

6-21-2017

## When Copyright is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make

Glenton Davis

Follow this and additional works at: <http://scholarship.kentlaw.iit.edu/ckjip>



Part of the [Intellectual Property Law Commons](#)

---

### Recommended Citation

Glenton Davis, *When Copyright is Not Enough: Deconstructing Why, as the Modern Music Industry Takes, Musicians Continue to Make*, 16 Chi.-Kent J. Intell. Prop. 373 (2017).

Available at: <http://scholarship.kentlaw.iit.edu/ckjip/vol16/iss2/7>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Journal of Intellectual Property by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

WHEN COPYRIGHT IS NOT ENOUGH: DECONSTRUCTING WHY,  
AS THE MODERN MUSIC INDUSTRY TAKES, MUSICIANS  
CONTINUE TO MAKE

GLENTON DAVIS

INTRODUCTION .....	374
I. THE MODERN MUSIC INDUSTRY .....	376
II. UNDERSTANDING MUSICIANS .....	381
III. INSIDE THE MIND OF THE MUSICIAN .....	384
A. Incentive Theories: Managing Incentives in a “Winner- Take-All” Economy.....	384
B. Intermediary Interception of Payment Flows Makes Losers Even Out of the Modern Music Industry’s Biggest Winners .....	386
C. Hedonic Theories .....	388
IV. COPYRIGHT LAW, CORPORATIZED .....	391
V. SKETCHING THE MODERN MUSICIANS’ NEXT MOVE .....	395
A. Look Beyond Copyright Law Reform .....	395
1. Musicians Lack a Meaningful Number of Seats at the Table .....	396
2. The Copyright Office’s Recommendations for Copyright Law Reform Ignore Musicians’ Interests .....	397
B. Fight for Subsidies, not Legislation .....	400
C. If You Can’t Beat ‘Em, Join ‘Em.....	402
1. To Adapt, Today’s Musician Must Become a Marketer- Entrepreneur .....	403
2. The Breadth of Adaptation Required May Exact Real and Psychic Costs from Musicians and Society .....	404
CONCLUSION.....	406

## INTRODUCTION

Since June 2010, Spotify has grown from a paying user base of just 500,000 to over 20 million.<sup>1</sup> Further, advances in the platform's technological capabilities and algorithmic precision signal improvements to the streaming service that may further facilitate a positive feedback loop between the product and paid user adoption.<sup>2</sup> In light of these promising user adoption and business indicators, some music business journalists believe that music streaming is here to stay.<sup>3</sup>

The music industry's transition to a streaming ecosystem has important and even ominous implications for independent artists. First, the economics of streaming continue to bode poorly for them. For example, a spokesman for Spotify confirmed that the company pays "between \$0.006 and \$0.0084" in royalties to an artist each time a user streams a work by that artist.<sup>4</sup> While the company considers this royalty payout "quite large," for it represents approximately 70 percent of Spotify's revenue,<sup>5</sup> to the independent artist, this wage is the opposite – it is not livable.<sup>6</sup>

Beyond music streaming, independent artists continue to earn almost nothing for their creative endeavors. Musicians have made commercial ploys and policy pleas to restore some value to their work, over which they have a temporary monopoly thanks to U.S. copyright. However, these attempts have, for many artists – particularly the independents - yielded scant results.

Today's musician must, therefore, make a strategic decision: to create, or not to create. The incentive theory underlying copyright law suggests that song creation could decline given the infinitesimally small return an artist sees in exchange for his or her creative investment. However, the opposite

1. *Number of paying Spotify subscribers worldwide from July 2010 to June 2015 (in millions)*, STATISTA, <http://www.statista.com/statistics/244995/number-of-paying-spotify-subscribers/> (last visited Apr. 22, 2016).

2. See Ben Popper, *How Spotify Discover Weekly Cracked Human Curation at Internet Scale*, THE VERGE (Sep. 30, 2015), <http://www.theverge.com/2015/9/30/9416579/spotify-discover-weekly-online-music-curation-interview> (citing improvements in Spotify's recommendation algorithms sufficient to provide individualized playlists to users at scale based on their individual streaming behaviors and preferences as evidence of the product's continued innovation and staying power in the marketplace).

3. Nikelle Murphy, *Why Streaming is the Future of the Music Industry, not its End*, THE CHEAT SHEET (May 27, 2015), <http://www.cheatsheet.com/business/why-streaming-is-the-future-of-the-music-industry-not-its-end.html?a=viewall>.

4. Sterling Whitaker, *Jason Aldean Joining Taylor Swift in Pulling Music from Spotify*, TASTE OF COUNTRY (Nov. 8, 2014, 2:00 PM), <http://tasteofcountry.com/jason-aldean-taylor-swift-spotify/>.

5. See Stephen Marcone, *The Poverty of Artist Royalties*, MUSIC BUSINESS JOURNAL: BERKLEE COLLEGE OF MUSIC (May 2013), <http://www.thembj.org/2013/05/the-poverty-of-artist-royalties/>; see also Anthony N. Luti, *Recording Contracts 101: The Basics*, TRUE MAGAZINE (Nov. 12, 2003), <http://www.lutilaw.com/articles/TheBasics.pdf>.

6. See Damon Krukowski, *Making Cents*, PITCHFORK, (Nov. 14, 2012), <http://pitchfork.com/features/articles/8993-the-cloud/>.

has occurred. Despite the precipitous decline in album releases over the last five years,<sup>7</sup> the number of individual songs released into the marketplace is at an all-time high.<sup>8</sup> The world today has more music than ever, and continues to get access to it for less and less money. Independent artists, however, continue to make it.

This report argues that the reason why musicians continue to make music as the industry essentially takes it is complex and wholly unrelated to copyright law. As a result, copyright law and, in particular, its underlying incentive theory, make little to no sense from the purview of the modern musician. The modern musician should, therefore, look beyond the growing support for copyright law reform while trying to traverse current market dynamics. He or she should either fight for help, in the form of music creation subsidies, from the government instead of legislative protection, or, stated oversimply, adapt.

This report begins, in Part One, with a brief overview and history outlining the “beginning of the end” of the music industry boom of the 1990s and 2000s, brought about by changes in technology and consumer behavior. Part Two introduces musicians, their earnings, and the financial as well as recognition challenges they currently face. Part Three delves into the mind of the musician, seeking to understand what motivates him or her to create music. Three sub-parts analyze those motivations. Sub-Part A examines an incentive, “winner-take-all” approach to music creation. Sub-Part B rejects the incentive theory as it explores the extent to which business and technology intermediaries in the music industry erode any spoils the modern musician may hope to take under the “winner-take-all” paradigm. Sub-Part C examines a hedonic approach. Part Four further explores business and technology intermediaries, evaluating the extent to which copyright law may in fact better serve their interests than those of the modern musician. Finally, Part Five offers the modern musician three ways forward from the legally, economically, and existentially complex debate over the role of copyright law in the modern music industry. Each of three sub-parts will advise the modern musician on making peace with, and thereafter surmounting, the disheartening dynamics currently at place in an industry that, in many ways, sets the modern musician up for failure.

7. Eamonn Forde, *Will 2014 be the year the album business fell apart?*, THE GUARDIAN (June 11, 2014, 11:47 AM EDT), <http://www.theguardian.com/music/musicblog/2014/jun/11/2014-music-industry-end-blockbuster-album-uk-charts-adele>.

8. For example, the number of new music works released to the market each year has increased by 50 percent since 2000. See Joel Waldfogel, *And the Bands Played On: Digital Disintermediation and the Quality of New Recorded Music*, SOCIAL SCIENCE RESEARCH NETWORK (July 25, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2117372](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2117372).

## I. THE MODERN MUSIC INDUSTRY

The modern music industry grew from its home parlor roots to a multi-billion-dollar global enterprise throughout the twentieth century. Such rapid growth occurred thanks to a number of technological innovations, beginning with the phonograph and the piano roll, and continuing through the advent of broadcast radio, the cassette tape, and the compact disc. The emergence of the MPEG-3, however, fundamentally upended the foundation upon which the music industry of the twentieth century was built.<sup>9</sup>

The MPEG-3, abbreviated as “MP3,” is a digital format that the Moving Pictures Expert Group developed in 1987.<sup>10</sup> The format exists because of a process known as “ripping.”<sup>11</sup> This process, performed by software, copies the content of an audio compact disc, or “CD,” directly onto a computer.<sup>12</sup> A user can thereafter transfer the MP3 to other users through electronic communications such as electronic mail, or transfer mechanisms like peer-to-peer file sharing networks.<sup>13</sup> What is notable about this technology is that it essentially eliminated the need for consumers to buy music in CD form. Consumers could make infinite copies of one audio recording file. The magnitude and potential of this technological innovation also fueled the growth of a number of businesses in the peer-to-peer file sharing space, the most notable (and perhaps notorious) of which was Napster.

Napster was an online file-sharing company that “[facilitated] the transmission of MP3 music files between and among its users.”<sup>14</sup> The company achieved this in three ways. First, Napster allowed users to make their stored MP3 files available to other Napster users.<sup>15</sup> Second, Napster allowed users to search for music MP3 files stored on other users’ computers.<sup>16</sup> Third, the company allowed users to make “exact copies” of MP3 files stored on other users’ computers via the Internet.<sup>17</sup> Napster went live in June of 1999.<sup>18</sup> Almost immediately, the music industry – record labels in particular – voiced its fervent disapproval of the company and the

9. See *A&M Records, Inc. et al. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

10. *Id.* at 1004.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *A&M Records, Inc. et al. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

16. *Id.*

17. *Id.*

18. Glynn S. Lunney, Jr., *Empirical Copyright: A Case Study of File Sharing and Output 4* (Tulane Univ. Sch. Of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 14-2), available at <http://ssrn.com/abstract=2372630>.

nascent file-sharing phenomenon.<sup>19</sup> A&M Records, in concert with fourteen other record labels, filed a copyright infringement lawsuit against Napster in December 1999.<sup>20</sup> The consortium of record labels represented as plaintiffs – and by extension, the broader universe of copyright holders in the United States – won what, to outside observers, seemed to be an important victory when the Ninth Circuit imposed an injunction and damages upon Napster sufficient to shut down the business in July 2001.<sup>21</sup>

Record labels and copyright owners continued winning landmark court cases against companies – and even individuals – accused of copyright infringement.<sup>22</sup> However, seemingly unwittingly, record labels and copyright owners were losing the broader technology innovation war. For example, while litigating against Napster, record labels were unable to combat the creation of iTunes, a media player and software system that Apple developed and marketed as “the world’s best and easiest to use jukebox.”<sup>23</sup> Further, record labels and music industry associations fell prey to the negative press associated with choosing to sue their own customers in an effort to reduce peer-to-peer file sharing.<sup>24</sup> The Recording Industry Association of America (“RIAA”), the trade organization that represents the American music industry, reportedly spent \$64 million in legal fees over a three-year period to collect \$1.4 million in settlements from individual consumers whom it sued.<sup>25</sup> Despite these lawsuits and settlements, the rate of peer-to-peer file sharing continued to increase throughout the early 2000’s.<sup>26</sup> For example, Napster alternatives like Grokster and Kazaa

19. See Rich Menta, *RIAA Sues Music Startup Napster for \$20 Billion*, MP3 NEWSWIRE.NET (Dec. 9, 1999), <http://www.mp3newswire.net/stories/napster.html>.

