and BMI, have lobbied in favor of the Songwriter Equity Act ("SEA").[93] The SEA, if passed, would make changes to Sections 114 and 115 of the Copyright Act, effectively changing the way that songwriters are compensated for reproductions and performances of their works.[94] While the SEA is structured around songwriting royalties (mechanicals) in particular, reform of these sections would allow performer-songwriters to collect greater overall royalties.

The proposed new language of Section 114 would allow the rate courts, in setting rates under the ASCAP and BMI consent decrees, to consider all relevant economic and use information in establishing rates and terms that mirror bargaining that would take place in the marketplace.[95] This evidence would include the royalties paid to performing artists for the same recorded works, alleviating the current discrepancy felt due to the longstanding inability of the consent decrees to translate fairly into the digital era of music. While amendment of this section in order to clarify this language is endorsed by the SEA, the Copyright Office's recent report on the music marketplace has recommended the repeal of § 114(i) (the most problematic clause in the

93. Songwriter Equity Act of 2014, H.R. 4079, 113th Cong. (2014), https://www.congress.gov/bill/113th-congress/house-bill/4079/text. *See, e.g.*, *Ask Congress to #StandWithSongwriters and Support the Songwriter Equity Act*, ASCAP, http://www.ascap.com/about/legislation/songwriter-equity-act.

94. Songwriter Equity Act of 2014, *supra* note 93.

95. *Id.*

section) citing its apparent effect in hindering, rather than protecting, songwriters and publishers.[96] Either of these actions would further the end goal of disallowing rate courts from considering sound recording performance royalties in rate setting.

The proposed new language of § 115 is less relevant to the Spotify debate because it largely concerns the royalty rates for cover songs, but it is a meaningful step toward greater recognition of songwriters' rights. The amendment would largely benefit songwriters in negotiations with artists seeking to cover their songs, allowing Copyright Royalty Judges to establish "rates and terms 'that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller,'" instead of requiring songwriters to accept the flat compulsory license rate of 9.1¢ per song reproduction.[97]

In the summer of 2014, songwriters, PRO representatives, and other advocates on both sides of the recording industry took part in a series of House Subcommittee hearings on music licensing under the Copyright Act.[98] These hearings featured advocates for the SEA on behalf of career songwriters and PROs on behalf of their constituent artists, as well as counterarguments from representatives of music distributors in favor of retaining the current state of copyright law.[99] While the proposed legislation has garnered bipartisan support in both houses, there has been no action toward enacting the legislation since early 2015.[100] The Copyright Office's recent report outlining the flaws of "Copyright and the Music Marketplace" set forth similar arguments in favor of reforms to these sections and the terms of the PRO consent decrees, which may catalyze Congressional action in this arena in the coming year.[101]

More widespread advocacy in favor of legislative change can bolster the efforts of those who have spoken in favor of Congressional reforms. Much of the current support for the SEA has come from the South, where songwriters and legislators alike have recognized the importance of promoting career songwriting in the country music sector.[102] Additional advocacy could surely be garnered from members of

96. U.S. COPYRIGHT OFFICE, *supra* note 17, at 4.

97. *Id.* at 49.

98. H.R. REP. NO. 113-682, at 74–75 (2014), https://www.congress.gov/congressional-report/113th-congress/house-report/682/1.

99. The subcommittee heard testimony from Roseanne Cash and Lee Thomas Miller on behalf of songwriters associations, Michael O'Neill, CEO of BMI, Paul Williams, President and Chairman of ASCAP and others in favor of reforms. Chris Harrison, Vice President of Business Affairs of Pandora, David Frear, CFO of Sirius XM and others spoke in favor of retaining current copyright law. *See id.*

100. Ed Christman, *Songwriter Equity Act Reintroduced to Congress*, BILLBOARD (Mar. 4, 2015), http://www.billboard.com/articles/business/6487798/songwriter-equity-act-introduced-to-congress.

101. *See generally* U.S. COPYRIGHT OFFICE, *supra* note 17.