20. *A&M Records, Inc. et al. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

21. Glynn S. Lunney, Jr., *Empirical Copyright: A Case Study of File Sharing and Output* 5 (Tulane Univ. Sch. Of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 14-2), available at <http://ssrn.com/abstract=2372630> (citing *A&M Records*, 239 F.3d at 1004; *A&M Records v. Napster, Inc.*, 239 F.3d 1091 (9th Cir. 2002)).

22. See *id.* (referencing *Metro-Goldwyn-Meyer Studios, Inc. v. Grokster*, 545 U.S. 913 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *Arista Records LLC v. Lime Group LLC*, 784 F. Supp. 2d 398 (S.D.N.Y. 2011)).

23. *Apple Introduces iTunes – World’s Best and Easiest to Use Jukebox Software: From Macworld Expo*, APPLE (Jan. 9, 2001), <https://www.apple.com/pr/library/2001/01/09Apple-Introduces-iTunes-Worlds-Best-and-Easiest-To-Use-Jukebox-Software.html>.

24. See Mike Masnick, *RIAA Spent \$17.6 Million in Lawsuits . . . to Get \$391,000 in Settlements?*, TECHDIRT (July 14, 2010), <https://www.techdirt.com/articles/20100713/17400810200.shtml>.

25. *Id.*

26. Glynn S. Lunney, Jr., *Empirical Copyright: A Case Study of File Sharing and Output* 6 (Tulane Univ. Sch. Of Law Pub. Law & Legal Theory Working Paper Series, Paper No. 14-2), <http://ssrn.com/abstract=2372630>.

emerged.<sup>27</sup> The latter reportedly boasted 230 million worldwide users in 2003.<sup>28</sup>

Some music industry stakeholders better understood that file-sharing, instead of indicating imminent threat, indicated a critical need for innovation. In 1999, EMI, AOL, BMG, and RealNetworks founded MusicNet, a global digital music distributor, to compete with the likes of Napster, Grokster, and Kazaa.<sup>29</sup> However, record labels, even the innovative ones, had done too little too late. They were unable to stop or effectively steer widespread file-sharing. In fact, the practice, after Napster, ballooned. As a result, record labels and copyright holders experienced three-fold losses: money, competitive advantage, and their consumers' trust.

The losses that the record labels experienced have been enormous. The RIAA reports that, since the emergence of file-sharing in 1999, recorded music sales have fallen 53 percent, from \$14.6 billion to \$7.0 billion in 2013.<sup>30</sup> Further, the trade organization reports that Internet users "pirated" approximately 30 billion songs on file-sharing networks between 2004 and 2009. These pirated songs represent approximately 63 percent of music that consumers acquired over the aforementioned five-year period.<sup>31</sup> Consumers, in many ways, simply stopped buying music. If consumers did buy music, they bought single songs on platforms like iTunes in lieu of full music albums at traditional brick-and-mortar stores.<sup>32</sup>

The economic and cultural consequences were far-reaching. Tower Records, the venerable music retailer and purveyor of music industry trends since 1960, filed for bankruptcy in 2006 and closed its doors.<sup>33</sup> Further, record labels themselves faced hyper-consolidation.<sup>34</sup> During the music industry "heyday" of the 1990s, six major record labels dominated the

27. Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases*, 49 J.L. & ECON. 63, 64 (2006).

28. *Id.*

29. Tony Smith, *Major labels sell off MusicNet*, THE GUARDIAN (Apr. 13, 2005), [http://www.theregister.co.uk/2005/04/13/labels\\_sell\\_musicnet/](http://www.theregister.co.uk/2005/04/13/labels_sell_musicnet/).

30. See Recording Industry Association of America, *Scope of the Problem*, PIRACY (Nov. 9, 2014, 2:04AM), [http://www.riaa.com/physicalpiracy.php?content\\_selector=piracy-online-scope-of-the-problem](http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem).

31. *Id.*

32. For example, a one percent increase in music downloading has been associated with a six percent decrease in album sales. See *The Music Industry's Unbundling Blues*, HARVARD BUS. REV. (Mar. 1, 2010), <https://hbr.org/2010/03/the-music-industrys-unbundling-blues>.

33. Dan Glaister, *Tower crumbles in the download era*, THE GUARDIAN (Oct. 9, 2006, 7:35AM ET), <http://www.theguardian.com/business/2006/oct/09/retail.usnews>.

34. See Joseph Silver, *Why the EMI-UMG merger is bad for artists and fans*, FUTURE OF MUSIC COALITION (May 30, 2012), <https://futureofmusic.org/blog/2012/05/30/why-emi-umg-merger-bad-artists-and-fans>.

market.<sup>35</sup> However, the peer-to-peer file sharing induced industry shift, along with a complex host of other industry-specific and macroeconomic factors, brought that number down to three.<sup>36</sup> Opinions abounded that record labels were archaic, doomed to insolvency and an eventual demise.<sup>37</sup> Their deaths would not only be at the hands of file-sharing, and album unbundling, but also the emerging “do-it-yourself” market on the Internet. Social networking sites like Facebook and YouTube, to many, were nascent but formidable content distribution channels that empowered musicians to deliver their music to fans directly over the Internet.<sup>38</sup> As such, many saw either no place, or an increasingly narrow place, for the record labels that once dominated the music industry.<sup>39</sup> In essence, they saw an industry resigned to dissolution.

Critics of this prognosis are quick to point out that the three record labels are far from dead.<sup>40</sup> In fact, thanks to a combination of blockbuster artist release strategies and quiet deal-making with a variety of digital entertainment startups, major record labels may even be experiencing a comeback.<sup>41</sup> Critics also point to two growing industries on the Internet as continued positive indicators: music streaming and webcasting.<sup>42</sup>

Music streaming is a process by which an end user can hear sound as a broadband network transmits it.<sup>43</sup> Music streaming platforms like Spotify

35. Those six major record labels were (1) Universal Music Group, (2) Sony Music Entertainment, (3) Warner Music Group, (4) EMI, (5) Polygram and (6) BMG Entertainment. See Jae Allen, *What are the Five Major Record Labels?*, EHOW, [http://www.ehow.com/list\\_6974654\\_five-major-record-labels\\_.html](http://www.ehow.com/list_6974654_five-major-record-labels_.html); see also Neil Strauss, *A Major Merger Shakes Up the World of Rock*, N.Y. TIMES (Dec. 21, 1998), <http://www.nytimes.com/1998/12/21/arts/a-major-merger-shakes-up-the-world-of-rock.html?pagewanted=all>.

36. Only (1) Universal Music Group, (2) Sony/BMG Music Entertainment, and (3) Warner Music Group remain. See Bram Teitelman, *The Big Four Become the Big Three . . . Labels*, METAL INSIDER (Nov. 11, 2011), <http://www.metalinsider.net/label-moves/the-big-four-become-the-big-three-labels>.

37. Richard Busch, *Major Record Labels as Dinosaurs?*, FORBES (Mar. 27, 2012, 1:05 PM), <http://www.forbes.com/sites/richardbusch/2012/03/27/major-record-labels-as-dinosaurs/#4c890b361f91>.

38. See Joshua S. Lundquist, *Dear Musicians: Become Your Own Middleman*, HYPEBOT (Apr. 2013), <http://www.hypebot.com/hypebot/2013/04/dear-musicians-become-your-own-middleman.html>.

39. *Id.*

40. See Zack O'Malley Greenburg, *Revenge of the Record Labels: How the Majors Renewed Their Grip on Music*, FORBES (Apr. 15, 2015), <http://www.forbes.com/sites/zackomalleygreenburg/2015/04/15/revenge-of-the-record-labels-how-the-majors-renewed-their-grip-on-music/#70c1b858debe>.

41. For example, the three major record labels, reportedly, have acquired an equity stake of between 10 and 20 percent of established music streaming services like Spotify and (the now defunct) Rdio. Further, Warner Music Group quietly acquired up to five percent of music-streaming site SoundCloud. See *id.*

42. See Ingrid Lunden, *In Europe, Spotify Royalties Overtake iTunes Earnings by 13%*, TECHCRUNCH (Nov. 4, 2014), <http://techcrunch.com/2014/11/04/in-europe-spotify-royalties-overtake-itunes-earnings-by-13/>.

43. Mark Harris, *What Is Streaming Music? All About Steaming Music and How it Works*, LIFEWIRE (Dec. 20, 2016), <http://mp3.about.com/od/digitalmusicfaq/f/StreamingmusicFAQ.htm>.



allow its users to play specific songs within a platform's collection on demand.<sup>44</sup> Music streaming is legally distinct from the second Internet phenomenon mentioned above, webcasting. Webcasting services, while leveraging music streaming technology, are non-interactive.<sup>45</sup> Users cannot pick and choose what music they hear on-demand. Instead, services like Pandora allow users to log their reactionary preferences to personalized broadcasts submitted by Pandora's mix of algorithm and human curation to users.<sup>46</sup> These two companies, among others, bring music and other media to consumers faster, more conveniently, and more cheaply than traditional media download providers like iTunes.<sup>47</sup> It is, therefore, no surprise that the adoption of music streaming has grown exponentially since first gaining traction in the mid-to-late 2000's. For example, in 2014, consumers streamed music content 434.7 billion times.<sup>48</sup> Music streaming revenue is also growing at a rate of approximately 39 percent.<sup>49</sup> This growth, in many ways, may help stymie the precipitous, decade-long revenue decline facing the music industry- if it represents a consumer shift away from file-sharing. However, this revenue growth may be short-lived if overwhelmingly led by a consumer shift away from purchasing physical units and downloads.

44. See *What is Spotify and How Does it Work?*, TECHBOOMERS (Nov. 8, 2016), <https://techboomers.com/t/what-is-spotify>.

45. *Royalties and Spins*, PANDORA HELP, <http://help.pandora.com/customer/portal/articles/24788-royalties-and-spins> (last visited Apr. 22, 2016).

46. As a result, Pandora operates under a legal and licensing structure distinct from Spotify. Pandora, as a non-interactive webcaster, operates in accordance with 17 U.S.C. § 114 statutory license, which mandates the statutory license rate for the public performance of sound recordings by means of digital audio transmission. See *id.*; see also *Licensing 101*, SOUND EXCHANGE, <http://www.soundexchange.com/service-provider/licensing-101/> (last visited Apr. 22, 2016); see also *Licensing*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/licensing/index.html> (last visited Apr. 22, 2016).

47. This is possible because music streaming services exist in the cloud. Users, therefore, are not required to have the memory necessary to store downloaded content on their computers. Further, music streaming services' existence in the cloud allows users to interact with services' content across devices including computer, tablet, and phone. Perhaps the greatest benefit that streaming services provide is cost. Most streaming services have a free, ad-driven tier whereby users can consume content for free in exchange for hearing ads alongside their desired content. Even paid tiers are cheaper than purchasing a digital download. For example, the \$9.99 monthly subscription fee to Spotify, in exchange for unlimited access to millions of songs across devices, provides far greater surplus to consumers than the typical \$0.99 or \$1.29 download from iTunes. See Bakari Chavanu, *The Pros and Cons of Streaming vs Downloading MP3s*, MAKEUSEOF (Oct. 17, 2011), <http://www.makeuseof.com/tag/pros-cons-streaming-downloading-mp3s/>.

48. The platforms which comprise this total are Spotify, YouTube, Vevo, SoundCloud, Vimeo, and the now defunct Rdio. See *Industry Report 2014*, NEXT BIG SOUND (2014), <https://www.nextbigsound.com/industry-report/2014>.

49. *Labels at Work: The Music Business in the Digital Age*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (Sept. 2015), <https://www.riaa.com/wp-content/uploads/2015/09/LabelsAtWork.pdf>.

Some in the industry also point to a growth in live performance revenue as another potential source of future revenue.<sup>50</sup> However, this new growth is not enough to make up for the losses that record labels and the music industry more broadly have experienced over the same time period. Further, these industry changes have largely applied only to record labels and the tech intermediaries now competing with them for recorded music revenue. They fail to include an analysis of musicians, who arguably sit at the middle of – and are most affected by – the industry transformations previously described. Part Two, which proceeds below, will undertake that analysis.

## II. UNDERSTANDING MUSICIANS

The Bureau of Labor Statistics refers to musicians and singers as individuals who “play instruments or sing for live audiences or in recording studios.”<sup>51</sup> As of 2014, the Bureau estimates that there are approximately 173,300 professional musicians and singers in the United States who, on average, earn approximately \$24.16 per hour for their work.<sup>52</sup> These numbers, however, fail to distinguish between full-time and part-time musicians, and the myriad ways in which a musician may earn money beyond live performance or recorded music.<sup>53</sup> A survey of approximately 5,000 musicians across the United States revealed that the lives of musicians are far more complex and varied than what the Bureau presents.<sup>54</sup> For example, surveyed musicians cited forty-two distinct sources of musician-based revenue in the past twelve months.<sup>55</sup> These musicians reported earning an estimated average yearly income of \$34,456 from music-related activities.<sup>56</sup> The Bureau specifically reports that the intermittent

50. For example, PricewaterhouseCoopers contends that the growth in global live music revenue may in fact be sufficient to fully offset the decline in global recorded music revenue by 2019. *See Music: Key Insights at a Glance*, PRICEWATERHOUSECOOPERS, <http://www.pwc.com/gx/en/global-entertainment-media-outlook/assets/2015/music-key-insights-1-growth-rates-of-recorded-and-live-music.pdf> (last visited Apr. 22, 2016).

51. *Occupational Outlook Handbook: Musicians and Singers*, U.S. DEP’T OF LABOR, BUREAU OF LABOR STAT., <http://www.bls.gov/ooh/entertainment-and-sports/musicians-and-singers.htm#tab-1> (last visited Apr. 3, 2016).

52. *Id.*

53. *See* Peter DiCola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons about Copyright Incentives*, 55 ARIZ. L. REV. 301, 321 (2013).

54. *See id.* at 323.

55. The forty-two distinct sources of revenue were condensed into eight “bucket” sources from which musicians could divide their income (based on a 100-percent total allocation): (1) money from songwriting/composing; (2) salary as an employee of a symphony, band or ensemble; (3) touring/shows/live performance fees; (4) money from sound recordings; (5) session musician; (6) merchandise sales; (7) teaching; and (8) other. *Id.* at 324; *see also* 42 *Revenue Streams*, FUTURE OF MUSIC, <http://money.futureofmusic.org/40-revenue-streams> (last visited Apr. 22, 2016).

56. The median recorded yearly income from music was \$18,000. *See* DiCola, *supra* note 53 at 322.

opportunities for work that musicians face often cause them to work only part-time on music-related activities while deriving income from other sources.<sup>57</sup>

These statistics offer a glimpse at the work that musicians do for relatively little money, in relative obscurity. In fact, online music analytics provider Next Big Sound reports that they consider over 90 percent of musicians in its systems “undiscovered.”<sup>58</sup> Only 0.2 percent of musicians in its system are “megastars,” and another 0.9 percent are “mainstream.”<sup>59</sup> Musicians, it seems, overwhelmingly struggle.<sup>60</sup>

Given these financial as well as recognition challenges, this report will focus specifically on musicians’ motivations for producing recorded music. Specifically, this report focuses on what may motivate musicians to record and release pop/rock music. The rationale for doing so is simple, and, admittedly self-interested: the author has a particular love and passion for the genre. This report further concentrates on recorded music to understand musicians’ motivations for creation, as this asset in particular has suffered the hardest from Internet-driven technological innovation.

The economics and profitability of recorded music have eroded drastically over the last fifteen years.<sup>61</sup> For example, in 2011, ninety-four percent of all albums released sold fewer than 1,000 copies.<sup>62</sup> Eighty percent of that cohort sold fewer than 100 copies. Most shocking of all, though, is the statistic that only 0.5 percent of all albums released in 2011 that managed to sell one copy surpassed the 10,000 units sold threshold.<sup>63</sup> Record labels and musicians alike have therefore had to look beyond recorded music sales for revenue.

57. *See id.* at 347; *see also* U.S. DEP’T OF LABOR, *supra* note 51.

58. *Industry Report 2014*, *supra* note 48.

59. *Id.*

60. Only 57 musicians surveyed (1.1% of total) reported earning more than \$200,000 in yearly income from music-related activities. Twenty-two of those fifty-seven musicians belong to the rock/pop category. It is important to note here that, while an income of \$34,456 is well above the poverty threshold for one person in the United States (\$12,071), the aforementioned income is roughly in line with recent legislative action, in California and New York, that would raise the minimum wage to \$15/hour, or approximately \$31,200 per year. Being a musician, therefore, is equivalent on a monetary basis with minimum-wage employment. *See* DiCola, *supra* note 53 at 350; *see also* *What are the poverty thresholds and poverty guidelines?*, INSTITUTE FOR RESEARCH ON POVERTY, <http://www.irp.wisc.edu/faqs/faq1.htm#thresholds> (last visited Apr. 22, 2016); *see also* John Bacon, *\$15 minimum wage coming to New York, Calif.*, USA TODAY (Apr. 5, 2016, 7:10 AM), <http://www.usatoday.com/story/news/nation/2016/04/04/california-new-york-minimum-wage-hikes-signed-into-law/82617510/>.

61. RECORDING INDUSTRY ASSOCIATION OF AMERICA, *supra* note 49.

62. *Id.*

63. *Id.*

Record labels have found new revenue streams by licensing recorded music to technology intermediaries for music streaming. Musicians, however, get paid essentially nothing from this channel.<sup>64</sup> Damon Krukowski, the former drummer of the now defunct American alternative rock band Galaxie 500, (in)famously reported that his share of revenues earned from 7,800 plays on Pandora of the band's song "Tugboat" amounted to forty cents.<sup>65</sup> Independent cellist Zoë Keating, who has sold well over 3,000 albums on iTunes, also made her digital earnings public.<sup>66</sup> She reported earning just \$0.00438 per stream on Spotify.<sup>67</sup>

Paltry paydays seemingly affect even the most successful of artists in the digital era. International superstar Pharrell, for instance, reportedly earned between \$2,700 and \$25,000 in publisher and songwriter royalties from his Grammy-nominated song "Happy," which users streamed 43 million times on Pandora in the first quarter of 2014 alone.<sup>68</sup> These figures are unnerving, but may actually reflect the plausible reality that musicians own a far smaller share of their music than they think. As a result, some musicians, although correct to point out this payment problem, may be overstating it. The problem, though, is that, across the industry, there is not sufficient transparency in royalty and payment accounting to fully deconstruct and understand this issue.<sup>69</sup>

These problems, however, are not sufficient deterrents to the modern musician. In fact, the supply of new music in the marketplace continues to reach new yearly highs.<sup>70</sup> That number continues to grow rapidly thanks to ever-lowering costs of recording music and thereafter distributing it across digital channels through services like CDBaby and Tunecore. These dynamics beg the question: why? Why do musicians not only continue to

64. See Krukowski, *supra* note 6.

65. Krukowski owns the copyright to "Tugboat," and wrote the song. As a result, Krukowski did not face administrative deductions that performing rights organizations normally extract from artists' earnings in exchange for managing artists' copyrights. His forty-royalty consists of a thirty-three cent mechanical royalty (for being the songwriter) and a seven-cent performance royalty. *Id.*

66. See Paul Resnikoff, *I'm A Successful Indie Artist. And This is What Streaming Services Are Paying Me.*, DIGITAL MUSIC NEWS, (Feb. 24, 2014), <http://www.digitalmusicnews.com/permalink/2014/02/24/successful2014>.

67. Users streamed Keating's music 435,035 times during the 2014 year, earning Keating \$1,764.18, net of performance rights organization deductions. *See id.*

68. Maya Kosoff, *Pharrell Made Only \$2,700 in Songwriter Royalties from 43 Million of 'Happy' on Pandora*, BUSINESS INSIDER, (Dec. 23, 2014), <http://www.businessinsider.com/pharrell-made-only-2700-in-songwriter-royalties-from-43-million-plays-of-happy-on-pandora-2014-12>.

69. See *Fair Music: Transparency and Payment Flows in the Music Industry*, RETHINK MUSIC (2015), <https://www.berklee.edu/sites/default/files/Fair%20Music%20-%20Transparency%20and%20Payment%20Flows%20in%20the%20Music%20Industry.pdf>

70. This report previously stated that the number of new music works released to the market each year has increased by 50 percent since 2000. *See* Waldfoegel, *supra* note 8.

supply the market with recorded pop music, but also accelerate their number of offerings? The next part of this report explores what drivers, both intrinsic and extrinsic, may motivate musicians to continue creating music despite the economics underlying recorded music working fundamentally against them.

### III. INSIDE THE MIND OF THE MUSICIAN

A multitude of scholarship exists attempting to extract and understand the individual and collective motivations driving music creation. However, one of the problems that scholars have faced in their pursuit is that relatively little formal data exists assessing precisely why musicians create.<sup>71</sup> There is a dearth of data because, fundamentally, the drivers of human emotion and motivation are multi-faceted and highly complex. Scholars have, therefore, had to rely on surveys, inferences, and estimations to understand the inner workings of the musician's mind.<sup>72</sup> Two over-arching theories have emerged from scholars' work: incentive and hedonic theories. In Sub-Part A of this section, the report will first walk through the incentive theory as a musician's motivator, and the role it plays in helping musicians navigate the "winner-take-all" dynamics that exist in the modern music industry. Sub-Part B ultimately rejects the incentive theory, instead arguing that because intermediaries' business practices financially sabotage even the most-savvy and successful creators, something other than the incentive theory must be motivating musicians to create. Following this analysis, in Sub-Part C, the report will move on to examine hedonic theories driving music creation, and, given the strength of those hedonic values, questions the relevance of incentive-theory-driven copyright in the modern music industry.