102. *See Cosponsors: H.R. 4079 – 113th Congress (2013–2014),* CONGRESS.GOV,

other sects of the music industry, as country stars and songwriters are not the only ones dissatisfied with their royalties. This could incite additional support from members of Congress and press the issue in the next session of Congress. Currently, all of the voices from rock and pop music that have spoken out against their royalty payments have pointed at distributors themselves, without looking toward the greater, overarching copyright law that could force those distributors to alter their pay scales. Getting Taylor Swift, David Byrne, and the others that have spoken out in opposition to Spotify's royalty scheme to join this discussion in favor of legislative reform could incite additional power in the currently stagnant state of Congress in reforming the Copyright Act.

B. Industry Change

As stated in Part III(A), legislative reform to federal copyright law would be the most authoritative means in inciting music distributors like Spotify to pay out higher royalty rates to copyright owners. These changes in legislation could force the "All-in-Royalty-Rate" to adjust for the new statutory requirements. However, as these changes are slow and uncertain, actions from within the music industry can and should continue to inspire a conversation and a movement toward industry-wide change. Taylor Swift has popularized this topic by withdrawing her 1989 album from Spotify.[103] In theory, if enough widely demanded musical releases are withheld from streaming services, consumers could be incentivized to revert to their old ways of purchasing music through MP3s or even at record stores. At the very least, Swift's move in removing her work from streaming sites inspired a conversation among music fans, critics, and industry leaders. Spotify published a statement on the day of 1989's release outlining its continued pride in its policies and its ability to make music available to the masses at a reasonable return to the copyright holders, while Swift sold over a million records in the first week of the album's release.[104] While moves like these can disrupt the status quo, make consumers reconsider the amount they are willing to pay for their favorite music, and stir up the music industry temporarily, it is unlikely that artist behavior alone can have the same effect as legislative change.

https://www.congress.gov/bill/113th-congress/house-bill/4079/cosponsors (last visited Nov. 14, 2015); *Cash Testimony*, *supra* note 16.

103. Luckerson, *supra* note 58.

104. *On Taylor Swift's Decision to Remove Her Music From Spotify*, SPOTIFY NEWS (Nov. 3, 2014), https://news.spotify.com/uk/2014/11/03/taylor-swifts-decision/. *See* Lisa Respers France, *Taylor Swift's '1989' Has Biggest Sales Week Since 2002*, CNN (Nov. 6, 2014, 4:26 PM), http://www.cnn.com/2014/11/05/showbiz/music/taylor-swift-1989-sales/.

CONCLUSION

The SEA, or a similar new initiative taking the Copyright Office Report's guidance into account, would only be a first step in the comprehensive reform desired by songwriters, publishers, PROs, and other rights-holders. However, this small legislative change would serve as a catalyst toward a music industry that rewards and encourages creativity in musicianship. As stated by New York Representative Jerrold Nadler, summing up the consensus among the bill's cosponsors, "there were varying points of view about the specific problems in need of a legislative solution, [but] there was widespread agreement that the system is in need of comprehensive reform...."[105]

Throughout the shift in the medium of recorded music, rights-holders have been in a constant state of flux when it comes to the calculation of their overall royalties. The digitization seen in recent decades has all but destroyed the revenues that these parties once expected. A projected shift toward even less music ownership, in favor of on-demand streaming as the industry default, could be reached shortly. Legislative reform will protect songwriters as this shift occurs, but more forward-looking reform of copyright law, including reform to the governing PRO consent decrees, will likely be needed to amend those provisions that delineate between the performance and the reproduction of recordings. As stated by Howard Coble, a North Carolina Congressman in support of congressional reform, "[i]f we want to continue to lead the world in music, from a cultural and economic perspective, future changes to our copyright laws should be aimed at supporting and helping the American songwriter."[106]

105. Juan Carlos Melendez-Torres, *Copyright Hearing Recap: Music Licensing Pt. 2*, FUTURE OF MUSIC COALITION (Jul. 22, 2014, 1:14 PM), https://futureofmusic.org/blog/2014/07/22/copyright-hearing-recap-music-licensing-pt-2.

106. 160 Cong. Rec. E1278 (daily ed. July 30, 2014) (statement of Hon. Howard Coble).