#### *A. Incentive Theories: Managing Incentives in a "Winner-Take-All" Economy*

A "winner-take-all" economy is one in which "the value of what gets produced in them often depends on the efforts of only a small number of top performers, who are paid accordingly."<sup>73</sup> The modern music industry is one such economy. For example, fifteen percent of digital song sales in 2011 comprised titles that sold more than one million copies, up from seven

71. See Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J. 63, 96 (2011).

72. *Id.*

73. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY 2* (The Free Press, 1995).

percent in 2007.<sup>74</sup> The phenomenon also extends to the Internet and social media reach.<sup>75</sup> Over eighty percent of artists in Next Big Sound's database earn less than one Facebook page like per day.<sup>76</sup> The top tier of artists in Next Big Sound's database, which comprise 0.2 percent of total, have fifty percent of all Facebook fans, YouTube views, and Vevo views tracked by the company.<sup>77</sup> Further, the company reports that over ninety percent of the artists it tracks have fewer than three percent of the likes and plays across the three aforementioned channels. The few, the superstars, clearly dominate.

Outsized rewards, both monetary and existential, that flow from "winning" the "winner-take-all" economy may, and do, lure many musicians into the modern music industry. As a result, overcrowding occurs.<sup>78</sup> There is simply a glut of talent in the market, supplying it with an increasing amount of content, in the hopes of winning outsized rewards.<sup>79</sup> For example, legal scholar Henry H. Perritt, Jr., estimates that a serious musician has, on average, a 0.024 percent change of "taking the spoils" in the modern music industry.<sup>80</sup> By comparison, Perritt notes that a musician has "a 0.0004 percent probability of being struck by lightning, a 0.022 percent probability of being murdered, and a 0.02 percent probability of being killed in an automobile accident."<sup>81</sup> Despite these odds, the supply of new music in the marketplace continues to eclipse previous records.

These probabilities strongly suggest that the incentive theory may explain why so many musicians enter the modern music industry's "winner-take-all" economy. Musicians want a chance at outsized riches and fame. Entry may therefore be akin to entering the lottery. While entering a lottery may be rational for an individual musician with a high risk-taking utility function, other musicians, frankly, may be deluded in their chances of succeeding in this highly competitive industry. The musicians who lose, in addition to diminishing their own utility vis-à-vis the aforementioned loss,

74. Robert H. Frank, *Winners Take All, but Can't We Still Dream?*, N.Y. TIMES, (Feb. 22, 2014), <http://www.nytimes.com/2014/02/23/business/winners-take-all-but-cant-we-still-dream.html>.

75. See *Industry Report 2013: The Year in Rewind*, NEXT BIG SOUND (2013), <https://www.nextbigsound.com/industry-report/2013>.

76. *Id.*

77. *Id.*

78. ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 8-9 (The Free Press, 1995).

79. *Id.*; see also ANITA ELBERSE, *BLOCKBUSTERS: HIT-MAKING, RISK-TAKING, AND THE BIG BUSINESS OF ENTERTAINMENT* (Henry Holt & Company, LLC, 2013).

80. Perritt defines a musician as "serious" when he has made sufficient investment in the modern music industry via behavior like having a MySpace music page, and uses as a benchmark for "taking the spoils" achieving a yearly music income of \$500,000 per year or more. Perritt, Jr., *supra* note 71, at 105-106.

81. *Id.* at 106.

may hurt society via the opportunity costs the latter must bear because the musician chose to enter and lose the modern music industry lottery instead of, for example, becoming a doctor. Such an outcome is socially sub-optimal and inefficient. Further, even when one “hits the jackpot” and reaps the spoils of winning the competitive game of modern music, she more often than not gets but a small portion of her earnings because of the one-sided, yet widely tolerated, business practices of intermediaries.

*B. Intermediary Interception of Payment Flows Makes Losers Even Out of the Modern Music Industry’s Biggest Winners*

Despite a decreased dependence on intermediaries like record labels in the modern music industry, many musicians may still want to contract with them, and for good reason.<sup>82</sup> Contracting with a record label may offer a musician tactical as well as strategic benefits.<sup>83</sup> For example, a record label may offer a musician additional artist development resources, capital, and recording services.<sup>84</sup> A label also may advertise and/or market a musician’s recorded music, in addition to manufacturing audio CDs of the musician’s recorded music, distributing those audio CDs to stores, and providing the musician an accounting of revenue and royalties earned.<sup>85</sup> A record label may also enforce a musician’s copyright, thereby relieving the musician of a mighty burden.<sup>86</sup> A record label provides these services via contract, of course, in exchange for a musician’s recordings and a predetermined percentage of any revenue he may earn during the contract period.<sup>87</sup> It is within the details of these record label contracts that even the most successful artists find a devil that costs them money, as well as, in many cases, their artistic freedom.

Record label contracts notoriously contain cumbersome and confusing language, as well as non-negotiable terms that fundamentally work against a musician’s best interests.<sup>88</sup> For example, record labels require musicians to transfer ownership in all of their sound recordings to the record label.<sup>89</sup>

82. See Seth Robert Belzley, *Grokster and Efficiency in Music*, 10 VA. J.L. & TECH 10, 21-22 (2005).

83. See *id.*

84. Perritt, Jr., *supra* note 71, at 79.

85. *Id.*

86. *Id.*

87. See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 64 (8th ed. 2012).

88. FMC Staff, *Major Label Contract Clause Critique*, FUTURE OF MUSIC COALITION (Oct. 3, 2011), <https://futureofmusic.org/article/article/major-label-contract-clause-critique>.

89. *Id.* The clause in question, as taken from Future of Music Coalition, reads as follows:

Record label contracts also stipulate contract language sufficiently vague to lock musicians up for what may amount to the most commercially relevant years of their careers.<sup>90</sup> The two most insidious sections of a record contract to which a musician must agree are the royalty calculation and cross-collateralization clauses.<sup>91</sup> This report details some idiosyncrasies related to royalty calculations below.

A royalty, in the most generic terms, is the division of revenue between a musician signed to a record label and that label.<sup>92</sup> A royalty rate stipulates what amount of money is due to an artist for each copy of his or her recording sold, performed, or somehow used in commerce.<sup>93</sup> The royalty rate (for physical records) is a percentage of that physical product's wholesale price, called published price to dealers (PPD).<sup>94</sup> A musician may, for the purposes of the following illustration, earn a PPD royalty rate of fifteen percent.<sup>95</sup> The signed musician may think, therefore, that, for every \$1 in revenue, she is entitled to 15 cents. However, that is not true. The signed musician's fifteen points are subject to a number of further deductions relevant to royalty rate

"You grant and convey to Label, and confirm that Label shall be the exclusive, perpetual owner of all Masters throughout the universe, including without limitation, all copyrights therein as a "work made for hire". Label and all parties authorized by Label shall have the exclusive right to exploit the Masters, and to use your name, voice and likeness in connection with such exploitation. The right to use your name, voice and likeness shall be exclusive during the term and non-exclusive thereafter."

90. *Id.* The clause in question, as taken from Future of Music Coalition, reads as follows:

"The Term shall consist of an Initial Period and of the Option Periods (defined below) for which Company shall have exercised the options hereafter provided. The Initial Period and each Option Period are each hereafter sometimes referred to as a "Contract Period". The Initial Period shall commence on the date hereof and shall continue until the earlier of the dates referred to in paragraphs (a) and (b) immediately below:

a) the date twelve (12) months after the Delivery to Company, as defined in paragraph 19.09 below, of the fully equalized, digital tape Masters to be used in manufacturing the Phonograph Record units to be made for distribution in the United States from the last Master Recordings made in fulfillment of your Recording Commitment for the Contract Period concerned under Article 3 below; or

b) the date nine (9) months after the initial commercial release in the United States of the Album required to be delivered in fulfillment of your Recording Commitment for the Contract Period concerned; but will not end earlier than one (1) year after the date of its commencement.

You grant Company separate options to extend that Term for additional Contract Periods ("Option Periods") on the same terms and conditions, except as otherwise provided herein. Company may exercise each of those options by sending you a written notice not later than the expiration date of the Contract Period, which is then in effect (the "Current Contract Period"). If Company exercises such an option, the Option Period concerned will begin immediately after the end of the Current Contract Period and shall continue until the earlier of the dates referred to in [the] paragraphs above."

91. *Id.*

92. Passman, *supra* note 87, at 74-75.

93. *Id.*

94. *Id.*

95. Music industry jargon would say that the musician in this example has 15 points. *See id.*



calculations that effectively reduce an artist's royalty basis. They include, but are not limited to, reserves, container charges, free goods allowances, cross-collateralization, territory and format adjustments, and channel of trade.<sup>96</sup> Therefore, the \$1 in basis may be worth as little as twenty-eights cents after the aforementioned deductions. The musician's fifteen points are now worth far less than she previously envisaged.<sup>97</sup>

Revenue sources beyond traditional sales of recorded music also continue to evade the major label musician. Signed musicians often see only 10-50 percent of sound recording revenue from digital sales on platforms like iTunes, Amazon, Google Play, or eMusic.<sup>98</sup> Signed musicians reportedly receive similar percentages of sound recording revenue from interactive streams that occur on platforms like Spotify and Rhapsody; however, 10-50 percent of \$0.00438 is effectively zero.<sup>99</sup> Similar effective rates of zero apply to sound recording revenue earned from webcasters like Pandora and Sirius XM, and an absolute rate of zero applies to terrestrial radio.<sup>100</sup> As a result, the outsized spoils about which a musician dreamed belong to everyone but her. This poor financial reality exists before even taking into account the many costs a signed musician must recoup before earning her first cent in royalties. The aforementioned calculations apply to the increasingly rare, "lucky" few who find themselves with a record contract in hand in the first place. For the vast majority of musicians who remain undiscovered, however, the notion that something other than the incentive theory must drive their motivations to not only create music, but to accelerate their rates of creation in the modern music economy, becomes stronger.

### *C. Hedonic Theories*

Not every musician makes music hoping to earn a large payday. In fact, many musicians invest a significant amount of time making music for the

96. For more information, see RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW* 62-82 (Billboard Books, 1999); see also Passman, note 87, at 74-82, 90-91; see also FMC Staff, note 88.

97. The musician in the above illustration may, therefore, collect as little as four cents for each physical unit sold. See *id.*

98. See Kristin Thomson, *Music and How the Money Flows*, FUTURE OF MUSIC COALITION, (Mar. 10, 2015), <http://futureofmusic.org/article/article/music-and-how-money-flows>; see also RETHINK MUSIC, *supra* note 69.

99. Independent cellist Zoe Keating revealed that, in 2014, she earned \$0.00438 each time a user streamed her work on Spotify. This "per stream" royalty rate has been subsequently accepted as customary. See Resnikoff, *supra* note 66; see also Thomson, *supra* note 98; see also RETHINK MUSIC, *supra* note 69.

100. Radio broadcasters in the United States do not pay royalties to performers or sound recording copyright owners. See Thomson, *supra* note 98; see also RETHINK MUSIC, *supra* note 69.

sake of making music.<sup>101</sup> For example, musicians report making music as a form of self-expression or technical love for the discipline.<sup>102</sup> These responses suggest that music-making, for many musicians, is less formulaic and more expressive, individualistic, even spiritual.<sup>103</sup>

Musicians may create music out of what many describe as an innate attraction to the discipline, as if they cannot help *but* create.<sup>104</sup> Desire and love are at the root of this motivation. Musicians may also create music to express their identity and to build self-esteem. Musicians often label music as “part of [their] DNA;” consequently, musical expression is a critically important way to allow that existential DNA to manifest.<sup>105</sup> Music may also build self-esteem.<sup>106</sup> Celebrity musicians like Billie Joe Armstrong of Green Day report the intense emotional feelings they experience not only from technical mastery of musical tropes, but also from expressing such mastery to others.<sup>107</sup> These motivations are related to pride and identity.<sup>108</sup> Finally, musicians report an important motivation to share their music with others.<sup>109</sup> They want to reach others in addition to expressing themselves.<sup>110</sup> Further, they want to communicate with society at large, to leave their mark on the world through musical expression.<sup>111</sup> These feelings are highly existential, and can be considered spiritual in nature.<sup>112</sup>

Researchers have also uncovered that hedonic values mean more to those subscribing to them when others validate those hedonic values.<sup>113</sup> Musicians also report that earning peer and consumer respect for their craft heightens the previously listed emotions, and further motivates their creative impulses.<sup>114</sup> As a result, the music-making process is a highly personal, subjective, instinctual, and even egocentric endeavor. Given the highly personal, even self-centered, nature of music creation, one may wonder why musicians so fervently protest the evolution of copyright in the digital era.

101. Belzley, *supra* note 82, at 16.

102. Perritt, Jr., *supra* note 71, at 97-98.

103. *Id.*

104. See Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM J.L. & ARTS 467, 497 (2015).

105. *Id.* at 498.

106. Perritt, Jr., *supra* note 71, at 98.

107. *Id.*

108. See Liu, *supra* note 104, at 498-499; see also Perritt, Jr., *supra* note 71 at 99-100.

109. See Perritt, Jr., *supra* note 71, at 99-100.

110. *Id.* at 99. (describing Billie Joe Armstrong’s desire to write “to reach others as well as to express himself. . .”).

111. *Id.* at 99-100.

112. See Liu, *supra* note 104, at 499-500.

113. *Id.* at 500.

114. *Id.*

Frankly, why do musicians need money for something they currently do, happily, for free?

Musicians, like any individual living in a market economy, need money for survival.<sup>115</sup> They must pay for quotidian necessities like shelter, food, and clothing, in addition to funding the requisite inputs for their music-making, like instruments and equipment.<sup>116</sup> Musicians often work multiple jobs – both within and beyond the music industry – to afford those quotidian necessities. Working multiple jobs may leave musicians little space in their lives for music creation. Paying for musicians' work may help alleviate this burden. Further, it provides to musicians the material conditions and space they need for music creation.

Musicians also report that consumers' willingness-to-pay for their music brings them an added sense of validation.<sup>117</sup> Notably, musicians consider making money from their music as “the difference between ‘making something of [themselves] and ‘fooling around.’”<sup>118</sup> Previously, consumers' willingness-to-pay for recorded music provided musicians that sense of validation. It also compensated musicians for the creative costs they bear when first creating a song. Now, however, consumers continue to enjoy new works, and in fact enjoy an increasing number of new works, while simultaneously lowering their willingness-to-pay for those new works to effectively zero. As a result, musicians no longer receive that sense of validation, and are no longer compensated for that initial creative cost. Further, a consumer who copies a musician's song for free and thereafter distributes it pays no fixed creativity cost for those distributed copies, thereby extracting an outsized utility for herself to the musician's economic detriment.<sup>119</sup> This is a kind of consumer free-riding that paying musicians for their work would help solve.<sup>120</sup>

A potent argument for more critically examining modern copyright's evolution in the digital age may come not from musicians, but from the intermediaries who connect musicians to consumers. The expansive evidence described above reveals that not only do musicians largely create

115. Perritt, Jr., *supra* note 71, at 103.

116. *Id.*

117. *Id.*

118. *Id.* at 104.

119. *Id.*

120. The free-rider problem occurs in economics when “some individuals in a population either consume more than their fair share of a common resource, or pay less than their fair share of the cost of a common resource.” See *What Is the ‘Free Rider Problem’*, INVESTOPEDIA, [http://www.investopedia.com/terms/f/free\\_rider\\_problem.asp](http://www.investopedia.com/terms/f/free_rider_problem.asp) (last visited Apr. 22, 2016); see also Harold Demsetz, *Creativity and the Economics of the Copyright Controversy*, 6 REVIEW OF ECON. RESEARCH ON COPYRIGHT ISSUES, 5, 10 (2009).

music irrespective of copyright law, but that copyright law itself may not have been developed with musicians in mind. As such, a deep-dive into copyright law's relationship with the intermediaries that drive the modern music industry forward may help clarify copyright law's overarching relevance in the space.

#### IV. COPYRIGHT LAW, CORPORATIZED

Strong arguments exist that copyright law has never played an important role in artists' creative production.<sup>121</sup> However, copyright law may be critical to entice intermediaries to invest the capital necessary into musicians, their music, and into bringing both to enough consumers to earn a profit.<sup>122</sup> The intermediaries most associated with the industrialization of music are the record labels. Record labels are companies that, according to Perritt, contribute eight distinct services to the music industry.<sup>123</sup> Record labels (1) scout new artists; (2) invest capital into those artists; (3) facilitate and oversee artists' recording processes; (4) manufacture compact discs; (5) market, advertise, and promote both the compact discs and the artists featured on those discs; (6) distribute artists' music across a variety of channels; (7) manage revenue and royalty accounting for artists; and (8) enforce copyright.<sup>124</sup> Record labels incur enormous expenses providing these services to artists.<sup>125</sup> For example, between 2009 and 2013, record labels invested \$20 billion in A&R and marketing.<sup>126</sup> Further, record companies spent 27 percent of their revenue on those two business functions.<sup>127</sup> Record labels also report that it requires a capital investment of between \$500,000 and \$2,000,000 to break a new artist in a major market.<sup>128</sup>

121. Ruth Towse, *Copyright and Creativity: An Application of Cultural Economics*, 3 REVIEW OF ECON. RESEARCH ON COPYRIGHT ISSUES 83, 87 (2006).

122. Belzley, *supra* note 82, at 17.

123. Perritt, Jr., *supra* note 71, at 79.

124. *Id.*

125. See *Investing in Music: How Music Companies Discover, Nurture, and Promote Talent*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (Sep. 2015), [https://www.riaa.com/wp-content/uploads/2015/09/Investing\\_In\\_Music.pdf](https://www.riaa.com/wp-content/uploads/2015/09/Investing_In_Music.pdf).

126. A&R stands for artist & repertoire. This is the division of a record label tasked with scouting and developing new artists. See *What is an A&R?*, ARTISTS & REPERTOIRE ONLINE, <http://www.arcontacts.com/what-is-an-a&r.htm> (last visited Apr. 6, 2016); see also IFPI, *Investing in Music: How Music Companies Discover, Nurture, and Promote Talent*, RECORDING INDUSTRY ASSOCIATION OF AMERICA (Sep. 2015), [https://www.riaa.com/wp-content/uploads/2015/09/Investing\\_In\\_Music.pdf](https://www.riaa.com/wp-content/uploads/2015/09/Investing_In_Music.pdf).

127. *Id.*

128. *Id.* The breakdown of the figures listed above proceeds as follows:

New Artist Advance: \$50,000 - \$350,000

Recording: \$150,000 - \$500,000

In addition to these investment costs, record labels face high levels of investment risk, akin to the risks that venture capitalists face in technology and entrepreneurship. For example, for every five or six new albums that a record label releases, it only recovers its investment on one album.<sup>129</sup> Given record labels' need to maximize their profits despite the aforementioned dynamics, and the appurtenant difficulty in doing so, record labels have an economic motivation to extract as much value as they can from the creative assets they purchase, nurture, and promote.

One may question, however, the amount of risk the major record labels, in particular, truly bear. There are currently three major record labels: (1) Universal Music Group, (2) Sony/BMG Music Entertainment, and (3) Warner Music Group. All three have a global footprint that should give them the economies of scale as well as the business diversification necessary to effectively mitigate any of the risk described above. However, some music pundits point out that the majors' combined dominance, in the U.S., at least, may be waning to the surge in independent record labels' market share.<sup>130</sup> Combined, the U.S. independents claim a 35.4 percent domestic market share by volume, up 0.3 percent from last year.<sup>131</sup> The indies' collective market share exceeds any individual market share the three major record labels enjoy, and continues to grow.<sup>132</sup> As a result, the majors, at least, may plausibly face increased risks.

Record labels and intermediaries like them currently leverage copyright to extract value from the recorded music assets they own. For example, record labels provide the services described earlier to artists only after an artist transfers her sound recording copyrights to the record label.<sup>133</sup> Further, songwriters transfer their composition copyrights to publishers, which are intermediaries that perform exploitative functions similar to record labels for

Video Production: \$50,000 - \$300,000

Tour Support: \$50,000 - \$150,000

Marketing & Promotion: \$200,000 - \$700,000

129. *Id.*

130. The nonprofit trade organization American Association of Independent Music (A2IM) notes that, for their purposes and those related to the above statistics, "independent" may include independent record labels that have major-label distribution. The above market share statistics are based on copyright ownership. See *News: Indies Still #1 – Mid-Year 2015*, A2IM, <http://a2im.org/news/indies-still-1-mid-year-2015/#> (last visited May 5, 2016); see Tim Ingham, *Independent Labels Trounce UMG, Sony and Warner in US Market Shares*, MUSIC BUSINESS WORLDWIDE (Jul. 29, 2015), <http://www.musicbusinessworldwide.com/independent-label-us-market-share-trounces-universal-sony-warner/>.

131. Ingham, *supra* 130.

132. Universal has a U.S. market share of 27.6 percent. Sony/BMG has a U.S. market share of 20.9 percent, and Warner has a U.S. market share of 15.2 percent. See *id.*

133. DiCola, *supra* note 53, at 306.

songwriters and composers.<sup>134</sup> These intermediaries, therefore, have a vested economic interest in maximally exploiting the works they decide to acquire.<sup>135</sup>

Intermediaries' economic interest in copyright exploitation is not confined to the music industry. The Walt Disney Company ("Disney"), the American media and entertainment conglomerate, has famously spent millions of dollars protecting the copyright of its most prized possession, Mickey Mouse.<sup>136</sup> Mickey Mouse is more than a mouse and muse of legendary Disney founder Walt Disney.<sup>137</sup> He is a copyrighted intellectual property asset worth a reported \$5.8 billion per year to Disney.<sup>138</sup> Originally debuted to the public on November 18, 1928, Mickey Mouse's copyright was subject to the 1909 Copyright Act, granting him 56 years of federal copyright protection.<sup>139</sup> As such, Mickey Mouse should have entered the public domain in 1984.<sup>140</sup> However, Disney's aggressive lobbying, alongside legislative reform enacted through the Copyright Act of 1976 and the Copyright Term Extension Act, continues to protect Mickey Mouse from the public, and Disney from billions of dollars in potential losses.<sup>141</sup>

The technological advances discussed earlier in this report threaten intermediaries' abilities to maximally extract economic value from the copyrights they possess. Further, in the eyes of many intermediaries, these technological advances directly violate their 17 U.S.C. § 106 rights.<sup>142</sup> As such, intermediaries' litigious responses to technology companies and consumers alike could have economically rational basis.<sup>143</sup> Their responses also evince the corporatization of copyright. Commercially exploiting copyright law brings intermediaries billions of dollars.

134. *Id.*

135. *Id.*

136. Zachary Crockett, *How Mickey Mouse Evades the Public Domain*, PRICEONOMICS (Jan. 7, 2016), <http://priceonomics.com/how-mickey-mouse-evades-the-public-domain/>.

137. *See id.*

138. *Id.*

139. *Id.*

140. A work that is in the public domain is not protected by intellectual property laws like copyright, trademark, or patent. That work, in essence, belongs to the public, who can consume such work as it pleases (1) without seeking permission and (2) without fear of indictment for copyright infringement. *See* Rich Stim, *Welcome to the Public Domain*, COPYRIGHT & FAIR USE STANFORD U. LIBR., <http://fairuse.stanford.edu/overview/public-domain/welcome/> (last visited Apr. 22, 2016).

141. Disney has reportedly spent \$87.6 million in lobbying expenses from 1997 – 2015. *See* Crockett, *supra* note 136.

142. Those rights are (1) to make copies; (2) to prepare derivative works; (3) to distribute copies; (4) to control public performance; (5) to publicly display; and (6) to non-traditional rights. *See* 17 U.S.C. § 106 (1976).

143. *See* Sony BMG Music Entm't, et al. v. Joel Tenenbaum, 660 F.3d 487 (2011); *see also* Capitol Records, Inc. v. Jammie Thomas-Rassett, 692 F.3d 899 (2012).

Interestingly, technology is both foe and friend to music industry intermediaries. This is because the rise of music streaming services like Spotify has simultaneously destroyed old revenue sources (e.g., recorded music sales) and opened new ones (e.g., licensing). These licenses are becoming increasingly valuable and remunerative for intermediaries to exploit.<sup>144</sup> As such, intermediaries are investing more time and money into the catalogues of recorded music copyrights they possess.<sup>145</sup>

Despite intermediaries' dogged protection of their commercial copyright interests, this report understands that the incentive theory of copyright may not be motivating their litigating and lobbying. The evidence proffered in the report suggests that, even without copyright, music would very likely continue to enter the market. As such, intermediaries may simply believe that they can better exploit the music that enters the market through copyright than can the musicians who make the music. They could also be rent-seeking.<sup>146</sup> In the absence of copyright, these intermediaries could find other ways to sustain the profits they currently enjoy. Copyright, therefore, could merely be a means to profit, and not a socially useful end unto itself.

In order to fully understand whether and to what extent intermediaries would stop bringing music to market in the absence of copyright (thereby evincing copyright's basic social utility), the author believes a control study, devised to simulate and thereafter record collective corporate action in a world in which copyright did not exist, could begin to answer that question. However, the feasibility of executing and accurately extracting such motivations at scale are questionable and, unfortunately, beyond the scope of this report. Irrespective of motivation, however, intermediaries continue to be the largest beneficiaries of copyright law. This leaves the modern

144. For example, Spotify reports that it pays approximately 70 percent of its revenue out to artists and rights holders in various capacities. However, it is important to note that the three major labels own a combined 20 percent of Spotify, making the net contribution of the business to record labels' bottom lines difficult. See Marcone, *supra* note 5; see Resnikoff, *supra* note 66.

145. For example, Sony Corporation recently announced that it has agreed to buy out Michael Jackson's fifty percent stake in music publishing powerhouse Sony/ATV for approximately \$750 million. The catalogue includes songs written and recorded by artists like Bob Dylan, Eminem, and Taylor Swift. The emergence of music streaming services like Spotify now provide record labels new and viable ways to reintroduce old music to the marketplace. See *Sony buys Michael Jackson's stake in music catalog for \$750M*, ASSOCIATED PRESS (Mar. 15, 2016, 12:29AM EDT), <http://bigstory.ap.org/article/38b5de5feb247b7b0a333a8f87d7aa3/sony-buys-michael-jacksons-stake-music-catalog-750m>.

146. Rent-seeking occurs when an actor uses its own resources to acquire the surplus of another actor. Specifically, an actor may use its own resources, or the resources of a company, organization, or individual, to obtain economic gain without reciprocating any benefits to society. See David John Marotta, *What Is Rent-Seeking Behavior?*, FORBES (Feb. 24, 2013), <http://www.forbes.com/sites/davidmarotta/2013/02/24/what-is-rent-seeking-behavior/#4a4bd5827f24>; see also *Rent Seeking*, INVESTOPEDIA, <http://www.investopedia.com/terms/r/rentseeking.asp> (last visited Apr. 22, 2016).

musician in a pernicious place, a place that copyright law is seemingly unable to help fill. The next part of this report explores three solutions for musicians that could.

## V. SKETCHING THE MODERN MUSICIANS' NEXT MOVE

The preceding four parts of this report reveal that musicians largely create music irrespective of copyright law. Further, musicians derive little to no benefit from copyright law for the music they ultimately make. As a result, today's independent musicians are right to question the extent to which copyright law was ever meant to nurture their creativity or support their economic livelihood. Today's musicians are also right to feel, in many ways, demoralized by the modern music industry's market dynamics and copyright law's inability to assuage the hardships, both creative and psychic, that they experience. This report argues, however, that all hope is not lost. Specifically, this report argues that there are three ways forward for today's musicians as they manage their trajectories in the modern music industry. First, this report argues that musicians should look for change beyond copyright law reform. Second, this report argues that musicians eager for governmental intervention should champion such intervention through grants and subsidies instead of copyright law reform. Third and finally, this report argues that musicians may just need to strengthen their entrepreneurial acumen and adapt to the strong market forces currently at play in the modern music industry.

### *A. Look Beyond Copyright Law Reform*

Many musicians hope that copyright law reform may be the panacea to their complaints that the market still treats music like a free – or ostensibly free – good. They hope that, by rewriting the statutory and legal foundations underlying the United States' current copyright law regime, the market will subsequently correct and start paying creators more than zero for their work. Unfortunately, this logic fails to account for the immeasurable complexity underlying the link between copyright law, music pricing, and artist earnings. Further, it assumes that musicians are meant to be the primary beneficiaries of copyright law reform. A deep dive into the copyright law reforms that the United States Copyright Office recently proposed reveals that, again, copyright law – even as it potentially undergoes transformative reform – may not have the musician in mind. The two Sub-Sub Parts that follow posit that, first, musicians lack a meaningful voice in the copyright law reform debate. Second, the Copyright Office, through its report and



recommendations, ignored any voice that musicians have tried to exercise in the copyright law reform debate.

### 1. Musicians Lack a Meaningful Number of Seats at the Table

In February 2015, the United States Copyright Office released “Copyright and the Music Marketplace.”<sup>147</sup> The 245-page report is the culmination of a yearlong study of music industry dynamics and stakeholders to identify, first, the most pressing inefficiencies facing the industry vis-à-vis copyright law, and, second, to offer a panoply of solutions to those inefficiencies, leveraging music licensing in particular.<sup>148</sup> The Copyright Office invited public comment to address the existent industry inefficiencies through a first notice of inquiry.<sup>149</sup> Twelve of the eighty-four parties who responded to the Copyright Office’s First Notice of Inquiry, or only 14.3 percent of respondents, are believed to be musicians.<sup>150</sup> A further investigation of the parties that participated in the Copyright Office’s public hearings on copyright law reform in Nashville, Los Angeles, and New York further supports the statistic: musicians comprise but a small minority of those at the table fighting for copyright law reform.<sup>151</sup> At first glance, those who criticize musicians’ vocal complaints about copyright can point to this low participation as evidence that musicians may not care about copyright law reform as much as they claim. Musicians are not actively fighting for seats at the copyright law reform table. As a result, perhaps they should not have them.

Musicians’ low participation, however, may be explained not by their apathy, but rather by their self-awareness. As discussed in previous parts, musicians are aware of copyright law’s limited ability to protect their rights. Musicians are further aware that they choose to create music despite this limited protection. As a result, musicians may be rightly *choosing* to overlook what few seats may exist for them at the copyright law reform table. A second, more generalized, explanation may be that musicians are largely

147. U. S. COPYRIGHT OFF., COPYRIGHT AND THE MUSIC MARKETPLACE (2015).

148. *Id.* at 1.

149. *Id.* at Appendix B.

150. *Id.* To understand each party’s participation in the modern music industry, the author did a Google search of each of the eighty-four parties and read their comments to the Copyright Office. It should be noted that, while the author did his best to correctly identify each participant’s role within the modern music industry, this number is, in fact, his best estimate of the number of artists who commented after the Copyright Office’s First Notice of Inquiry.

151. The Copyright Office notes that, in June 2014, it conducted three two-day “public roundtables in Nashville, Los Angeles, and New York City.” The roundtables provided music industry stakeholders the opportunity to voice their opinions on matters pertaining to copyright law, with a particular focus on music licensing. *See id.* at 14; *see also id.* at Appendix B.

creators first and foremost. They may, therefore, be increasingly concerned with that which they can directly control: their creative works. Last, musicians may have generally been unaware of the Copyright Office's public notices. Little evidence exists to show that the Copyright Office widely publicized their notices. As a result, musicians may have largely been unaware that public commentary was even taking place. This combination of self-awareness, control maximization, and lack of publicity may more appropriately explain musicians' low participation rates.

Copyright law's legislative process may also actively exclude musicians. Jessica Litman, in her book Digital Copyright, notes that "copyright rules [have been] hammered out by copyright lawyers to adjust the commercial relations among their clients."<sup>152</sup> The rules now fail, in many ways, because the global proliferation of digital media through the Internet has extended questions of copyright beyond copyright lawyers and their clients to essentially every person on the planet.<sup>153</sup> The rules of copyright simply were not meant to have such expansive reach. Copyright law is narrow, and its purveyors (largely copyright lawyers) are ruthlessly copyright-centric.<sup>154</sup> These purveyors are also the ones that Congress calls upon to examine and revise copyright legislation, not musicians.<sup>155</sup> This leads, inevitably, to more of the same: complex additions to the rules of the game that actively ignore musicians.

Interestingly, and perhaps disappointingly, is the realization, to be discussed below, that, despite whatever small amount of musician participation occurred during the Copyright Office's inquiry periods, it seemingly did nothing to influence the Copyright Office's ultimate recommendations for copyright law reform.

## 2. The Copyright Office's Recommendations for Copyright Law Reform Ignore Musicians' Interests

The Copyright Office, in its February 2015 report, established eight guiding principles underlying their recommendations for copyright law reform: (1) music creators should be compensated fairly for their work; (2) the music licensing process should be more efficient; (3) reliable data on existent music works should be available for those interested in licensing music; (4) rights holders should have easy access and transparency into licensing fees; (5) the government should treat music used in similar ways

152. JESSICA LITMAN, DIGITAL COPYRIGHT 29 (2006).

153. *Id.*

154. *Id.* at 30.

155. *Id.* at 31.

alike; (6) the government should also balance individual and collective interests in licensing transactions; (7) separate entities should manage rate setting and related antitrust issues; and (8) those rates should be consistent and market-oriented.<sup>156</sup> These principles governed the recommendations, and tactical implementation strategies, that the Copyright Office ultimately offered in its report.<sup>157</sup>

The Copyright Office specifically recommended actions like licensing parity and fair compensation, government involvement in music licensing, greater licensing transparency and efficiency, as well as building up-to-date licensing systems.<sup>158</sup> However, nowhere in the report did the Copyright Office specifically address protective measures for musicians and songwriters. Although the report listed as a guiding principle that “music creators should be fairly compensated for their contributions,” it made no mention of *how* such equitable compensation would happen.<sup>159</sup> This guiding principle, and the apparent lack of details surrounding its implementation, in many ways, feels like mere lip-service from the Copyright Office to musicians. Without tangible solutions to the problems of underpayment of music creators for their works, music creators have no choice but to have little faith in the Copyright Office or its proposed reforms.

Opponents of the argument above may point to the Copyright Office’s proposal to extend public performance rights in sound recordings to terrestrial radio as evidence of musicians’ interests being met.<sup>160</sup> Currently, the United States only pays royalties to songwriters and publishers when their works are played on terrestrial radio.<sup>161</sup> It does not pay royalties to the performer or the owner of the sound recording.<sup>162</sup> These restrictions apply not only to American sound recordings, but also to sound recordings globally.<sup>163</sup> As a result, the 75 or more countries around the world that pay public performance rights to performers and sound recording owners via terrestrial radio do not make such payment to American performers.<sup>164</sup> However, should the United States institute a public performance royalty for sound recordings via terrestrial radio, it could not only help musicians – particularly those signed to record labels looking for ways to recoup their

156. See U.S. COPYRIGHT OFF., *supra* note 147, at 1.

157. *Id.*

158. *Id.*

159. *Id.* at 1.

160. *Id.* at 2.

161. *Public Performance Right for Sound Recordings*, FUTURE OF MUSIC COALITION (Nov. 5, 2013), <https://www.futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings>.

162. *Id.*

163. *Id.*

164. *Id.*

advances – but also the industry at large. The regime, as is, currently leaves tens of millions of dollars on the table that could, instead, be paid out to American musicians.<sup>165</sup> This argument is particularly potent given radio’s recent resurgence.<sup>166</sup> Despite reports to the contrary, radio seems to be booming.<sup>167</sup> For example, radio currently reaches ninety percent of almost every demographic in the United States.<sup>168</sup> Further, Millennials – the largest and, to businesses, the most valuable generation since the Baby Boomers – report listening to, on average, over eleven hours of radio each week at a reach percentage of 91.3 percent.<sup>169</sup> As a result, the terrestrial radio public performance royalty for songwriters, combined with the continued health of the radio industry more broadly, could enrich all stakeholders in the modern music industry, particularly musicians.

This argument fails, however, to include the indirect and often opaque money flows in the music industry. Because most musicians whose works receive radio play contract with intermediaries like record labels that can help them receive radio play in the first place, musicians – specifically, recording artists – would ultimately see, at best, a fraction of the royalties in dispute in the Copyright Office’s proposal. Any amount of terrestrial radio revenue that a recording artist would receive would be contingent upon the contractual provisions to which they agreed with their respective intermediaries. Earlier parts of this report have discussed the one-sided, largely unremunerative deals that musicians sign with intermediaries, particularly the major record labels. As such, this benefit, again, would more likely accrue to the music industry’s intermediaries as opposed to the music industry’s creators.

The above argument also fails to account for the rare cohort of musicians lucky enough to even fret terrestrial radio public performance royalties. This report previously noted that a mere 0.2 percent of musicians in the United States are “megastars,” with another 0.9 percent classified as “mainstream.” This issue, therefore, may only be relevant to those musicians at the extreme top of the music industry ladder. Given the issues described in this sub-part, musicians eager to engage government for protection and stimulus should do so beyond the realm of copyright law reform.

165. *Id.*

166. *See State of the Media: Audio Today*, NIELSEN (Mar. 2015), <http://www.nielsen.com/content/dam/corporate/us/en/reports-downloads/2015-reports/state-of-the-media-audio-today-q1-2015.pdf>.

167. *Id.*

168. *Id.*

169. *Id.*

### B. Fight for Subsidies, not Legislation

American musicians have spent much of their time and resources lobbying Capitol Hill for changes in copyright law to nurture and protect their creative interests. They should consider, however, pivoting. American musicians should lobby Capitol Hill for subsidies to promote the creation of American pop music, much like the pop and rock-n-roll subsidies that exist for musicians in Canada.

Canada has a rich pop/rock music subsidy program.<sup>170</sup> Two particularly notable programs are the country's Radio Starmaker Fund ("Fund") and The Foundation Assisting Canadian Talent on Recordings ("FACTOR").<sup>171</sup> An initiative between the Canadian Association of Broadcasters and the Canadian Radio-television and Telecommunications Commission created the fund in 2000.<sup>172</sup> The fund, which is private, states that its mission is to provide incremental investments in Canadian artists with "established track records."<sup>173</sup> Pop/rock artists achieve "established track records" when they have sold, at a minimum, 5,000 units within five years of their initial application if they self-release music or are signed to an indie label.<sup>174</sup> Artists signed to a major label can apply if they have sold, at a minimum, 7,500 units within the aforementioned time period.<sup>175</sup> Eligibility for independent artists ends once they have sold 150,000 units, while eligibility for major label artists ends once they have sold 100,000 units.<sup>176</sup>

While the Radio Starmaker Fund dedicates itself, truly, to making Canadian pop stars of established artists, FACTOR may often provide a Canadian musician with his or her first dollar.<sup>177</sup> The foundation, a public/private partnership, provides monetary support to "the production of sound recordings by Canadian musicians."<sup>178</sup> The foundation also provides

170. The country's music subsidy programs are not limited to federal action. The province of Ontario, for example, recently created a \$45 million music fund to support "the production, distribution, and performance of music" within the province, domestically, and globally. For more information, see Ben Rayner, *Ontario government to create \$45M music fund*, THESTAR, (May 1, 2013), [http://www.thestar.com/entertainment/music/2013/05/01/ontario\\_government\\_promising\\_45m\\_grant\\_to\\_help\\_music\\_industry.html](http://www.thestar.com/entertainment/music/2013/05/01/ontario_government_promising_45m_grant_to_help_music_industry.html).

171. *About the Radio Starmaker Fund*, STARMAKER, <https://www.starmaker.ca/about> (last visited Apr. 18, 2016); see also FACTOR, <http://factor.ca/> (last visited Apr. 18, 2016).

172. *Id.*

173. *Id.*

174. *Eligibility Requirements for Artists*, STARMAKER, <https://www.starmaker.ca/about/requirements> (last visited Apr. 18, 2016).

175. *Id.*

176. *Id.*

177. *See Our Mandate*, FACTOR, <http://factor.ca/about-the-foundation/our-mandate/> (last visited Apr. 18, 2016).

178. *Id.*

support to record companies looking to distribute Canadian music beyond the country's borders.<sup>179</sup> FACTOR reportedly provided early subsidies to Canadian acts like Nickelback and Sarah McLachlan.<sup>180</sup> These acts have achieved global success, which, in many ways, was made possible because they received governmental support when they needed it most: at the very beginning of their music-making careers. American musicians should lobby the government, as well as private industry, for similar support at home.

Opponents of such subsidies may have moral objections much like those voiced in Britain in response to governmental subsidy of rock bands.<sup>181</sup> Many in Britain worried that the government, in effect, was funding the storied "sex and drugs" that accompany "rock-n-roll."<sup>182</sup> Dissenters in the United States could likely have the same concerns. Criticism of public funding for the arts has long existed in the U.S., and has long rooted its opposition in religion and morality.<sup>183</sup> Further, the political climate in the U.S., as a general matter, makes grants and subsidies for musicians difficult. As a result, much of the art that seems to get funded in the United States through the Congressionally mandated National Endowment for the Arts ("NEA") feels muted. For example, the author's cursory review of the types of music that the NEA funds reveals that the organization mostly supports generally uncontroversial genres like classical, jazz, chamber, and early music.<sup>184</sup> One could hypothesize, then, that moral concerns may preclude more popular music genres from public funding in the United States.

Britain circumvented the aforementioned moral concerns by earmarking its subsidy funds for particular line items on bands' expense sheets. For example, the country accepts uses related to marketing, tour

179. *See id.*

180. *See* Periodicvideos, *Artistshouse Interview: Randy Lenox*, ARTISTSHOUSE MUSIC (May 2006), <http://www.artistshousemusic.org/videos/government+grant+assistance+in+canada>.

181. *See* Stephen Beard, *Britain is giving subsidies for rock music*, MARKETPLACE (June 5, 2014), <http://www.marketplace.org/2014/06/05/world/britain-giving-subsidies-rock-music>.

182. *See id.*

183. For example, public and senatorial outcry erupted in the United States after the National Endowment for the Arts granted a \$15,000 subsidy to *Piss Christ*, a 1987 photograph by Andres Serrano that depicts a plastic crucifix suspended in an amber liquid that the photographer describes as his own urine. The photograph was ultimately destroyed on Palm Sunday 2011 by protestors in Avignon, France. For more information, *see* Angelique Chrisafis, *Attack on 'blasphemous' art work fires debate on role of religion in France*, THE GUARDIAN, (Apr. 18, 2011, 3:00PM ET), <http://www.theguardian.com/world/2011/apr/18/andres-serrano-piss-christ-destroyed-christian-protesters>.

184. *See* MUSIC: NATIONAL ENDOWMENT FOR THE ARTS, <https://www.arts.gov/artistic-fields/music> (last visited Apr. 19, 2016).

support, or venue fees.<sup>185</sup> The United States could make similar provisions to ensure that rock-n-roll subsidies are, in fact, used to make rock-n-roll.

Interestingly, the United States has ostensibly begun subsidizing popular music – through intermediaries.<sup>186</sup> The International Trade Administration (“ITA”), in 2013, granted its first trade mission grant to a company in the music industry.<sup>187</sup> The ITA granted the American Association of Independent Music \$300,000, which the latter then used to send executives from a consortium of independent record labels to countries like South Korea, China, and Brazil to conduct market research and music distribution negotiations.<sup>188</sup> These expeditions yielded promising deals for the cohort. One record label head, Alec Bemis of Brassland, landed a five-figure music festival deal along with music licensing negotiations in Hong Kong and Taiwan.<sup>189</sup> These expeditions, though, continue what the previous parts of this report deems a long-standing tradition in the United States of supporting music industry intermediaries, without much recognition of - or regard for - music creators. The United States, therefore, has much work to do to help pop/rock musicians directly. Musician-specific subsidies could be a particularly potent remedy, and musicians should fight for them.

### *C. If You Can't Beat 'Em, Join 'Em*

The record-breaking proliferation of new music in the digital age suggests that musicians, in many ways, understand and accept that copyright law may not apply – or be relevant - to them. Further, many musicians create *in spite of* copyright law's limitations and the modern music industry's current zero-price paradigm. As a result, competition for listeners is fierce, and musicians who still lobby for increased copyright protection may be fighting a battle that has already been fought. These musicians, like all musicians, frankly, may need to simply adapt to the changing tide. The two Sub-Sub Parts that follow outline how a musician can adapt, while recognizing the psychic toll such adaptation may take on the musician.

185. Stephen Beard, *Britain is giving subsidies for rock music*, MARKETPLACE (June 5, 2014), <http://www.marketplace.org/2014/06/05/world/britain-giving-subsidies-rock-music>.

186. See Hannah Karp, *Uncle Sam Helps Indie-Rock Bands Drum Up Fans Abroad*, THE WALL STREET J., (May 3, 2013), <http://www.wsj.com/articles/SB10001424127887324582004578457490606789014>.

187. *See id.*

188. *Id.*

189. *Id.*

### 1. To Adapt, Today's Musician Must Become a Marketer-Entrepreneur

The modern musician must demystify what it means to actually adapt to the changing tide. Popular music industry blogs and talking heads tout the new world of constant content creation. Modern musicians must be ready with *stuff* for listeners to consume – original music, cover tunes, videos, remixes – on a constant cycle.<sup>190</sup> Further, it is not sufficient for the musician to merely create content constantly and to thereafter post it to Internet sites like YouTube and Facebook. The musician must *find* her audience.<sup>191</sup> This is akin to the customer discovery process that Steve Blank famously illustrated for startup entrepreneurs in his book The Four Steps to the Epiphany.<sup>192</sup> The conundrum here, though, is that it is almost impossible for a nascent musician's content to rise above the deluge of content on the Internet in order to be found. For example, users upload approximately 300 hours of video content to YouTube *each minute*. The competition for eyeballs is truly ferocious. Today's musician must, therefore, have a strategy for directing eyeballs to her content. Musicians must, in essence, flex their marketing chops, which often requires an advertising budget for musicians to use to pay for the customer discovery described above.

For example, this report's author, who has been a professional musician with a pop album that reached the Canadian Adult Contemporary charts in 2009, hosts a "music" page on Facebook.<sup>193</sup> When the author posts content to the page without paying an advertising fee, organic reach (e.g., the number of screens such posts 'reaches' without paid advertising boosts) rarely eclipses 600. However, with a \$100 paid advertising "boost," the author's reach often surpasses 13,000. The paid advertising not only gives the author "paid reach," but also improves the author's organic reach. This enhanced reach has a direct positive effect on the number of streams the author receives on music streaming platforms like Spotify, and even sales of his original music on sites like iTunes. As a result, the author, and musicians like him, must, in essence, pay to get played.<sup>194</sup>

190. See Bobby Owsinski, *9 Rules for Success in Today's Music Business*, MUSIC 3.0 MUSIC INDUSTRY BLOG (Apr. 6, 2016), <http://music3point0.blogspot.com/2016/04/9-new-rules-for-success-in-todays-music.html?m=1>; see also Bob Lefsetz, *Modern Stardom*, THE LEFSETZ LETTER (Apr. 26, 2016), <http://lefssetz.com/wordpress/2016/04/26/modern-stardom/>.

191. See *id.*

192. See BOOKS FOR STARTUPS, STEVE BLANK BLOG, <https://steveblank.com/books-for-startups/> (last visited Apr. 19, 2016).

193. For more information, please see Glenton Davis, FACEBOOK, <https://facebook.com/glentondavis> (last visited Apr. 19, 2016).

194. This concept gels with the financial reality that the biggest chunk of a major record label's capital investment in a new artist goes to marketing and advertising. As noted above, record labels often spend between \$200,000 and \$700,000 breaking a new artist in a major market.



The pay-to-be-played paradigm is problematic for most musicians. They cannot afford the regular advertising payments that the author described. A rare few musicians bypass this anomaly via virality; however, virality is notably rare and ephemeral. The lasting success that many musicians seek requires enough money for the musician to persevere through protracted periods of zero-or-negative earnings. She must have enough financial runway to pay her way into a sufficiently large and monetizable fan base. Today's musician therefore faces the proverbial Catch-22. She needs money to discover and nurture fans, but needs fans to convert into customers willing to pay her money.

## 2. The Breadth of Adaptation Required May Exact Real and Psychic Costs from Musicians and Society

This market dynamic, in the author's opinion, rightfully causes musicians concern, outrage, even despair. Michal, for example, is an Emmy-award winning composer and singer-songwriter. She was previously signed to Columbia Records during the early 2000s before the company dropped her from its roster. Since then, Michal has done what many musicians do – apply their talents elsewhere. She graduated from Yale University and then from Columbia Law School, and thereafter did a brief stint as an intellectual property litigator at the venerable law firm Skadden, Arps, Slate, Meagher & Flom.<sup>195</sup> Michal has since left BigLaw and returned to her recording artist roots. This time, however, she is on her own.

The panoply of paradigm shifts described in this report have taken their toll on Michal, who also works as a voice and piano teacher out of her home to earn supplemental income. She recently posted a new song, entitled “Old” to her Facebook page, through a publicly accessible Dropbox account. In the post, Michal notes: “Being a songwriter is a really fun job if you don't mind doing things for free, and constant low-level rejection and disappointment.”<sup>196</sup> Further, Michal lamented, “And please don't tell me to do it for love and not expect a reward because artists have bills to pay and deserve to feel valued by society like any other job you pour your heart and decades of your life into.”<sup>197</sup> Her post precisely, and painfully, illustrates the

195. For more information on Michal, please see <https://www.linkedin.com/in/michal-towber-94a694b> (last visited Apr. 19, 2016).

196. See Michal Towber Prywes, FACEBOOK (Mar. 31, 2016, 6:17AM), <https://www.facebook.com/MichalTowberOfficial>.

197. *Id.* The full post reads:

New song “old”: <https://www.dropbox.com/s/2xbrfz52u7kip10/Old.m4a?dl=0>

Being a songwriter is a really fun job if you don't mind doing things for free, and constant low-level rejection and disappointment. Don't get me wrong, I love music and I'm going to keep making it no matter what, but it's a really hard business. And please don't tell me to do it for love and not expect a reward because artists have bills to pay

quandary to which this report devotes itself. Musicians feel an intrinsic, hedonic pull to create music. The music creation process not only yields creativity and existential fulfillment for the creator, but also yields increased utility via entertainment, sensory stimulation, and even emotional/spiritual connection, for listeners in society, at scale. Yet the modern music industry supports an environment where almost 99 percent of these creators earn relatively small sums of money. The worry one can extract from posts like the one that Michal wrote – and, frankly, the reality – is that the vast majority of musicians, particularly those like Michal who face high opportunity costs (for example, as a first-year associate, Michal likely earned \$160,000 per annum, the going-rate for BigLaw litigation attorneys at the time of her graduation from law school), will simply give up. These musicians may make the “rational” choice given current market constraints and pursue work with compensation commensurate with their perceived worth and the market’s willingness-to-pay. Those who do not give up may continue to toil with little reward, facing and struggling to overcome the “constant low-level rejection and disappointment” that is the byproduct of their perseverance.<sup>198</sup> These feelings are a kind of psychic cost that music creators, and subsequently, society, must bear. As a result, even a society that equates music creation with hedonic indulgence may find it optimal to stop precluding artists from policy intervention and societal support in order to avoid the aforementioned psychic costs which may inject negative, or at the very least sub-optimal, externalities into broader society.

Critics may first note that Michal – and virtually all musicians – make choices about their careers. A musician who chooses to leave a high-paying job for the full-time pursuit of music is not entitled to similar pay – or potentially any pay – for her creative pursuits. Further, it is not the burden of society to make up for the musician the earnings she willfully foregoes in choosing to create music full-time.

Second, critics may equate music creation to any other, more traditional form of entrepreneurship. Society overwhelmingly underpays entrepreneurs for their inventions, products and services, reserving outsized rewards for the very few.<sup>199</sup> Many in entrepreneurship hold that the primary reason that the

and deserve to feel valued by society like any other job you pour your heart and decades of your life into. I've been doing this professionally for almost two decades now, and I've basically got a trophy and some writing credits to show for it. But I'm still opening old wounds and looking in the mirror and trying to make something honest for like twenty folks to enjoy for free and like on FB. It's not that teaching music isn't rewarding, but it's not performing on a stage every night. Anyway, here's a nice depressing song for those of you paying attention. Thanks for reading this far and please hit share so maybe I'll get one new listener.

198. *See id.*

199. Forbes Magazine reports that 90 percent of startups fail. *See* Neil Patel, *90% of Startups Fail: Here's What You Need to Know about the 10%*, FORBES (Jan. 16, 2015),

“lucky” few are in fact lucky is that they make a product that people want.<sup>200</sup> Entrepreneurs must persevere – by working part-time on their businesses, or taking side jobs to bootstrap their businesses – until their products find a market fit, or pivot. Modern society may be asking musicians to do the same. Further, such “musical” pivots are not uncommon. For example, Lady Gaga famously performed rock and piano music at local clubs around New York City to almost no one before becoming the global pop-dance icon that millions of fans adore today.<sup>201</sup> Musicians, therefore, may need to sublimate hedonism in order to get paid. Those musicians who choose not to pivot, in many ways, may, in this zero-price environment, ultimately be getting paid zero because they refuse to do the long, hard work required to give the market what it wants.

The high rates of music consumption, however, of mainstream and obscure music, reveal that the market *is* getting what it wants – for free. Consumers, for the first time in history, have what amounts to the entirety of the world’s music catalogue at their fingertips at a negligible cost. The utility surplus that consumers currently enjoy is truly astounding. Much like the entrepreneur would want to close this kind of value gap between producers and consumers in his business, so too do musicians. The entrepreneur is at an advantage, for he can raise prices and directly affect some modicum of change over this value exchange. The modern musician largely lacks such power, which is why it may be the role of the government, and of society, to find ways to give the modern musician that power.

#### CONCLUSION

A number of highly complex questions emerge from the aforementioned analysis. First, is it fair to ask musicians to sublimate their hedonic values to enter a “winner-take-all” lottery built on incentive theories of copyright that were never meant to support them? Second, in the context of creativity and creation, what would make the “winner-take-all” dynamics of the modern music industry feel more fair to those who choose to enter? Third, does, or should, society even care? Fourth, and more fundamentally, is music creation sufficiently distinct from business entrepreneurship or other forms of work to warrant increased policy oversight and intervention?

<http://www.forbes.com/sites/neilpatel/2015/01/16/90-of-startups-will-fail-heres-what-you-need-to-know-about-the-10/#584e38be55e1>; see also Erin Griffith, *Why startups fail, according to their founders*, FORTUNE (Sep. 25, 2014), <http://fortune.com/2014/09/25/why-startups-fail-according-to-their-founders/>.

200. See Griffith, *supra* note 199.

201. See Periodicvideos, *Vintage Lady Gaga Live at NYU – Captivated & Electric Kiss*, YOUTUBE (Nov. 16, 2009), <https://www.youtube.com/watch?v=NM51qOpwcIM>.

While the answers to these questions are beyond the scope of this report, it appears that, despite the economically “unnatural” dynamics currently at play in the music industry, something must change. What that something is, however, remains to be seen. This report argues that any change that may come to the modern music industry will not – and perhaps, should not – come from copyright law.